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# CALIFORNIA REPORTER

## 177 PACIFIC REPORTER

### SECOND SERIES

29 Cal.2d 616

**PEOPLE v. CAETANO.**

**Cr. 4754.**

**Supreme Court of California, in Bank.**

**Jan. 31, 1947.**

**1. Homicide ⇐253(1)**

Evidence sustained conviction of murder in the first degree without recommendation.

**2. Criminal law ⇐1172(3)**

"Homicide" is the killing of a human being by a human being and may be excusable, justifiable or felonious, and where it was undisputed that defendant had killed his wife he was not prejudiced by the assumption in the instruction that a homicide had been committed.

See Words and Phrases, Permanent Edition, for all other definitions of "Homicide".

**3. Criminal law ⇐479**

Where a witness was a practicing physician at the time of trial which was less than two months after the homicide involved, it was not error to permit him to give an opinion as to the cause of death though there was no specific proof of his professional status at the time he performed the autopsy.

**4. Criminal law ⇐741(1), 1169(9)**

Where the rifle used by defendant in killing his wife and the bullet found in the decedent's body were introduced in evidence and the owner of the rifle had testified that it was a 22 long pump rifle the weight to be given to the evidence of the physician performing the autopsy that he believed the bullet found in the decedent's body was of 22 caliber was for jury, and it was not prejudicial error to permit the physician to give his opinion as to the caliber of the bullet.

**5. Criminal law ⇐713**
**Homicide ⇐282½**

The matter of punishment for first degree murder is entrusted to the discretion of the jury, but this does not mean that there may not be legitimate argument concerning matters which the jury is entitled to consider in determining the punishment to be imposed.

**6. Pardon ⇐6**

A person sentenced to life imprisonment may be granted a parole after he has served at least 7 calendar years. Pen. Code, §§ 3040, 3046.

**7. Criminal law ⇐713, 730(1)**

An argument by the district attorney which could be construed to mean that because the penitentiaries are overcrowded paroles are granted without regard to merit in order to provide space for incoming prisoners was improper but not prejudicial in view of court's instruction that jury should disregard the argument.

**8. Homicide ⇐237**

Evidence on plea of not guilty by reason of insanity sustained finding that defendant convicted of murder in the first degree was sane.

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Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Joe Caetano was convicted of murder in the first degree without recommendation and was later found to be sane and from the judgment and from an order overruling motion for a new trial an automatic appeal was taken under Pen.Code § 1239.

Affirmed.

Blain McGowan, of Eureka, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., of Sacramento, for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of murder of the first degree without recommendation, and later upon a trial of his plea that he was not guilty by reason of insanity found him to be sane. This is an automatic appeal from the judgment imposing the death penalty.

The homicide was the outgrowth of domestic difficulties that caused the parties to separate three times during their 11 years of married life. When they last separated, Mrs. Caetano withdrew their meager savings from the bank and a few days later, on March 8, 1946, she filed a suit for divorce demanding all of the community property. Defendant brooded over his marital troubles and was particularly upset by what he considered the unfair claims made by his wife to the little property they had accumulated. On Wednesday, April 24, 1946, defendant borrowed a 22 rifle from a friend, representing that he was going hunting. The next afternoon he walked into the grocery store where his wife worked as a clerk and raising the rifle ordered the persons present to stand aside. He said to his wife, "All right, you son of a bitch, you thought you was going to get everything, and you are not going to get a goddamn thing, and neither am I. I am going to shoot you." She answered, "Go ahead, see if I care." Defendant shot her through the heart and she died almost instantly. He then shot himself twice and a few minutes later was taken into custody and placed in a hospital. Two days later, defendant told the district attorney that when he borrowed the gun he had made up his mind to kill his wife and himself, and that he had the same intention when he went to bed on Wednesday night and when he got up the next morning. He said that when he "got off work" Thursday afternoon, he decided that he was going to "get it over with" and that he went to the store with the intention of shooting his wife.

[1] There can be no question that the evidence was sufficient to support the verdict on the general issue of guilt, but it is contended that the judgment should be reversed because of errors committed during the trial.

[2] First, it is claimed that the court erred in giving an instruction which improperly assumed the commission of a homicide. In defining first degree murder, the court said in part: "You are instructed that the homicide in this case can be murder of the first degree, only if it is proven to have been deliberate and premeditated; and it is therefore necessary for you to know what is meant by the terms 'deliberate' and 'premeditated'." Homicide is the killing of a human being by a human being and may be excusable, justifiable or felonious. It was established without dispute that defendant killed his wife, and he was, therefore, in no way prejudiced by the assumption in the instruction that a homicide had been committed. People v. Putman, 129 Cal. 258, 262, 263, 61 P. 961.

[3] Defendant next contends that it was not proved that Dr. Carl Wallace, who performed the autopsy, was a practicing physician at the time he examined decedent's body and that therefore the court erred in permitting the doctor to give his opinion of the cause of death. The doctor testified that he was a graduate of McGill University in Montreal, and that he was a practicing physician and surgeon in Humboldt County. He was not asked specifically on either direct or cross-examination concerning his professional status at the time the autopsy was performed. However, since the witness was a practicing physician at the time of the trial, which was less than two months after the homicide, it was not error to permit him to give an opinion as to the cause of death even though there was no specific proof of his professional status at the time he performed the autopsy.

[4] It is also urged that it was error to permit the doctor to give his opinion as to the caliber of the bullet which he found in the body of the decedent. The gun used by defendant which the owner testified was a "22 * * * long pump rifle," and the bullet found in the decedent's body, were introduced in evidence. The witness, holding the bullet in his hand while testifying, stated that he believed it to be of 22 caliber.

Although the doctor may not have been as well qualified as a ballistics expert to give an opinion as to the caliber of the bullet, it was for the jury to determine the weight to be given his testimony and it was not prejudicial error under the circumstances to permit him to give his opinion. See People v. Johnson, 203 Cal. 153, 163, 263 P. 524.

The district attorney, in arguing to the jury that a death sentence should be imposed on defendant, said in substance that a sentence to life imprisonment did not necessarily mean that defendant would remain in the penitentiary all his life, that, if so sentenced, he would probably be paroled in 10 or 12 years, that the penal institutions were very crowded and that the authorities "have got to make some sort of disposition * * * so they do the best they can to make room for some more, and out they go. And that is what happens in these life sentences." In response to an objection that these statements constituted prejudicial misconduct the court gave an instruction prepared by defendant's attorney admonishing the jury to "disregard any remarks made by the district attorney in his closing argument about parole." It is contended that notwithstanding this instruction the jury may have been improperly influenced by the argument of the district attorney against making a recommendation for a sentence of life imprisonment.

[5-7] The matter of punishment for first degree murder is entrusted to the discretion of the jury, but this does not mean that there may not be legitimate argument concerning matters which the jury is entitled to consider in determining the punishment to be imposed. A person sentenced to life imprisonment may be granted a parole after he has served at least seven calendar years, Pen.Code, §§ 3040, 3046. In the case of People v. La Verne, 212 Cal. 29, 297 P. 561, 562, the district attorney, in the course of his argument, stated in substance that it was a matter of common knowledge that a person under life sentence in the penitentiary could "be out on the streets again." The trial court refused to admonish the jury to disregard the statement and it was held on appeal that the remarks did not constitute reversible error "for it is a matter of common knowledge that a parole may be granted to a defendant serving a term of life imprisonment." The statement of the district attorney in the present case could be construed to mean that because the penitentiaries are overcrowded, paroles are granted without regard to merit in order to provide space for incoming prisoners. This was not proper argument but we cannot say, in view of the court's instruction, that the remarks constituted reversible error.

[8] With respect to the sanity issue three experts appointed by the court, all of whom were superintendents of state hospitals, testified that defendant was sane. Defendant, testifying in his own behalf on the trial of the sanity issue, said that he had received only a third grade education and had worked as a farmhand since he was 15. At the time of the trial he was 34. He testified that when his wife left him the second time she took everything but his clothes and that when, on the occasion of the last separation, she withdrew the savings account and demanded all of the community property, he felt that he was being unjustly treated and that he worried about it. He said he could not sleep at night and that a voice kept saying to him "get it over with, do it, get it over with." He admitted that he knew it was wrong to shoot his wife but said "there was something just pushing my mind to it." A number of witnesses, some of whom had known defendant rather intimately for many years, testified that he was normally very cheerful and friendly but that for several weeks before the shooting he appeared to be worried, preoccupied and depressed. Other witnesses testified that they observed no change in his manner and that he appeared to be normal. The evidence is clearly sufficient to support the finding of the jury that defendant was sane at the time the crime was committed.

The judgment and order denying a new trial are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 561

## SEVERANCE v. KNIGHT-COUNIHAN CO.

S. F. 17299.

Supreme Court of California, in Bank.

Jan. 28, 1947.

**1. Evidence ⇐444(2)**

That a contract depended upon a condition precedent could be shown by parol evidence in absence of express provisions inconsistent with such condition.

**2. Sales ⇐87(3)**

Evidence established that printer's contract to sell tariff plates to employee remained inoperative, precluding recovery of the plates or damages by employee, because printer's creditors did not take over the business or force printer into liquidation, which was a condition precedent to effectiveness of the sale.

**3. Appeal and error ⇐854(1)**

A finding that printer's contract to sell tariff plates to employee was collusive and executed to defraud creditors, showing disbelief of employee's testimony that contract was an award for services, included an implied finding that taking of action by seller's creditors was a condition precedent to exercise of employee's rights, so that reviewing court could affirm trial court's judgment on that ground.

**4. Fraudulent conveyances ⇐69(1)**

An agreement, made when employer's financial condition was unsound and it was "hounded" by creditors, giving employee an option to purchase tariff plates for cost of the metal, was void as made to defraud future, if not present creditors, even though payment by employee would have been enough to satisfy existing creditors. Civ.Code, §§ 1596, 1598, 1599, 3439; Pen. Code, §§ 31, 154, 155, 531.

**5. Fraudulent conveyances ⇐208**

Future creditors as well as present creditors are protected by Uniform Fraudulent Conveyance Act and prior legislation. Civ.Code, §§ 1596, 1598, 1599, 3439; Pen. Code, §§ 31, 154, 155, 531.

**6. Fraudulent conveyances ⇐172(2), 176(1)**

One who conveys property to defraud creditors cannot revoke the conveyance, but an executory contract for purpose of defrauding creditors is void. Civ.Code, §§ 1596, 1598, 1599, 3439; Pen.Code, §§ 31, 154, 155, 531.

**7. Contracts ⇐107**

Where a statute prohibits or attaches a penalty to an act, the act is void, though the statute does not expressly pronounce it so, and regardless of whether the thing is malum in se or merely malum prohibitum. Civ.Code, §§ 1596, 1598, 1599.

**8. Contracts ⇐107**

Imposition of penalty by statute implies prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. Civ.Code, §§ 1596, 1598, 1599.

**9. Fraudulent conveyances ⇐176(1)**

A contract for sale of employer's goods to employee, made to defraud creditors, would not be enforceable by employee on theory that he was not in pari delicto because acting under influence of his superior.

**10. Work and labor ⇐10**

That parties to an executed illegal contract are not equally at fault may justify recovery, by the party whose fault is slight, of what he has rendered as performance of the contract.

**11. Fraudulent conveyances ⇐172(3)**

One cannot lay a trap for another, secure his confidence, induce him to make a conveyance in expectation that property will be returned, and thereafter retain the fruits of perfidy on ground that donor too readily yielded to temptation to save himself at possible expense of his creditors.

**12. Contracts ⇐138(3), 139**

If parties are not in pari delicto, the party who is only slightly at fault can recover money paid under executory contract, and such relief is even granted to a party equally at fault if he repudiates the contract before the illegal part is executed.

**13. Contracts ⇐139**

Court will not enforce an illegal contract, as distinguished from granting relief to one who repudiates it, merely because one party's fault was slighter than the other's.

**14. Fraudulent conveyances ⇐297, 299(1)**

Evidence authorized refusal to enforce employee's option to purchase tariff plates from employer on 60 days' credit on ground that option agreement was fraudulent against employer's creditors in view of employer's insolvency and delaying effect of agreement. Civ.Code, §§ 1596, 1598, 1599, 3439, 3439.07; Pen.Code, §§ 31, 154, 155, 531.

CARTER, EDMONDS, and SCHAUER, JJ., dissenting.

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Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Alfred D. Severance against Knight-Counihan Company for recovery of tariff plates or their value and damages, under contract giving plaintiff option to purchase such plates. From a judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion 164 P.2d 522.

J. W. Jackson, of San Francisco, for appellant.

Jackson Maddux and Charles F. Jonas, both of San Francisco, for respondent.

TRAYNOR, Justice.

Defendant operates a printing plant in San Francisco. Plaintiff was employed by defendant as a salesman of its tariff business from May 1936 to January 1943. For over twenty years before his employment with defendant he conducted a printing business of his own. Defendant had no tariff business when plaintiff entered its employ, and plaintiff built up defendant's tariff business during the period of his employment to a volume of approximately $50,000 a year. When plaintiff resigned his position with defendant, he notified defendant of his decision to exercise an option to purchase at their metal value all tariff plates used in defendant's business. The parties agree that at this time the metal value of the plates was $8,000 and their value as tariff plates $31,450. Defendant refused to sell the plates, and plaintiff brought this action to recover them or $31,450, their value as tariff plates, and damages. The trial court entered judgment for defendant. It found that the option agreement "was collusive and was drawn and signed by plaintiff and defendant for the purpose and with the intent to defraud creditors of defendant; that said agreement provides for a wholly inadequate and unfair consideration to be paid by plaintiff for said property; that said agreement was and is contrary to good morals and public policy, illegal, void and unenforceable." Plaintiff appeals.

[1] Plaintiff contends that the judgment of the trial court is not supported by the evidence. Defendant contends that there was no contract, since the written agreement on which plaintiff relies was never delivered to him. Defendant also contends that even if there was a contract, it was unenforceable on the grounds that it was to become operative only upon the condition that defendant's creditors took action to take over defendant's business or to force defendant into liquidation; that even if that condition materialized, plaintiff was to acquire the plates only as a trustee; and that the sole purpose of the agreement was to withhold a valuable asset of defendant's from the creditors and to place in its stead a claim against plaintiff who had no funds to pay it. The trial court made no finding as to whether a signed copy of the agreement was delivered to plaintiff within the meaning of section 1626 of the Civil Code. It is immaterial, however, whether the written agreement was delivered. If it was not, there was no contract. If it was, the evidence supports the judgment of the trial court that the contract was unenforceable. The fact that the contract depended upon a condition precedent could be shown by parol evidence, since the contract did not include express provisions inconsistent with the condition. P. A. Smith Co. v. Muller, 201 Cal. 219, 222, 256 P. 411; Verzan v. McGregor, 23 Cal. 339, 343; Gleeson v. Dunn, 113 Cal.App. 347, 350, 298 P. 119; Cooper v. Cooper, 3 Cal.App.2d 154, 158, 39 P.2d 820; see Restatement, Contracts, § 241; 3 Williston, Contracts, rev. ed., § 634 and cases there cited; 9 Wigmore, Evidence, 3d ed., § 2410; Corbin, Conditional

Delivery of Written Contracts, 36 Yale L. J. 443.

The agreement on which the action is based reads as follows:

"Agreement. Now this agreement made and entered into this 16th day of February, 1938 by and between Alfred D. Severance, hereinafter called first party, and Knight-Counihan Company, a corporation, hereinafter called second party.

"Whereas, first party is now employed by second party, and desires to continue in the employ of second party.

"Whereas, second party is engaged in a general printing business and desires the services of first party.

"Now, therefore, in consideration of the aforesaid, and the mutual covenants and conditions to be performed by the parties hereto, they agree as follows:

"That as part of the consideration for the services rendered and to be rendered by first party to second party, and in addition to the salary received, and to be paid first party by second party, it is hereby understood and agreed that first party shall have the option and right to purchase, as hereinafter provided, all of the tariff pages set up and/or standing, whether completed or not, and used, or had been used, or to be used in connection with the business of the second party.

"That said option and right to purchase shall, and may be exercised within thirty days after the termination of first party's employment with second party for any reason whatever, or said option and right to purchase shall, or may be exercised within thirty days after written notice by second party to first party that there has been a substantial change in the management of second party, or that the business of second party has been consolidated with, or sold, or assigned to another person, firm, copartnership, or corporation, or second party has, or is about to liquidate its business, and first party's option and right to purchase may be exercised by him upon the happening of any events mentioned aforesaid, even though second party fails to give such written notice.

"First party shall at the time of the exercise of said option and right to purchase, give second party written notice thereof and shall have sixty days thereafter within which to pay second party as and for the full purchase price of said tariff pages, which shall be the then prevailing market price of all the metal contained in said tariff pages.

"That second party shall not have the right, and hereby agrees not to sell or assign in any manner whatever said tariff pages, or the use thereof to any person, firm, copartnership, or corporation without the written consent of first party during the term hereof.

"This agreement shall be binding upon the successors and assigns of second party and terminate at the death of the first party."

The evidence showed without conflict that when the agreement was signed, defendant was in an unsound financial condition and that the parties feared that defendant's creditors would either take over the business or force defendant into liquidation. The tariff business was a valuable part of defendant's printing enterprise and could be "saved" from the creditors if a way were found to withhold the tariff plates. According to plaintiff's testimony, defendant agreed to give him an opportunity to obtain its whole tariff business by paying the metal value of the plates at any time he left defendant's employ, defendant's management changed, or defendant "went into insolvency." Plaintiff had not bound himself to stay in defendant's employ for a certain term and could thus acquire defendant's tariff business at any time for a price far below its true value. Even without leaving defendant's employ he could acquire defendant's tariff business if there was any substantial change in defendant's management. According to the testimony of defendant's president, Mr. Counihan, there was no intention to enable plaintiff to obtain for himself the whole of defendant's tariff business by paying the metal value of the plates. The agreement with plaintiff was made merely to enable defendant or its directors in cooperation with

plaintiff to continue the tariff business, if defendant's creditors took action against it that prevented it from continuing its business. In that event the plates were to be vested in plaintiff as trustee for defendant or for a group of individuals consisting of defendant's directors and plaintiff; the purchase price for the plates was to be paid, not by plaintiff, who did not have sufficient funds, but by Counihan. Counihan testified:

"I told Mr. Severance that the creditors were hounding us, and I felt possibly that the creditors might take over the company, and figured that if they did, I would like to keep the company continuing, and possibly that we could save the tariff business by some method whereby I could let him have the tariff pages for the price of the metal, and continue the company in existence after the creditors foreclosed on us. * * * The story is that we were attempting to save the tariff plates to continue the business; so the contract was for the price of the metal, rather than let the junk man have it; and continue the business and pay off the creditors with the same value in the metal as the junk man would have paid. The metal was not for him at all, it was for the little company to continue. * * *

"Q. Mr. Severance was to get the metal? A. No. Mr. Severance was to get the metal for us at the price—the tariff pages at the price of the metal, so we could start in business again, if we were liquidated.

"Q. Was there anything in writing that you obtained from Mr. Severance to protect yourself in that respect? A. No.

"Q. Was there any understanding as to when you were to deliver the agreements and to whom? A. I trusted Mr. Severance like my brother. I didn't need any particular agreement outside of that. That is all. We were in unison. We were going to be closed up, and this would let us get the tariff pages and start over again. * * * I was the one that was going to put up the money. Mr. Severance didn't have any money to buy it. I was the one that proposed to raise the money. * * *

"Q. And if you wanted someone else to buy it they could buy it? A. I didn't want that, I wanted Mr. Severance to remain in the company with the other boys and continue on."

There was a conflict in the evidence, which remained unresolved by the trial court, as to whether after the agreement had been signed all executed copies were given to an officer of defendant for safekeeping or whether one of them was given to plaintiff and later returned by him upon Counihan's request because of the latter's fear that defendant's principal creditor might obtain knowledge of the agreement.

[2, 3] Even if it be assumed that a signed copy was delivered to plaintiff, the evidence showed that the contract remained inoperative for failure of the condition precedent on which its effectiveness depended, namely, defendant's creditors taking over defendant's business or forcing defendant into liquidation. The evidence shows without conflict that defendant's creditors did not take such action and that some months after the agreement was signed, defendant made an arrangement with its creditors involving personal funds of defendant's president and thus removed the danger that the creditors would take over defendant's business or force it into liquidation. It is contended that this court cannot affirm the judgment of the trial court on this ground, since the trial court made no express finding thereon, and since there was evidence, namely, plaintiff's testimony, that he could have exercised the rights under the contract immediately after it was executed. This evidence was inseparably connected, however, with plaintiff's testimony that the contract was not made for the purpose of defrauding defendant's creditors but constituted an adequate remuneration for plaintiff's services. Since the trial court found that the contract was collusive and was drawn and signed by both parties for the purpose of defrauding the creditors of defendant and that it provided for an inadequate and unfair consideration, it clearly disbelieved plaintiff's testimony that the contract was an award for his services and that he could have enforced the contract immediately after it was signed. The findings of the trial court include therefore the implied finding that the taking of action by

defendant's creditors was a condition precedent to the exercise of plaintiff's rights under the contract. Even if the condition precedent on which the effectiveness of the contract depended had occurred, plaintiff would not have been entitled to exercise the option for his own benefit without breach of the trust on which the agreement was based.

[4-8] Furthermore, the agreement is void because it was made to defraud creditors. It is contended that the agreement would not serve that purpose, since according to Counihan's testimony the payment of the metal value of the tariff plates would have been enough to satisfy defendant's creditors. He testified: "* * * the company was solvent enough to pay the creditors with the metal as metal, and we were to get the pages of tariff and start up again. * * *" The unconflicting evidence shows that the agreement was made when defendant's financial condition was unsound, its sales volume "very badly down," and it was "hounded" by its creditors. It is clear that under these circumstances, defendant and plaintiff were concerned with the possibility that the sales volume would undergo a further decrease and that additional indebtedness would accumulate so that defendant would be unable to pay the full amount of its indebtedness, which would include the claims of both present and future creditors. Hence, even if it be assumed that the creditors at the time of the agreement could have been satisfied, the agreement would still have been fraudulent as impairing the rights of future creditors. Future creditors as well as present creditors are protected by the legislation relating to fraudulent conveyances. Such protection is extended not only under the Uniform Fraudulent Conveyance Act, which was adopted in this state in 1939 (Civ.Code, § 3439.07), but under the law as it stood in 1938 when the agreement was made. Former Civ.Code, § 3439; Sasaki v. Yana Kai, 56 Cal.App.2d 406, 410, 133 P.2d 18. Although it is recognized that a transfer of property conveyed to defraud creditors cannot revoke the conveyance (First Nat. Bank of Riverside v. Eastman, 144 Cal. 487, 489, 77 P. 1043, 103 Am.St. Rep. 95, 1 Ann.Cas. 626; Moore v. Schneider, 196 Cal 380, 385, 238 P. 81; Liuzza v. Bell, 40 Cal.App.2d 417, 424, 104 P.2d 1095; See Glenn, Fraudulent Conveyances, rev. ed. § 114; 24 Am.Jur. 265), it is also recognized in this state that an executory contract is void, if the parties have entered into the contract for the purpose of defrauding creditors of one of the parties. Hays v. Windsor, 130 Cal. 230, 234, 62 P. 395; Ager v. Duncan, 50 Cal. 325; Glenn, ibid., §§ 116–118; 24 Am.Jur. 266; see 6 Williston, Contracts, rev.ed. §§ 1739, 1754. Both parties to such a contract are punishable under section 531 of the Penal Code. See, also, Pen.Code §§ 154, 155, 31. It is settled that a contract must have a lawful object (Civ.Code, §§ 1596, 1598, 1599) and that a contract for an object prohibited by a penal law is void. "The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum. * * * The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void." Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, 15; City of Oakland v. California Const. Co., 15 Cal.2d 573, 577, 104 P.2d 30; Duntley v. Kagarise, 10 Cal.App.2d 394, 397, 52 P.2d 560; see Kyne v. Kyne, 16 Cal.2d 436, 438, 106 P.2d 620; Restatement, Contracts, § 598; 4 Cal.Jur. 10–Yr.Supp. 79, 80.

[9-13] It is contended that despite its illegal purpose this contract is enforceable on the ground that the parties were not in pari delicto since plaintiff as an employee of defendant was conducting the negotiations concerning the contract with defendant's president upon the initiative of the latter who was his superior. Even if it be assumed that plaintiff was less at fault than defendant it would not follow that this contract is valid and enforceable in a court of equity. The fact that the parties to an executed illegal contract are not equally at fault may justify recovery by the party

whose fault is slight of what he has rendered as performance of the contract. Thus "one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of his creditors." Watson v. Poore, 18 Cal.2d 302, 312, 115 P.2d 478, 483; Birney v. Birney, 217 Cal. 353, 359, 18 P.2d 672; Chamberlain v. Chamberlain, 7 Cal.App. 634, 639, 95 P. 659; Woodham v. Allen, 130 Cal. 194, 199, 62 P. 398; see Restatement, Contracts, § 604. If the parties are not in pari delicto the party who is only slightly at fault can also recover money paid under an executory contract. McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800. Such relief is even granted to a party equally at fault, if he repudiates the contract before the illegal part of the bargain is executed. Wassermann v. Sloss, 117 Cal. 425, 431, 49 P. 566, 38 L.R.A. 176, 59 Am.St.Rep. 209; see Restatement, Contracts, § 605. The granting of relief, however, to one who repudiates an illegal contract is entirely different from granting relief to one who seeks to enforce it. A court will not enforce an illegal contract merely because one party's fault was slighter than the other's. Smith v. Bach, 183 Cal. 259, 263, 191 P. 14; Butler v. Agnew, 9 Cal.App. 327, 331, 99 P. 395. Moreover, plaintiff did not plead that he acted under the influence of defendant's president. The evidence shows without conflict that the contract was drafted by plaintiff's attorney, and, according to plaintiff's allegations and testimony, he took the initiative in obtaining the contract to enable him to obtain the tariff plates if he chose to leave defendant's employ, if he were dismissed, or if defendant was forced into bankruptcy.

It is contended that in two early cases this court repudiated the doctrine that an executory contract made for the purpose of defrauding creditors cannot be enforced. These cases must be read in the light of the circumstances there involved. In Smith v. 49 & 56 Quartz Mining Co., 14 Cal. 242, it was held that there was no intention to defraud the transferor's creditors. It was said hypothetically that if there was such an intent of the transferor, it would not prevent him from recovering property that he had hypothecated, which, by the fact of such recovery, would become available to his creditors. In Davis v. Mitchell, 34 Cal. 81, the fraudulent conveyance was executed and a note was received in exchange for the property. It was held that the holder of the note could sue thereon, since he had parted with the property and could not recover it. Anything in these cases inconsistent with Hays v. Windsor, supra, and Ager v. Duncan, supra, must be considered disapproved by those cases.

[14] Moreover, defendant's creditors would be delayed by the agreement (former Civ.Code § 3439; Civ.Code § 3439.07), since plaintiff was given the right thereunder to acquire the plates on sixty-days credit. There was evidence that plaintiff had no funds to pay the purchase price. Hence, the sixty-days credit meant that he had either to secure the money within the sixty-days from some one else or to obtain it from the future earnings of the tariff business itself. Thus, the creditors would receive, instead of valuable property, merely a claim against plaintiff, the recovery of which was doubtful.

Apart from the foregoing considerations, the trial court might well have disbelieved Counihan's testimony that defendant would have been solvent enough to pay its creditors had it received the metal value of the plates. Counihan also testified that the claim of the principal creditor was about $50,000. It is clear that defendant, a printing corporation "hounded" by its creditors, had little liquid assets and that its assets available to meet its liabilities consisted mostly of machinery and other assets of similar nature of uncertain value to the creditors. Counihan's testimony that defendant could have paid its creditors had it received the metal value of the plates was therefore a conclusion rather than a statement of fact. The trial court had reason to question the soundness of that conclusion, since Counihan testified that defendant owed its principal creditor $50,000, whereas

plaintiff testified that this claim alone exceeded $100,000. If plaintiff was correct, defendant owed $50,000 more than Counihan supposed when he testified that the proceeds from the sale of the plates as metal would have enabled the company to pay its creditors.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

I do not agree with the statement that "*an executory contract* is void [as between the parties], if the parties have entered into the contract for the purpose of defrauding the creditors of one of the parties." In early cases this court has held that such a contract may be enforced by a third person against the dishonest debtor even if the plaintiff participated in the fraud. Later decisions are to the contrary. Courts have also allowed a recovery if the parties are not in pari delicto. Furthermore, in my opinion, the judgment adverse to Severance should be reversed because of the trial court's failure to make findings upon material issues.

Contrary to the rule now promulgated in the majority opinion, it has been held in this state, and in a number of other jurisdictions, that an executory contract in fraud of creditors is enforceable by a third person against the debtor although both of them participated in the fraud. Davis v. Mitchell, 34 Cal. 81 (overruled on other grounds, McBride v. Fallon, 65 Cal. 301, 4 P. 17); Smith v. 49 & 56 Quartz Mining Co., 14 Cal. 242; Hazleton v. Lewis, 267 Mass. 533, 166 N.E. 876; Stillings v. Turner, 153 Mass. 534, 27 N.E. 671; Harvey v. Varney, 98 Mass. 118; Winton v. Freeman, 102 Pa. 366; Clemens v. Clemens, 28 Wis. 637, 9 Am.Rep. 520; Carpenter v. McClure, 39 Vt. 9, 91 Am.Dec. 370; Bradtfeldt v. Cooke, 27 Or. 194, 40 P. 1, 50 Am.St.Rep. 701; Butler v. Moore, 73 Me. 151, 40 Am.Rep. 348; Nichols v. Patten, 18 Me. 231, 36 Am.Dec. 713; Mayberry v. Clark, 317 Mo. 442, 297 S.W. 39; Gray, Hudson & Co. v. Jacobson, 55 Miss. 204, 30 Am.Rep. 514; Giddens v. Bolling, 93 Ala. 92, 9 So. 427; for cases contra see 37 C.J.S., Fraudulent Conveyances, § 269, p. 1103, 27 C.J. 660. Concededly, there is a conflict of authority upon this question, and the California cases add to the confusion. Two of the four decisions of this court support the non-enforceability rule (Hays v. Windsor, 130 Cal. 230, 62 P. 395; Ager v. Duncan, 50 Cal. 325); the other two hold to the contrary (Davis v. Mitchell, supra; Smith v. 49 & 56 Quartz Mining Co., supra). But in none of these cases is there an adequate discussion of the reasons for the rule adopted, and the later two do not mention the earlier ones. Under these circumstances, "Amid such a conflict of authority it should be the duty of a court * * * to adopt that line of decisions which, in its judgment, presents the better reason * * *." Bradtfeldt v. Cooke, supra [27 Or. 194, 40 P. 3].

Generally "where a statute prohibits or attaches a penalty to the doing of an act, the act is void" (Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, 15; see City of Oakland v. California Const. Co., 15 Cal.2d 573, 578, 104 P.2d 30), and this court has held that, as to creditors themselves, transfers in fraud of their rights are void, being in contravention of statute and public policy. Everts v. Sunset Farms, Inc., 9 Cal.2d 691, 698, 72 P.2d 543; see Sasaki v. Yana Kai, 56 Cal.App.2d 406, 408, 133 P.2d 18. But whether a contract is void for all purposes is a question of legislative intent and only when the language of a statute makes no other conclusion reasonably possible should an agreement contrary to its provisions be held totally void for all purposes. See, Smith v. Bach, supra, p. 262; 5 Williston, Contracts, rev. ed., pp. 4564, 4575. In other words, "If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of the relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on [The Law of] Contracts, vol. 3, § 1789; vol. 5 [2d Ed.], § 1630. Cf. American Law Institute, Restatement of the Law of Contracts, §§ 548, 600." Rosasco Creameries, Inc., v. Cohen, 276 N.Y. 274, 278, 11 N.E. 2d 908, 909, 118 A.L.R. 641.

The general rule that an agreement in violation of a criminal or penal statute is void is subject to the qualification that the contract will not be declared void for certain purposes, or as to certain persons, where the purposes or objects of the legislation would be defeated by such a determination. Rosasco Creameries, Inc., v. Cohen, supra, 276 N.Y. at page 280, 11 N.E.2d 908, 118 A.L.R. 641; Reconstruction Finance Corporation v. Central Republic T. Co., D.C., 17 F.Supp. 263, 298; Lamb v. Condon, 276 Pa. 544, 120 A. 546, 548; Furlong v. Johnston, 209 App.Div. 198, 204 N.Y.S. 710, 712; State v. Haid, 325 Mo. 949, 30 S.W.2d 100, 103; 3 Horack's Sutherland Statutory Construction, 3d Ed., § 5405. "In passing upon contracts made in contravention of the statute, the court should carefully consider in each case the object of the statute, the evil it was enacted to remedy, and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void; and, if, from all these considerations, it is manifest that the Legislature had no such intention, the contracts should be sustained and enforced; otherwise they should be held void." Reconstruction Finance Corporation v. Central Republic T. Co., supra, 17 F.Supp. at page 298. For example, where a negotiable instrument is made in violation of the provisions of a penal statute its validity in the hands of a holder in due course has been sustained. Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 99 N.W. 399, 112 Am.St.Rep. 370, 4 Ann.Cas. 347.

Applying these principles, persuasive reasons support the rule allowing limited enforceability. Concededly, where a creditor's rights are involved a contract which limits or obstructs his recovery is void. But neither the civil nor the criminal provisions dealing with contracts in fraud of creditors expressly declares that such an agreement may not be enforced of a third party against a debtor where a creditor's rights will not be prejudiced. Moreover, at the time the agreement in controversy was executed, the Civil Code made such a transfer void only as "against all creditors" (former Civ.Code § 3439), and unless the person seeking to avoid the contract falls within one of the classes sought to be protected by the statute, he has no standing in court and cannot complain of the transaction however fraudulent. Ackerman v. Schultz, 178 Cal. 190, 172 P. 609; Frink v. Roe, 70 Cal. 296, 11 P. 820; H. D. Roosen Co. v. Pacific Radio Pub. Co., 123 Cal.App. 525, 11 P.2d 873; see 12 Cal.Jur. 975.

But the most persuasive reason for allowing such contracts to be enforced by a third party against the debtor where creditors' rights will not be prejudiced is that the rule implements public policy. The purpose of both the civil and the criminal statutes which concern contracts in fraud of creditors is to discourage persons from making them. Yet the rule now adopted by this court does nothing to hinder such agreements and therefore, to some extent, fosters them. There is no inconsistency in holding that, although one who enters into a contract with intent to defraud his creditors is, by statute, declared guilty of a misdemeanor, under certain circumstances the law will allow a civil judgment to be taken against him which would further the same public policy that the legislation was designed to sanction. Under the nonenforceability doctrine, a debtor who enters into a contract in fraud of creditors faces, at the worst, their prior rights to subject his property to his debts and conviction of a misdemeanor. But the contract rule, allowing it to be enforced by a third person against the debtor, subject, of course, to the rights of creditors, provides an additional, practical, and effective restraint against entering into an agreement of that kind. In the present case, as in most of such contracts, the consideration given for the right to purchase the property of the debtor is much less than its value, otherwise the very purpose of the agreement would be thwarted. Certainly a debtor would hesitate to make such a contract if the other party might enforce it against him.

The reasons for allowing enforcement as between the parties to the contract are stated in Carpenter v. McClure, supra: "If fraud enters into the trade or gift, it is in the power of the person against

whom the fraud is pointed to avoid the trade or gift. The injury is pointed, not at the public, nor at an unascertained portion of the public, but at the fixed rights of persons certain to whom the common law affords protection, and into whose hands the statute gives the right to inflict punishment. That the contract is made void as to creditors only has been thought to add to his protection, and to be calculated to restrain such transactions. The colorable contract can only be avoided by the creditor's aid, and without it a dishonest debtor places himself in the power of his confederate, whose exactions are not unusually more severe than a creditor's * * *." 91 Am.Dec. 374.

But another rule generally followed is that a contract in fraud of creditors will be enforced between the parties if the plaintiff was less at fault than the defendant. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Woodham v. Allen, 130 Cal. 194, 62 P. 398; Ager v. Duncan, supra; Ford v. Caspers, 7 Cir., 128 F.2d 884; Felder v. Paulk, 165 Ga. 135, 139 S.E. 873; Gay v. Gibson, 101 W.Va. 284, 132 S.E. 717; see 6 Williston, Contracts, rev. ed., §§ 1739, 1754, pp. 4919, 4985; Restatement, Contracts, §§ 602, 604; 37 C.J.S., Fraudulent Conveyances, §§ 261, 265, pp. 1095, 1104; 6 Cal.Jur. 157. And mere knowledge by both of them of the purpose of the contract does not of itself establish that they are in pari delicto.

In McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 916, 125 A.L.R. 800, it was said: "It is, of course, true that where parties are in pari delicto neither can secure affirmative relief at law or equity. But it is equally true that where one party is involved to some extent in the illegality, but where the second party is grievously at fault and the first party only slightly at fault, the court will allow recovery of moneys paid by the first party under the executory contract. * * * The exception and limitation to the main rule is stated in 1 Pomeroy's Equity Jurisprudence, section 403, p. 756, as follows:

" 'The first of these limitations may be given in the following general formula, and all the others may be regarded as merely particular deductions or corollaries from it. Assuming that a contract is fraudulent, or against public policy, or illegal, still, where the parties to it are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief, relief may be given to him, either against the transaction by setting it aside and restoring him to his original position, or even, in some cases, by enforcing the contract, if executory.' "

The pari delicto doctrine was recently considered by this court in connection with a question which concerned the establishment of a resulting trust because of fraud. And the rule was stated as follows: "Although Watson's conduct was far from exemplary, we do not believe that under these circumstances it can be said that Poore and Watson were equally at fault. In the case of Birney v. Birney, 217 Cal. 353, 359, 18 P.2d 672, 674, this court said: '* * * The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong. * * *.' " Watson v. Poore, supra, 18 Cal.2d 302, 312, 115 P.2d 478, 483. And Williston states that "the buyer's right to enforce an executory bargain where the seller intended to defraud his creditors should be governed by the principles applied to other cases of bargains where the plaintiff has guilty knowledge. * * * It is held in England that mere knowledge of an illegal purpose of the other party to the transaction will render a bargain so opposed to public policy that no recovery can be had upon it. * * * But the weight of authority in the United States does not support so strict a rule at least, 'unless the intended purpose involves serious moral turpitude, or unless a statute prohibits recovery.' " 6 Williston, Con-

tracts, rev. ed., §§ 1739, 1754, pp. 4919, 4985.

The making of a contract for the purpose of defrauding creditors, it is clear from these authorities, does not, in and of itself establish that both parties to the agreement are in pari delicto. If the offense of the plaintiff is trivial in comparison with that of the party whose conduct is much more wrongful, the fraudulent purpose will not bar a recovery. An equal fault may not properly be charged where there is oppression on one side and submission on the other. Woodham v. Allen, supra, 130 Cal. at page 199, 62 P. 398; see 6 Cal.Jur., Contracts, § 109. Also, the plaintiff should not be required to anticipate the defense of illegality and plead that the parties were not in pari delicto. Illegality is an affirmative defense that must be specially pleaded. Bernstein v. Downs, 112 Cal. 197, 44 P. 557; see 1 Bancroft's Code Pleading, § 336; 21 Cal.Jur. 138. Moreover, the failure of Severance to plead "that he acted under the influence of the respondent's president," is of no consequence. Upon the trial the parties treated this affirmative defense as being sufficiently pleaded and it will be so considered upon appeal. Busch v. Los Angeles R. Co., 178 Cal. 536, 174 P. 665; 2 A.L.R. 1607; Sukeforth v. Lord, 87 Cal. 399, 25 P. 497; Thomas v. Black, 84 Cal. 221, 23 P. 1037; King v. Davis, 34 Cal. 100.

It is settled law in California that where an action is tried before the court without a jury, in the absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence. If the court renders judgment without making such findings, the judgment must be reversed. Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; James v. Haley, 212 Cal. 142, 147, 297 P. 920; Wilcox v. Sway, 69 Cal.App.2d 560, 564, 160 P.2d 154; Bertrand v. Pacific Electric Ry. Co., 46 Cal. App.2d 7, 13, 115 P.2d 228. Although an appellate court may properly make findings to support the judgment when "no contrary conclusion from the evidence could reasonably be drawn" (Tupman v. Haberkern, 208 Cal. 256, 266, 267, 280 P. 970, 974; see Code Civ.Proc. § 956a; Bertrand v. Pacific Electric Ry. Co., supra, 46 Cal.App. 2d at page 12, 115 P.2d 228) the record now under review shows a substantial conflict in the testimony, requiring a finding or findings by the trier of fact.

The finding of the trial court in the present case that "said agreement was collusive and was drawn and signed by plaintiff and defendant for the purpose and with the intent to defraud creditors of defendant" does not determine the issue of pari delicto. Furthermore, the testimony of the respondent's president, which must have been believed by the trial court since the judgment was in favor, shows that Counihan conceived and initiated the plan to defraud the corporation's creditors. Severance, an employee, was induced by the president to enter into the contract in suit. Under such circumstances there is evidence which would support a determination that the parties were not equally at fault.

The record also shows a conflict of evidence upon the issue as to whether there was a condition specified by the parties for the taking effect of the contract and also in regard to the question as to a trust. No findings were made upon these issues and they may not now be made as the basis for denying Severance relief. Counihan insisted that the contract was to be effective only if the creditors took over the corporation's business or forced it into liquidation. When a witness in his own behalf, Severance was asked, "Now you say that the agreement was that you could come the next day if you wanted to and take the pages with you for the value of the metal, is that right?" He replied, "That is right." According to Severance, nothing was said to the effect "that the agreements were only to be effective if the creditors should take over the company." Severance's testimony likewise negatived a trust relationship.

Nor should we assume that the omitted findings, if made, would have been adverse to the plaintiff. See Krum v. Malloy, 22 Cal.2d 132, 136, 137 P.2d 18. The majority opinion reads an implied finding of a condition precedent into the express one that the agreement, based upon an inadequate and unfair consideration, was made for the purpose of defrauding creditors. But, in

my opinion, the findings of the trial court do not include any determination as to the very important issue in regard to the condition precedent upon which the contract's effectiveness depends.

The failure to so find necessarily raises other questions. Had the trial court decided that there was no condition precedent, it should have determined whether the creditors, contrary to Counihan's testimony, would be prejudiced by the enforcement of the contract and the time or conditions upon which the parties intended title to the plates to pass. The finding that the consideration was wholly inadequate and unfair is not controlling. Although the adequacy or amount of consideration may be a circumstance which, together with other facts, will tend to show fraud or undue influence, and must be pleaded and proved by a plaintiff in an action for specific performance, there was evidence that the consideration for the right to buy the plates was, as specifically stated in the contract, the value of Severance's services. That consideration was sufficient to support the contract and an action for its breach.

For these reasons, I believe that the judgment should be reversed.

CARTER, Justice (dissenting).

I dissent. I am in substantial accord with the view set forth in the dissenting opinion of Mr. Justice EDMONDS in this case.

Judicial conscience should revolt against the concept that a valid defense may be predicated upon a fraud perpetrated by the defendant asserting it. Especially should this be true in a case where the fraudulent scheme was conceived and proposed by such defendant for his own benefit and advantage. Such is the situation we are confronted with in this case. That is, the defendant comes into court and boldly asserts, that with the intent and design to defraud his creditors by withholding from them a valuable asset to which they might resort for the satisfaction of their claims against him, he proposed to plaintiff that a fraudulent deal be arranged whereby plaintiff would appear to have a valid contract for the purchase of this valuable asset for a nominal purchase price which would be paid by defendant if the creditors saw fit to force the collection of their claims, and the asset would thereafter be retained by defendant for his own use, benefit and advantage. To carry out this fraudulent design, the defendant had a purportedly valid written contract prepared and executed by himself and the plaintiff. When plaintiff attempted to enforce said contract, defendant's sole defense was that it was entered into for the fraudulent purpose of hindering, delaying and defrauding his creditors and was therefore invalid and unenforceable even as between the parties themselves. In my opinion there are compelling reasons which support the view that as between the parties the contract is valid and enforceable. These reasons are ably stated as follows in the dissenting opinion which was written by Mr. Presiding Justice Peters of the District Court of Appeal, First Appellate District, Division One, when this cause was before that court:

"There is another factor that compels the conclusion that such contracts should be enforceable by the third person. Public policy requires that contracts in fraud of creditors should be discouraged. The rule of the majority opinion encourages such contracts. Under that rule a fraudulent debtor can enter into a contract in fraud of his creditors knowing that the worst that can happen to him is, that if the creditors discover the fraud, they can reach the property—a right they would have had had the contract not been executed. Under the rule announced by the majority the third person cannot enforce that contract so that no penalty at all is exacted, no restraint at all is placed upon, the fraudulent debtor. But if such contracts could be enforced by the third person a real restraint against such contracts would exist. Any fraudulent debtor would hesitate before entering into such a contract if the third person could enforce it. It follows that, even if the parties were in pari delicto (which they are not), the public policy in favor of preventing such contracts being much stronger than the policy that the judicial hands should not be tainted by enforcing them, the first policy must prevail."

I take issue with the statement in the majority opinion that the contract is rendered void by the fact that the parties to it are subject to punishment under the penal statutes. Pen.Code, §§ 531, 154, 155. Sections 154 and 155 refer only to acts of the debtor and contain no provision which might be construed to defeat any right of plaintiff. Section 531 in effect provides that every party to any contract made "with intent" to defeat, hinder, or delay creditors is guilty of a misdemeanor.

The majority opinion correctly states that a contract must have a lawful object, and that as a general rule "where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum". Citing Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, and other cases. But in holding that this rule is here applicable, the opinion fails to discuss the many exceptions to it which have been declared by the courts, and fails to give weight to the controlling fact that the exception, and not the general rule, should prevail where the effect of application of the general rule is to encourage the making of the type of illegal contract under review.

The question is largely one of legislative intent, and in order to determine whether the penal provision was intended by the Legislature to render agreements violative of it illegal, the purpose of the statute has been generally adopted as a test (12 Am. Jur., § 163, p. 658). The penal statutes above referred to were obviously enacted solely for the protection of creditors, and they apply only where a transaction is entered into with a disclosed or undisclosed intent to defraud that class of persons. Their terms indicate that their purpose may be more successfully accomplished by not declaring illegal as between the parties, contracts violative of their provisions.

A contract, denominated by the majority opinion as void because its "object" is prohibited by penal law, should be distinguished from a contract, such as the present one, having an "object" which is unqualifiedly lawful but which is executed with the unstated intent to secure an unlawful advantage over persons not parties to it. The obviously lawful "object" of the present contract was to effect a purchase and sale of tariff plates at their metal value. Regardless of the undisclosed motive, or "intent" when that word is used in the sense of "motive" (see, discussion, Hansen v. Bear Film Co., 28 Cal.2d 154, 175, 168 P. 2d 946), the "object" of the contract is not prohibited by penal law. Section 531 refers to an intent or motive to deceive and defraud others, not to an object so to do.

There is nothing in the statute which indicates a legislative intent to declare void and illegal as between the parties contracts having a lawful object but motivated by design to defraud creditors. The statute has never been before the courts for construction on this point. See Sasaki v. Yana Kai, 56 Cal.App.2d 406, 133 P.2d 18. The compelling reasons already set forth constrain me to conclude that the effect of the penal provision is not to render totally void as between the parties, contracts in fraud of creditors.

It is said in Reconstruction Finance Corporation v. Central Republic T. Co., D.C., 17 F.Supp. 263, 298, "Each statute must be judged by itself as a whole, regard being had, not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract * * *." Such is the case here.

In my view, the judgment should be reversed.

SCHAUER, Justice (dissenting).

I dissent. I am in accord generally with the propositions of law declared by Mr. Justice EDMONDS and by Mr. Justice CARTER in their respective dissenting opinions and I agree that the majority opinion is unsound in law and in public policy as pointed out by Justices EDMONDS and CARTER. I am further of

the view that the majority opinion is untenable on any fair and realistic appraisal of the evidence and the findings of fact.

The evidence overwhelmingly and without substantial dispute establishes that there was ample consideration for the contract, that no creditor was injured by it, and that the corporation defendant, which the majority opinion supports in invoking its own weakly asserted intent to defraud as a basis for excusing its failure to perform the contract, was in fact at all times solvent.

The major issue of fact in the case was on the point as to whether the contract was in fact *delivered* as an actual contract or was merely signed for possible future use dependent upon a condition precedent which had not then, and which defendant asserts never has, occurred. Upon this all-important question the trial court failed to make any finding.

For each and all of the reasons indicated the judgment should be reversed.




29 Cal.2d 644

**In re BUTLER'S ESTATE.**
**BUTLER et al. v. COX.**
**S. F. 17227.**

Supreme Court of California, In Bank.

Feb. 11, 1947.

Rehearing Denied March 10, 1947.

**1. Executors and administrators ⇐314(12)**

An order denying motion by deceased's heirs to reopen administration proceedings after final distribution decree is not appealable. Probate Code, §§ 1020.1, 1240.

**2. Attorney and client ⇐11**

A non-lawyer's practice of soliciting decedent's heirs for authorization to appear for them in administration proceedings and employing counsel to represent them under powers of attorney or assignments providing for his payment of all expenses, including attorney's fees and court costs, amounts to commercial exploitation of legal profession and is contrary to public policy.

**3. Attorney and client ⇐11**

The statute authorizing probate court to inquire into circumstances surrounding execution of assignments, transfers, agreements, requests, or instructions by decedent's heirs before distributing decedent's property, did not recognize propriety of non-lawyer's solicitation of decedent's heirs, residing in foreign country, for authorization to appear for, and employment of counsel to represent, them in distribution proceedings under powers of attorney or assignments. Probate Code, § 1020.1.

**4. Attorney and client ⇐136**

The fact that non-lawyer, through agent, notified decedent's heirs, residing in foreign country, of their inheritance rights before public administrator did so on basis of information, readily available to him, as to their whereabouts, did not entitle such non-lawyer to agreed compensation, for representing heirs in distribution proceedings, where compensation agreements were procured only short time after decedent's death and before hearing of such administrator's petition for letters; presumption being that public administrator, would have notified heirs. Code Civ.Proc. § 1963, subd. 15.

**5. Attorney and client ⇐11**

A non-lawyer's activities in furnishing attorneys for beneficiaries of decedent's estate and soliciting beneficiaries residing in foreign country for authority to represent them in distribution proceedings for agreed compensation of percentage of their distributive shares constituted unlawful "practice of law", so that assignments and powers of attorney, under which he claimed such compensation, were void.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice of Law".

**6. Descent and distribution ⇐82**

The statute authorizing probate court to inquire into circumstances surrounding execution of assignments, transfers, agreements, requests, and instructions by decedent's heirs before distributing decedent's property merely enlarged probate court's powers respecting such assignments or agreements and declared no public policy in

favor of validity thereof. Probate Code, § 1020.1.

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Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of William Galvin Butler, deceased. From a decree of final distribution among Alice Galvin Butler and others, deceased's heirs, and Walter C. Cox, and an order denying a motion to reopen the proceedings, the heirs appeal.

Decree reversed with directions, and appeal from order denying motion to reopen proceedings dismissed.

Prior opinion 165 P.2d 955.

John B. Ehlen, of San Francisco, for appellants.

Elkins & Wright and Leo A. Elkins, both of San Francisco, for respondent.

Robert E. Hatch, of San Francisco, amicus curiæ.

SPENCE, Justice.

[1] This is an appeal by the heirs from a decree of final distribution and from an order denying their motion to reopen the proceedings under section 1020.1 of the Probate Code. The challenged order is not appealable under section 1240 of the Probate Code and the appeal therefrom must be dismissed. However, the decree of final distribution disposed of all the matters contemplated by section 1020.1 of the code. The determination of the rightful heirs was made in accordance with agreements of all the parties and the only point to be decided here is whether the probate court should have refused to make distribution to respondent of a percentage interest in appellants' distributive shares in the estate. Respondent predicates his claim upon certain assignments and powers of attorney procured from appellants in pursuance of his business practice of soliciting beneficiaries of estates. Appellants attack the arrangements under which respondent assumed to act as contrary to public policy. Their objection to the validity of his claim is well taken under the facts of this case.

The decedent died intestate in San Francisco on March 16, 1942, leaving an estate of approximately $8,000. On March 20, 1942, the public administrator petitioned for letters of administration. On March 31, 1942, upon solicitation by respondent's foreign agent, certain of appellants, brother and sister of the decedent residing in Ireland, executed powers of attorney and assignments of one-third of their interests in the estate to respondent, who conducts a business of "probate research" in Chicago. On April 21, 1942, the other appellants, who were similarly solicited, executed like instruments in favor of respondent. Between May and September, 1942, all of appellants executed powers of attorney to Matthew Murphy, Irish Consul in San Francisco, and specifically revoked the powers granted to respondent. The consul promptly notified respondent of appellants' revocation and cancellation of the arrangements made with him, including the agreements for his compensation. Meanwhile, however, respondent had retained the services of local counsel, who on May 27, 1942, filed a notice of appearance in the estate on behalf of appellants. In March, 1944, the final account showing the estate ready for distribution was filed, and in December, 1944, the probate court determined that appellants (and certain minors who are not involved here) were the sole heirs and entitled to distribution. In January, 1945, appellants filed a motion under section 1020.1 of the Probate Code for distribution of their entire interest to them in disregard of the assignments to respondent, and a supplementary motion asking the court to inquire into the reasonableness of the consideration for the assignments. The motions were denied. Appellants subsequently filed a motion to reopen the proceedings on the ground that prior to the hearing of his petition for letters of administration—April 7, 1942—the public administrator had definite information available as to the names and addresses of decedent's brother and sister, as well as their counsel in Ireland, and hence appellants were not "lost or missing heirs." This motion was also denied and the decree of final distribution was made distributing one-third of appellants' shares in the estate to respondent.

[2] The invalidity of respondent's claim stems from the nature of the agreements which he solicited from appellants, which agreements are typical of those used in his general practice of soliciting beneficiaries of decedents' estates. Operating from his principal office in the city of Chicago, respondent admittedly conducts his business in the following manner: by contacting and soliciting the heirs, securing their authorization to appear for them, and employing counsel to represent them under powers of attorney or assignments. Thus, as a nonlawyer acting for prospective beneficiaries under agreements providing for his paying "any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including attorneys' fees and court costs," respondent assumes complete control of litigation instituted on behalf of the beneficiaries through attorneys hired by him and becomes a "middleman" intervening for profit in the conduct of legal proceedings. Such procedure amounts to "commercial exploitation" of the legal profession and is contrary to public policy. Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 595, 52 P.2d 992; Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97, 99, 86 A.L.R. 509.

Pertinent to the consideration of the evil inherent in such heir-hunting system is the comparatively recent New York case of In re Lynch's Estate 1935, 154 Misc. 260, 276 N.Y.S. 939, wherein the general method of operation was similar to that here involved and the enterprise was condemned as constituting the unlawful practice of law contrary to the statute and public policy of the state. There the "heir-hunter" conducted a business under the trade name "Foreign Estate and Research Co." It was his custom to examine petitions in probate and administration as soon as filed for the purpose of ascertaining the names and addresses of legatees and beneficiaries in foreign countries. Through the information secured in that and other ways he solicited, through foreign correspondents, the prospective beneficiaries abroad of estates of decedents in this country and obtained powers of attorney. Thereupon he employed and paid local counsel to represent him in the administration of the estate, the compensation fixed in the agreement with a foreign beneficiary varying from ten to fifty per cent of the legacy or intestate share. Observing that under such arrangements "the services to be rendered by [the heir-hunter], aside from the mere collection, contemplated the rendition of legal services exclusively * * * [and] that the scheme of division of the fees was an unlawful participation by him in the practice of law," the court declared at page 945 of 276 N.Y.S. that "the power of attorney and the agreement of compensation [there] procured * * * were illegal and void ab initio and in their entirety." See, also, In re Wellington's Estate, 1935, 154 Misc. 271, 276 N.Y.S. 946; Id., 160 Misc. 383, 386, 289 N.Y.S. 1005; In re Vogelsang's Estate, 1937, 162 Misc. 257, 293 N.Y.S. 346; In re Tuthill, 1939, 256 App.Div. 539, 10 N.Y.S.2d 643.

A similar question is involved in "ambulance chasing" cases, where adjustors make contracts with injured persons to take all the steps necessary to collect their claims, such as employing attorneys and instituting suit. Townsend v. State Bar, 210 Cal. 362, 291 P. 837. That practice has been recognized as an evil (Howe v. State Bar, 212 Cal. 222, 298 P. 25) and the courts therefore have been inclined to hold the activities of those engaged therein as "practicing law." Smallberg v. State Bar, 212 Cal. 113, 297 P. 916.

[3] Respondent argues that section 1020.1 of the Probate Code recognizes the propriety of his business enterprise in aid of an heir to recover his interest in an estate under probate, and that his procedure therefore cannot be regarded as contrary to public policy. But said section does not appear to embrace the broad implications which respondent seeks to assign to it. Rather, the section indicates simply the purpose of the Legislature to give to the probate court, having but special and restricted jurisdiction as prescribed by law, "some control, at least for the purpose of distribution, over agreements providing compensation for services of so-called 'heir-hunters.'" In re Estate of Lund, 65 Cal.App.2d 151, 153, 150 P.2d 211, 212. Prior to the enactment of section 1020.1 and its forerunner, section 530.1 of the Probate Code, the probate court did not have the power to deter-

mine the issue of the validity of an assignment upon the distribution of an estate, (In re Estate of Howe, 161 Cal. 152, 118 P. 515,) upon inquiry "into the circumstances surrounding the execution of such" agreement and any accompanying instrument procured from the prospective beneficiary. In the Lund case, supra, which was an appeal on the judgment roll, the parties confined their dispute to the single point of the probate court's authority, after refusing to sustain the strict percentage terms of the heir's assignment, to recognize it to the extent of finding the reasonable value of the services performed thereunder and to decree distribution accordingly. Affirmance of the decree followed the express statement at page 156 of 65 Cal.App.2d, at page 214 of 150 P.2d that "no question has been raised concerning the validity generally of agreements providing compensation, by assignment or otherwise, for the services of so-called 'heirhunters.'"

While in the In re Estate of Cohen, 66 Cal.App.2d 450, it was said at page 459, 152 P.2d 485, 490, that upon enactment of the above-mentioned probate code sections "the legislature of this state recognized the validity of so-called 'heir-hunter' contracts of the *type here involved*" (italics ours), such emphasis upon the factual considerations there present serves to distinguish the feature of impropriety in the premise of respondent's claim. In that case a certain genealogist (not a member of the legal profession) located the decedent's sister after an intensive search of two years, and she, in consideration of "his time, effort and expense in investigation and procuring proof of relationship," assigned to him thirty per cent of her share in the estate. No element of legal representation entered into the arrangement between the parties, either by execution of a power of attorney or other instrument. The assignment related wholly to compensation for genealogical services and the decree of distribution so recognized it. In rejecting the heir's argument, upon appeal, that the instrument should have been declared void as contrary to public policy, the court significantly said at page 456 of 66 Cal.App.2d, at page 488 of 152 P.2d: "Sections 530 and 530.1 were added to the Probate Code as new sections in 1939, and in 1941, St. 1941, p. 2893, they were repealed and the substance thereof embodied in the enactment of section 1020.1 of said code. As enacted in 1939, sections 530 and 530.1 were evidently patterned after similar laws then existing in the state of New York; that being so, appellant contends that the decisions of that state are here controlling in the determination of the validity of the assignment in the present case. In this respect it appears that the statute of each state embodies the declaration that nothing contained therein shall be deemed to authorize the practice of law by an attorney in fact or other person acting under an instrument mentioned in the statute who is not a member of the bar of that state * * * [but] there is nothing whatever contained in the instrument in question here which could be construed as authorizing or permitting respondent to select an attorney for appellant; and the evidence definitely shows that prior to and at the time of the execution of the assignment he not only informed those acting for appellant that he could not select a lawyer for her, but that he expressly refused so to do; furthermore the record shows that throughout the probate proceedings appellant was represented in and out of this state by attorneys of her own selection."

In striking contrast is the record in this case, where it appears that respondent, in pursuance of the powers of attorney executed on his regular printed form by appellants, undertook "to represent [them] in all proceedings whatsoever in the matter of the estate * * * and particularly * * * to petition for letters of administration or letters testamentary, to recognize, defend or contest wills * * * to institute, prosecute or defend suits and proceedings in law, equity or in probate, in any court or courts, to enter our and each of our appearances therein. * * *" The respective assignments make express reference to the power of attorney "this day executed," so that integrated in the consideration therefor is the parties' understanding that respondent would manage whatever legal proceedings were undertaken on behalf of appellants. This, in fact, respondent proceeded to do upon hiring local counsel to represent appellants in this estate. No evidence was of-

fered by respondent as to any genealogical work or other activity required of him in locating appellants. The investigation report prepared for use of the public administrator in making his petition for letters of administration contained the notation that a certain local bank, where decedent had been employed, "will notify heirs," so that it cannot reasonably be said that ascertainment of appellants' whereabouts would involve any problem of research for "lost or missing" heirs.

[4] That respondent, through his foreign agent, *first* contacted appellants and notified them of their inheritance rights in the estate does not strengthen respondent's position. As appears from the record, agreements from some of appellants were procured only fifteen days after the death of the decedent and one week prior to the hearing of the petition for letters of administration; agreements from others of appellants were procured a short time thereafter. In the absence of any evidence to the contrary, it must be presumed that the public administrator, in the discharge of his official duty in the handling of this estate, would have notified appellants on the basis of the information readily available to him as to their whereabouts. Code Civ. Proc. § 1963, subd. 15. Respondent's speedy solicitation of appellants, who may properly be regarded as "known" heirs, emphasizes the detrimental results typical of his general business practice, whereby beneficiaries, who would ordinarily receive their shares of estates in the usual course and without any deduction for attorney's fees or for the compensation of solicitors, may be imposed upon by foreign agents to make assignments of substantial percentages of their distributive shares in estates, and to execute accompanying powers of attorney. Such system of intermeddling for profit is not reconcilable with the policy of probate courts "to protect beneficiaries of estates from imposition or unnecessary expense." In re Lynch's Estate, supra, 154 Misc. 260, 276 N.Y.S. 939, 943.

[5] It is clear from the record that respondent has made it a business to furnish attorneys or counsel to render legal services to beneficiaries and that his solicitation of appellants contemplated only such procedure—a course of conduct wholly beyond the scope of the "heir-hunter" type of contract approved in the In re Estate of Cohen, supra. As noted in the above quotation from that case, our legislation on this subject, like the New York statutes upon which it was based, does not purport to validate any such arrangements by "heir-hunters" as are presented by the record here. The similarity of legislative treatment of this matter in the two states effectively demonstrates the pertinency of the New York decisions above cited. Ocean Acc., etc., Co. v. Industrial Acc. Comm., 173 Cal. 313, 317, 159 P. 1041, L.R.A. 1917B, 336; Fink v. Superior Court, 105 Cal.App. 540, 542, 288 P. 124, 289 P. 209. As a like factual situation was analyzed by the New York court, respondent's activities constituted the unlawful practice of law, and for that reason the assignments and powers of attorney under which he claims are illegal and void. In re Lynch's Estate, supra, 154 Misc. 260, 276 N.Y.S. 939. Manifestly there is no similarity between the considerations involved here and those in the case of In re Estate of Cazaurang, 75 Cal.App.2d 217, 170 P.2d 694, where the assignments of certain percentage interests in the distributive share of an estate were executed by the claimant directly in favor of her attorneys and allowances made thereunder by the probate court were sustained as in accord with the findings of reasonable compensation for the legal services performed.

Nothing that is said herein is intended to cast doubt upon the validity of a power of attorney given to an unlicensed person who gratuitously performs services thereunder, including the employment of counsel for the principal at the principal's expense; and the question of the validity of an agreement to compensate an unlicensed person for that kind of service is not before us. Our decision is necessarily confined to the particular facts presented here, which admittedly show agreements for compensation and accompanying powers of attorney, obtained by an unlicensed person, under which he undertook to furnish legal services for his principals and to pay out of his agreed compensation "any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including at-

torneys' fees and court costs." Such is the nature of the undertakings which are here condemned as constituting the unlawful practice of the law and as contrary to the public policy of this state. See People v. Merchants Protective Corp., 189 Cal. 531, 538, 539, 209 P. 363.

[6] Respondent argues that his enterprise operates on no different principle than a collection agency and that a contract whereby such agency has agreed to employ an attorney and prosecute the assigned claims in its own name has been upheld in this state as consistent with public policy. Cohn v. Thompson, 128 Cal.App.Supp. 783, 16 P.2d 364, 365. But the cited case is distinguishable as the court there sustained the contract of the collection agency upon two grounds: First, that the collection agency, as the assignee, was the "real party in interest" and, as such, had the right to employ counsel to represent it, there being no agreement that the assignee would furnish "any legal services whatever to the assignor"; and second, that the statute adopted in 1927, defining and regulating collection agencies (Stats. 1927, ch. 485, p. 822), "declares the public policy as to such contracts" of collection agencies, and that therefore the courts may not declare such contracts to be contrary to public policy. Without pausing to discuss the first ground of the decision, upon which there is a conflict of authority (see 21 Cal.L.Rev. 616; 33 Cal.L.Rev. 622), we believe that the second ground of the decision clearly sustains the result reached in the cited case. If doubt may have previously existed concerning the public policy of this state with respect to the ordinary contract of a collection agency, such doubt was dispelled by the enactment of the above mentioned statute in 1927. There is no similar statute, however, relating to "heir-hunters." Section 1020.1 does not mention "heir-hunters" and does not purport to define or regulate any particular business. While it does give the probate court some control, at least for the purpose of distribution, over assignments and agreements obtained by "heir-hunters" (In re Estate of Lund, supra, 65 Cal.App.2d 151, 153, 150 P.2d 211), this is true because it refers in general terms to "any assignee or transferee" and to "any person other than an heir, devisee, or legatee" who claims the right to distribution "pursuant to any agreement, request or instructions of any heir, devisee or legatee." Said section and its forerunner merely enlarged the powers of the probate court with respect to all such assignments and agreements, and neither said section nor its forerunner may be said to declare, expressly or impliedly, a public policy in favor of the validity of any assignment or agreement which was theretofore deemed contrary to public policy. The only matter of public policy which may be said to be declared by said section 1020.1 of the Probate Code is a policy to limit rather than to enlarge the rights of the holder of any such instrument.

The decree is reversed with directions to the probate court to distribute appellants' entire interests in the estate to them, in disregard of the assignments made to respondent. The appeal from the order denying the motion to reopen the proceedings is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.




77 Cal.App.2d 860

## REED v. CITY OF SAN DIEGO.

## CROFT v. SAME.

Civ. 3633, 3634.

District Court of Appeal, Fourth District, California.

Jan. 31, 1947.

Rehearing Denied Feb. 21, 1947.
Hearing Denied March 31, 1947.

**1. Automobiles ⇐175(2)**

The exemption granted by statute exempting driver of an authorized emergency vehicle from rules of the road is not absolute but is one based upon the conditions that the use of the vehicle be an emergency one, and that a warning be given. Vehicle Code, § 454.

**2. Automobiles ⇐175(5)**

The duty of driver of authorized emergency vehicle to drive with due regard for safety of others as declared by statute exempting him from rules of the road requires the giving of a warning in order to give others an opportunity to protect themselves by yielding the right of way, and the warning required must be suitable for that purpose, and not the usual warning which all motorists must give under ordinary circumstances. Vehicle Code, § 454.

**3. Automobiles ⇐245(19)**

Evidence presented question for jury as to whether police officers, in parking their automobile on paved portion of highway with only taillights burning while citing a motorist who failed to have his headlights dimmed in a "dim out" zone under army regulations, gave suitable warning to other users of highway under statute exempting driver of an authorized emergency vehicle from rules of the road, so as to exempt city from liability for injuries sustained by motorist who was being cited as an offender when another automobile crashed into rear end of police automobile knocking it against motorist and for injuries sustained by occupant of automobile which struck police automobile. Vehicle Code, §§ 400, 454, 582, 583, 621.

**4. Automobiles ⇐175(2), 245(19)**

The privilege under statute exempting driver of an authorized emergency vehicle from rules of the road is based upon necessity arising from nature of the duty required of the driver, and where an emergency need does not appear, a use of the privilege may be arbitrary and a question of fact may be presented. Vehicle Code, § 454.

**5. Automobiles ⇐175(2)**

In considering whether there has been an arbitrary use of privilege afforded by statute exempting driver of an authorized emergency vehicle from rules of the road, the need or necessity at the time is an important factor. Vehicle Code, § 454.

**6. Automobiles ⇐245(19)**

Evidence presented question for jury as to whether police officers, in parking their automobile on paved portion of highway with only taillights burning while citing a motorist who failed to have his headlights dimmed in a "dim out" zone under army regulations, arbitrarily exercised their privilege under statute exempting driver of an authorized emergency vehicle from rules of the road. Vehicle Code, §§ 400, 454, 582, 583, 621.

**7. Automobiles ⇐245(65)**

Evidence presented question for jury as to whether police officers, in parking their automobile on paved portion of highway with only taillights burning while citing a motorist who failed to have his headlights dimmed in a "dim out" zone under army regulations, could have foreseen that another automobile might strike rear of police automobile or whether the accident was result of an intervening act of a third party which could not have been foreseen by officers. Vehicle Code, §§ 400, 454, 582, 583, 621.

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Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Lionel G. Reed against City of San Diego, consolidated with an action by Loretta Croft, a minor, by Ira Lester Croft, her guardian ad litem, against same defendant, both arising out of same automobile collision. From judgments for plaintiffs, the defendant appeals.

Affirmed.

J. F. DuPaul, City Atty., J. H. McKinney, Deputy City Atty., and Shelley J. Higgins, Special Counsel, for appellant.

Gaines Hon, Joseph W. Jarrett, Robert M. Newell, and J. Marion Wright, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

These are actions for damages arising out of an automobile collision. After trial by a jury, judgments were entered against the defendant city, awarding the plaintiff Reed $37,500, and the plaintiff Croft $2000. From these judgments the City has appealed. The cases were consolidated for the trial and on this appeal.

The accident occurred near midnight on July 18, 1943, on Rose Canyon Highway,

which is a part of Highway 101 as it enters San Diego from the north. This is a divided highway with a concrete barrier in the center, leaving 23 feet on each side for northbound and southbound traffic, respectively. On the west side of the highway, at the place of the accident, there was a shoulder about eight feet in width. At the time, this area was included in a "dim out" zone under Army regulations, with the requirement that headlights of a very much reduced candle-power be used.

On this night Reed was driving an automobile southerly toward San Diego. As he was traveling through Rose Canyon he saw some cars coming toward him with bright lights. Thinking he was out of the "dim out" zone he turned on his own bright lights. Shortly thereafter two police officers employed by the city of San Diego and engaged in traffic enforcement, approached from the north and sounded a siren. The police car also had a red light in front. Reed drove his car onto the shoulder and completely off the paved highway, and turned off his engine and lights. The police car was stopped about four or five feet behind Reed's car, but partly on the paved portion of the highway. It was parked slightly at an angle, the front end being farther to the left than the rear end, and there is evidence that about half of the police car was on the pavement. The driver of the police car left his motor running but dimmed his headlights, stopped the siren and turned off the front red light. While the other officer sat in the police car, the driver got out and informed Reed that he was traveling in a "dim out" area with illegal lights. The police car remained in this position for some six or seven minutes. While the officer and Reed were standing between the two cars but off the pavement, the officer engaged in writing out a citation, a car driven by Ira Lester Croft, in which Loretta Croft was a guest, approached from the north with dimmed-out lights, traveling on the paved part of the highway. The right front part of this car struck the police car and knocked it forward against Reed's car, causing serious injuries to Reed and the officer, and also causing lesser injuries to Loretta Croft. Croft testified that he had been following a car with two taillights; that the bright lights of an approaching car obscured his vision for a moment; that he then saw the taillights on the police car but thought it was the other car in motion on the pavement; and that he discovered too late that it was stopped.

The appellant City contends that in thus stopping the police car its officers were acting within the exemption given operators of emergency vehicles by the Vehicle Code, and that under the facts here appearing it must be held, as a matter of law, that the City was not liable.

Under section 400 of the Vehicle Code liability is imposed upon a City for damage arising from the negligent operation of a motor vehicle by an officer or agent of the City acting within the scope of his employment. Section 454 then provided for an exemption from such liability with respect to emergency vehicles under the following conditions; said exemptions shall apply (a) when the vehicle is being driven in response to an emergency call or in the immediate pursuit of a law violator, and (b) only when the driver of such vehicle sounds a siren when reasonably necessary as a warning to others and at nighttime when the vehicle is equipped with at least one lighted lamp displaying a red light to the front. When these conditions were present the driver was not required to observe the regulations contained in Chapters 6 to 13 of Division 9 of this code, but it is then further provided that any such exemption shall not relieve the driver from the duty to drive with due regard for the safety of others using the highway, nor shall it protect the driver from the consequences of an arbitrary exercise of the privilege thus granted. Section 582 of this code, which is found in Chapter 13 of Division 9, prohibits the standing or parking of a vehicle upon the paved portion of a highway, outside a business or residence district, when it is practicable to stop or park it off such paved portion.

The cases heretofore decided, with respect to the exemption thus granted, have involved emergency vehicles while moving through traffic in response to emergency calls or in immediate pursuit of law viola-

tors. While it might be arguable whether this exemption is applicable where the vehicle has stopped and the reasons for haste have ended, the trial court here held favorably to the appellant in this regard. On the theory that the officers were entitled to a reasonable time in which to complete the work of stopping and citing this offender, the court held that this was to be considered an emergency vehicle up to the time of the accident. The court instructed the jury that the mere stopping of this vehicle in this position for this purpose would not, standing alone, be evidence of, or support an inference of, an arbitrary use of the exemption given by section 454 from the duty of complying with sections 582 and 583. It then instructed the jury, in accordance with the limitations on the right to an exemption expressed in section 454, that before it could find the City liable it must find that the stopping of this car amounted either to a failure to drive with proper regard for the safety of others, defined as meaning without giving proper warning to others, or else to an arbitrary use of the privilege granted by section 454. The jury was then told that such arbitrary use could exist only if the use of the privilege amounted to willful misconduct, that is, if the officers acted intentionally with the knowledge that so stopping and permitting the car to remain on the highway would be likely to result in serious injury to others, or that they so stopped with a wanton and reckless disregard of the possible consequences of their act.

Relying on the rules expressed in Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599, and Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054, the appellant contends that since the prohibition against stopping a car on the paved part of a highway is found in Chapter 13, Division 9 of the Vehicle Code the driver of the emergency vehicle was specifically excused from observing that rule of the road by the provisions of section 454; and that it follows that where adequate warning was given stopping on this pavement in this manner was an act within the privilege given and not an act for the consequences of which a city could be held liable. It is then further argued that section 621, requiring a red light on the rear of any vehicle, is the only statutory requirement of a warning to those approaching from the rear; that this was held a sufficient warning even as to ordinary passenger cars in James v. White Truck & Transfer Co., 1 Cal.App.2d 37, 36 P.2d 401; that this police car, having two red taillights, complied with this requirement; that it follows, as a matter of law, that these lighted rear lamps constituted a sufficient warning to traffic approaching from the rear; and that no question of fact remained for the jury to decide, and no facts appear which would sustain a finding of liability against the City.

[1] The exemption granted by section 454 is not absolute but is one based upon the conditions that the use of the vehicle be an emergency one, and that a warning be given. Under those conditions, the driver is not required to observe certain traffic regulations. It is then provided that this exemption shall not relieve from the duty to drive with due regard for the safety of others, and shall not protect the driver from the consequences of an arbitrary exercise of the privilege thus given. If it be assumed that this statutory exemption applies here, while the officers were completing the purpose for which the other vehicle had been stopped, the terms and conditions on which the exemption is granted would also apply. In the Lucas and Raynor cases, above referred to, it is said that the requirement to drive with due regard to the safety of others requires that a suitable warning be given. It is further said that an arbitrary exercise of the exemption privilege may not be predicated on speed or the failure to obey the ordinary rules of the road, standing alone, where a warning has been given. Accordingly, the trial court here submitted to the jury, with appropriate instructions and as questions of fact, the issues as to whether a suitable warning had been given and whether there had been an arbitrary exercise of the privilege claimed.

The appellant contends, however, that no warning was here necessary other than the ordinary taillight required for all cars, and that no unusual circumstances appear which would justify a conclusion that the

stopping of this car in this position was an arbitrary exercise of the privilege granted. In our opinion, a question of fact was presented in each of these respects.

[2] The holding in the Lucas and Raynor cases is, in effect, that the duty to drive with due regard for the safety of others, as declared in section 454, requires the giving of a warning in order to give others an opportunity to protect themselves by yielding the right of way. It would seem that this must have been intended to refer to a warning which is suitable and adequate for that purpose, and not to the usual warning which all motorists must give under ordinary circumstances. In those cases, the cars in question were proceeding through traffic and the kind of warning required, the sounding of a siren, was clearly provided for in the statute. While the kind of warning required under the different circumstances here in question may not so clearly appear, the necessity for some suitable warning for the purpose of enabling others to protect themselves is just as apparent.

Although the situation here was quite different, the appellant contends that, since no form of warning was specifically required by any statute, the ordinary warning given by two taillights must be held sufficient, as a matter of law. This is opposed to the spirit of the statute granting the privilege claimed. That statute, while based on the necessity for such an exemption for emergency vehicles, also recognizes the need for, and was intended to require, a suitable warning in order to enable others to act in the interest of the safety of all concerned.

Strictly speaking, section 454 contained requirements or conditions for the exemption claimed which were not met by the appellant. At the time here in question that statute provided that "said exemptions shall apply only when the driver * * * sounds a siren as may be reasonably necessary as a warning to others and at night time when the vehicle is equipped with at least one lighted lamp displaying [a] red light to the front." If, as appellant claims, this exemption was applicable while this car was stopped in this position, these statutory conditions should also be applicable. While this car was equipped with such a lamp in front it is admitted that this red light was turned off when the car was stopped, some six or seven minutes before the accident occurred. Whether or not this requirement was intended for such a situation as this, and whether or not this failure to have such a lamp "displaying a red light to the front" is controlling under the facts of this case it can hardly be doubted, as a practical matter, that if such a light had been burning, throwing a red glare over the car in front and the surrounding area, it would have furnished a much more suitable warning than was given by the two taillights which were similar to those on ordinary cars. And if no other warning was provided for, or practicable, it may have been reasonably necessary to sound the siren.

In any event, the rules laid down in the Lucas and Raynor cases do not go so far as to require a holding that no further warning was necessary under the circumstances which here appear. Nor do we think the holding in the case of James v. White Truck & Transfer Co., supra, is controlling. Here, the officers voluntarily and intentionally left this police car partially on the pavement when there was no necessity to do so, and when existing conditions presented an unusual hazard.

[3] We are also unable to agree that no unusual circumstances here appear. This Rose Canyon highway runs downhill for several miles, with many curves and turns around the edges of the surrounding hills. This road and the traffic conditions thereon are well known to everyone in that vicinity and are such that no prudent motorist, who was not relying on a special privilege, would stop on the pavement even in broad daylight, when it was possible to avoid doing so. This was a "dim out" area and a motorist's vision would be greatly impaired. In coming downhill under such conditions, he would naturally rely on the fact that the paved road would be clear, especially since an unusually good shoulder was provided on which to stop. The weaker lights on his own car might not prevent him from seeing the taillights on a car

ahead of him, but would restrict his vision and affect his ability to judge whether that vehicle was standing still or in motion. Moreover, with his vision thus restricted, a motorist might well think the diagonal position of the police car indicated that it was going around a curve. As a practical matter, under the conditions here at the time, the two taillights on the police car might well have been more of a trap than of a warning. The night was very dark, with the dim out and road conditions no one would expect a car to stop on the pavement, and the entire situation was not only unusual but one fraught with danger. In Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 41, 19 A.L.R. 452, it is said: "Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary" in order to make the exemption applicable. It cannot be said, as a matter of law, that a reasonable opportunity was here given to others to yield the use of that part of the paved highway which was occupied by the appellant's car, or that these officers acted with due regard for the safety of others using this highway. That matter presented a question of fact which was properly left to the jury.

[4, 5] Nor can it be said, as a matter of law, that the conduct of these officers did not amount to an arbitrary use of the privilege claimed. That privilege is based upon the necessity arising from the nature of the duty required of the driver of an emergency vehicle. When, in performance of this duty, there is a need or necessity for him to violate certain traffic rules he may do so. When there is no such necessity the reason for the privilege ceases as, for instance, when a fire truck is returning from a fire or when a police officer is merely cruising. In such a case, where an emergency need does not appear, a use of the privilege may be arbitrary and a question of fact may be presented. Hopping v. City of Redwood City, 14 Cal.App.2d 360, 58 P. 2d 379. While it was held in Raynor v. City of Arcata, supra, that where a warning has been given an arbitrary exercise of the privilege can not be predicated upon the elements of speed and failure to observe the rules of the road, standing alone, it was not expressly held that those elements may not be considered in connection with other elements or circumstances, one of which would naturally be the necessity for disregarding the rule of the road in question. In considering whether there has been an arbitrary use of the privilege the need or necessity at the time is an important factor, and it has been pointed out that the general principles applicable to that question are quite similar to those involved in the "willful misconduct" element in guest cases. Lucas v. City of Los Angeles, 70 Cal.2d 476, 75 P.2d 599.

[6] In this case, the general situation with respect to this road, under "dim out" conditions, was well known to the officers and there was no need for the act which caused these injuries. The violator whom they were citing had stopped completely off the highway and was not trying to escape. There was ample room for the officers to have also so parked. They left a large part of their car in a position where it was obstructing traffic on the paved highway, giving as a reason that they wanted it out there to serve as a barricade to protect them, while they were standing on the left side of the car they had stopped, from any motorist who might come along and otherwise hit them. This discloses that they fully realized the inherent and unnecessary danger in leaving the car in that position. Whatever may be the necessity for taking such steps in some cases, it clearly appears that it was unnecessary here, where there was ample room to park on the shoulder and still leave their car somewhat to the left of the other car. It is admitted that the car was intentionally left in this position and the evidence is sufficient to justify an inference that this must have been done with the knowledge that it was likely to cause an injury, or with what amounts to a reckless disregard of possible consequences. In view of all of these circumstances and considerations a question of fact was presented as to whether the attempted use of the privilege here claimed was not an arbitrary one.

[7] It is next contended that this accident was the result of the intervening

act of a third party which could not have been foreseen by the police officers. This was also a question of fact, and the controlling principle is whether the events which followed were reasonably to be anticipated. Newman v. Steuernagel, 132 Cal. App. 417, 22 P.2d 780. The evidence amply sustains the implied finding in this connection.

Several other points are raised by the appellant which require no consideration since they are based upon the main propositions above discussed. In its brief, the appellant "concedes that the verdicts were justified if the Court's version of the law applicable is correct."

Each of the judgments appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.




## SPENDLOVE v. PACIFIC ELECTRIC RY. CO.

## HARRISON v. SAME. *

**Civ. 15591.**

District Court of Appeal, Second District, Division 2, California.

**Feb. 4, 1947.**

**Rehearing Denied Feb. 20, 1947.**
**Hearing Granted March 31, 1947.**

**1. Appeal and error ⇨927(3)**

In reviewing a judgment passing upon a motion for nonsuit, the evidence must be viewed most favorably to plaintiff.

**2. Railroads ⇨327(2), 333(1)**

Motorist crossing electric inter-urban railway tracks at speed of five miles per hour with unobstructed view of approaching train for at least 35 feet from point of collision was contributorily negligent as a matter of law in that he either failed to look or listen or having looked, failed to heed rapidly approaching train and endeavored to cross immediately in front of it.

**3. Railroads ⇨327(2), 333(1)**

If the physical facts shown by undisputed evidence raise the inevitable inference that a person approaching railroad crossing did not look or listen, or that having looked or listened, he endeavored to cross immediately before a rapidly approaching train which was plainly open to view, he was as a matter of law contributorily negligent.

**4. Railroads ⇨350(14)**

Trial court was authorized to determine whether as a matter of law motorist was contributorily negligent in attempting to cross tracks in front of rapidly approaching electric inter-urban train, though motorist was only 19 years of age where record disclosed that he possessed normal average intelligence and mental capacity.

**5. Negligence ⇨136(8)**

Where capacity and intelligence of a child are not controverted, court may determine, as a matter of law, whether particular act is such as would be performed by one of his age, capacity and intelligence, and whether such act or failure to act constitutes contributory negligence.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Actions by Leonard Roy Spendlove and Oleda Harrison against Pacific Electric Railway Company to recover for personal injuries sustained when defendant's electric inter-urban car struck automobile in which plaintiffs were riding. The cases were consolidated for trial in superior court. From judgments in favor of defendant predicated upon granting of defendant's motions for nonsuit, plaintiffs appeal.

Judgments affirmed.

Westover & Smith and Joseph D. Taylor, all of Los Angeles, for appellants.

C. W. Cornell, O. O. Collins and Malcolm Archbald, all of Los Angeles, for respondent.

McCOMB, Justice.

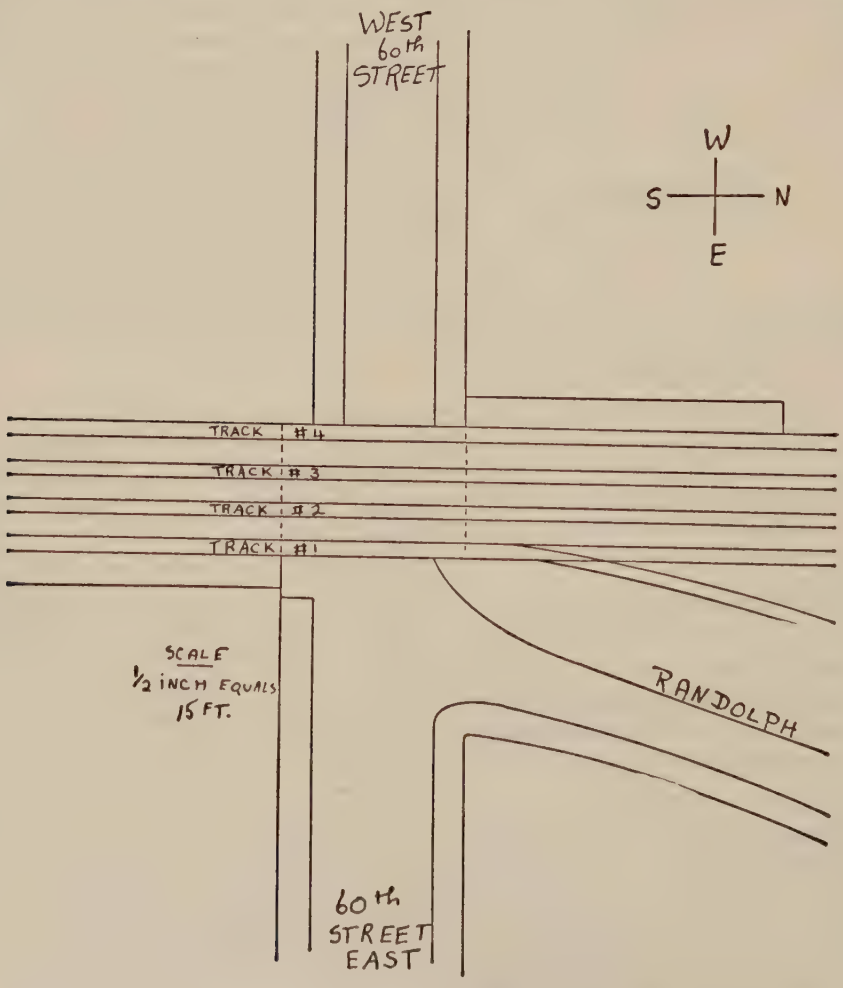
This is an action for personal injuries resulting from an accident which occurred

* Subsequent opinion 184 P.2d 873.

when defendant's electric interurban car collided with an automobile occupied by plaintiffs and a driver, Zearl Draper, the nineteen year old son of plaintiff Harrison. The two cases were consolidated for trial in the superior court and from the judgments in favor of defendant predicated upon the trial court's granting defendant's motion for a nonsuit, plaintiffs appeal.

[1] Viewing the evidence most favorable to plaintiffs as we must in reviewing a judgment based upon a motion for a nonsuit, the material facts are these:

Diagram of the intersection where the accident hereinafter described occurred:




The driver of the automobile testified that on December 23, 1944, about 4:00 p. m. defendant was operating a baggage car in a southerly direction on track No. 3 north of the intersection of the right-of-way with 60th street in Los Angeles at a speed of about 40 miles per hour; that the car in which plaintiffs were riding was proceeding in a westerly direction on 60th street and as it approached the right-of-way the driver noticed a wigwag operating which had been actuated by a Watts local moving in a southerly direction on track No. 4; that the car in which plaintiffs were riding came to a stop a number of feet east of track No. 1 to await the passing of the Watts local over the crossing. After he had noticed that the wigwag had stopped he looked to the north and proceeded onto the right-of-way at a speed of about 5 miles per hour. When the automobile had reached track No. 1 there was nothing to obstruct his view to the north as far as the eye could see, and he did not see the car that hit the automobile

which he was driving until he reached the third track.

There were no obstructions to a view of the train approaching from the north excepting a telegraph pole to the right of 60th street and several other poles located 100 feet apart, also to the north of 60th street and west of the right-of-way. The baggage car involved in the accident was 55 feet long, 9 feet, 2 inches wide, 13 feet, 4½ inches high and weighed 103,800 pounds unloaded. From the telegraph pole above mentioned it was 35 feet to the point of collision, and there was no obstruction whatsoever to a view of any train approaching from the north.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was the driver of the car in which plaintiffs were riding contributorily negligent as a matter of law in view of the facts stated above?*

[2, 3] This question must be answered in the affirmative. It is established in this state that if the physical facts shown by undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that having looked or listened, he endeavored to cross immediately before a rapidly approaching train which is plainly open to view, he is, as a matter of law, guilty of contributory negligence. (Koster v. Southern Pac. Co., 207 Cal. 753, 761 et seq., 279 P. 788; Heroux v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 401, 405, 82 P.2d 620; Guyer v. Pacific Electric Ry. Co., 24 Cal.App.2d 499, 502, 75 P.2d 550; Jones v. Southern Pac. Co., 34 Cal.App. 629, 631, 168 P. 586.)

In Koster v. Southern Pacific Company, supra, a guarded crossing case where the flagman was absent from his post, the deceased had a view of the tracks for 21 feet, 6 inches. The accident occurred at Keyes Street in the city of San Jose. The deceased was driving an automobile which collided with a passenger train consisting of a locomotive, three diners, two passenger coaches and three baggage cars. The plaintiffs claimed that the view of the approach of the train was obstructed by a flagman's shanty, 6¼ by 6¼ feet, 8 feet from the tracks, and a boxcar 36 feet, 10 inches long, 9 feet wide, standing near the flagman's shanty. Our Supreme Court said with respect to the plaintiff's contention, 207 Cal. at page 758, 279 P. at page 790:

"The overhang of a box car is 2½ feet. The distance from the flagman's shanty to the sidetrack is 8 feet 3¾ inches. Said track is 4 feet 8½ inches in width. The distance from the westerly rail of the side track to the first rail of the main track is 8 feet, 6 inches. Eliminating the box car from the side track, a traveler would have an open space of approximately 21 feet, 6 inches in which to make observation for an approaching train. That a single box car, 36 feet 10 inches in length and 9 feet 7 inches in width, should have obstructed the view of an approaching train, consisting of a steam locomotive, three diners, two passenger coaches, and three baggage cars, throughout the entire open space of 21 feet 6 inches, seems improbable."

Applying the foregoing rule to the facts of the present case it is evident from the undisputed physical facts that the driver of the car in which plaintiffs were riding had an unobstructed view of defendant's train as it approached the crossing for at least 35 feet prior to the accident, and that since he was driving at only 5 miles per hour, he could have stopped his automobile within less than one foot at any time before reaching the point of the accident by an application of the brakes on the car. It is therefore evident that either he did not look or listen or, having looked, failed to heed the fore patent that either he did not look or cross immediately in front of it. In either event he was contributorily negligent as a matter of law.

Since plaintiffs concede that the driver's negligence, if any, was imputable to each of the plaintiffs the trial court properly granted defendant's motion for a nonsuit.

Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183; Gregg v. Western Pacific Railway Company, 193 Cal. 212, 223 P. 553, are each factually distinguishable from the present case for the reason that in each case the driver's view of the tracks was completely obstructed. Therefore they are inapplicable to the facts in the instant case.

Second: *Since the driver of the automobile in which plaintiffs were riding was a minor nineteen years of age, did the trial court refuse to submit the question of his contributory negligence to the jury?*

[4, 5] This question must be answered in the negative. The rule is established in California that where the capacity and intelligence of a child are not controverted, the court may determine, as a matter of law, whether the particular act is such as would be performed by one of his age, capacity and intelligence, and whether such act or failure to act constitutes contributory negligence. (Raggio v. Mallory, 10 Cal.2d 723, 727, 76 P.2d 660; Bolar v. Maxwell Hardware Co., 205 Cal. 396, 398 et seq., 271 P. 97, 60 A.L.R. 429; Whalen v. Streshley, 205 Cal. 78 et seq., 269 P. 928, 60 A.L.R. 445; Studer v. Southern Pacific Co., 121 Cal. 400, 404 et seq., 53 P. 942, 66 Am.St.Rep. 39; Mathews v. City of Albany, 36 Cal.App.2d 147, 148 et seq., 97 P.2d 266, 98 P.2d 1025.)

In the present case, Zearl Draper, the driver of the automobile, was nineteen years of age, and from all the evidence in the record appeared to be possessed of normal average intelligence and mental capacity. The trial court was therefore authorized to determine whether as a matter of law he was contributorily negligent in his conduct.

Since the record is free from error the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur in the judgment.




77 Cal.App.2d 656

**BARONE et al. v. JONES et al.**

**Civ. 7295.**

District Court of Appeal, Third District, California.

Feb. 14, 1947.

**1. Automobiles ⇐173(5)**

When an automobile is parked on the public highway contrary to law failure to place signal lights on highway as required by statute constitutes negligence. Vehicle Code, § 590.

**2. Trial ⇐295(1)**

Instructions must be read together.

**3. Automobiles ⇐242(3), 246(55)**

Proof that defendants left truck on public highway imposed upon defendants burden of showing compliance with statute requiring operator of such truck to immediately place warning signals 100 feet in advance and to the rear of disabled vehicle and instruction to that effect was not erroneous, in view of evidence that warning flares were not placed as required by law. Vehicle Code, § 590.

**4. Automobiles ⇐246(58)**

Instruction that plaintiffs would not be contributorily negligent if they operated automobile as a reasonably prudent person would under the circumstances was not erroneous, where the only question involved as to violation of a statute by plaintiffs related to allegedly excessive speed. Vehicle Code, § 510.

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Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

On petition for rehearing.

Former opinion modified and petition denied.

Prior opinion, 176 P.2d 392.

Hawkins & Hawkins, of Modesto, and Lasher B. Gallagher, of Los Angeles, for appellants.

Robinson & Cornell, of Merced, for respondents.

PER CURIAM.

On petition for rehearing it is contended this court failed to consider plaintiffs' challenged instructions numbered 3, 5, and 18. Other challenged instructions were specifically considered, and the said three instructions were generally considered. The court concluded by stating that the challenged instructions were not prejudicial or erroneous. But in view of the impression of appellants that the court failed to consider said instructions, the opinion is modi-

fied by adding thereto, on the last page, after the paragraph ending with the words, "paved portion of the highway," the following:

[1, 2] Instruction No. 3 is not erroneous. It merely informed the jury that when a machine is parked on the public highway contrary to law, the failure to place signal lights on the highway as required by statute constitutes negligence. We think that is a correct statement of the law. The jury was further and fully instructed on that subject in the language of section 590 of the Vehicle Code. The jury could not have been misled by that instruction. All instructions must be read together.

[3] Plaintiffs' instruction No. 5 also appears to be a correct statement of the law. The jury was informed in the language of section 590 of the Vehicle Code that when a disabled truck is parked on the public highway it is the duty of the operator to immediately place warning signals 100 feet in advance and to the rear of the disabled vehicle, and that, upon proof that the defendants left their truck parked on the public highway, the burden was on them to show that they had complied with the statute in placing the warning lights before and behind the parked truck as required by law. We have previously held that the parking of a machine on the public highway contrary to the statute shifts the burden to the defendants to show that it was not practicable for them to park off the highway. We think the same principle applies to the foregoing instruction, and that the burden is then on the defendants to show by a preponderance of the evidence that they complied with the statute in placing the warning lights. There is evidence in this case that the flares were not placed 100 feet before and behind the truck as required by law. The foregoing instruction is therefore not erroneous or prejudicial.

Plaintiffs' instruction No. 18 merely informed the jury that if the evidence shows that plaintiffs operated their machine as a reasonably prudent person would under the circumstances, they would not be guilty of contributory negligence. That instruction is in accordance with section 510 of the Vehicle Code, which provides that no person shall drive upon the highway at a speed greater than "is reasonable or prudent". In support of their contention that the foregoing instruction is erroneous, the appellants rely on the case of Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, at page 83, 62 P.2d 1387, at page 1390, in which it is said that: "Where a driver, as in the instant case, *has failed to conform to a statutory requirement,* he cannot establish freedom from responsibility on the ground that he acted as a prudent person would have acted." (Italics added.)

[4] In that case the plaintiff sought to pass a truck on the highway without sounding his horn, thereby violating the provisions of section 528 of the Vehicle Code, by failing to give the "audible signal". Proof of the violation of the statute in that case established prima facie evidence of contributory negligence on the part of plaintiff. In the Duncan case, the court refused defendants' proposed instruction that it was the duty of the operator of a vehicle "to sound a warning when passing or about to pass another vehicle". In the present case the question of the sounding of a horn by plaintiffs, or of the violation of any other statute, except by alleged excess speed, was not involved. It is apparent that it would be useless to sound a horn when approaching a truck parked on the highway, which was not occupied by any person. That instruction was therefore neither erroneous nor prejudicial.

With the foregoing amendment to our opinion, the petition for rehearing is denied.

78 Cal.App.2d 43

**HOLMES et al. v. SOUTHERN CALIFORNIA EDISON CO., Limited.**

**Civ. 3440.**

**District Court of Appeal, Fourth District, California.**

**Feb. 10, 1947.**

**Rehearing Denied Feb. 28, 1947.**

**Hearing Denied April 3, 1947.**

**1. Appeal and error ⇐989**

Conflicts in evidence were addressed to jury as trier of facts, and appellate court's sole duty was to determine if there was substantial evidence in record supporting inference drawn by jury.

**2. Electricity ⇐19(6)**

In action against electric company for damages resulting from fire which destroyed plaintiffs' house and contents, whether fire was of electrical origin and was caused by negligence of defendant in the poor condition in which defendant maintained its service wires leading from pole to house wiring was for jury.

**3. Appeal and error ⇐1004(3)**

If trial judge believes damages awarded by jury to be excessive and question is presented, it becomes his duty to reduce them, and his denial of motion for new trial for excessive damages is an indication that trial judge approved amount of award.

**4. Appeal and error ⇐994(2), 1003**

An appellate court cannot weigh the evidence and pass on credibility of witnesses.

**5. Appeal and error ⇐1004(1)**

For appellate court to hold an award excessive, it must be so large as to indicate passion or prejudice on part of jurors.

**6. Appeal and error ⇐1004(3)**

Generally, when damages are recovered for destruction of property, if there is substantial evidence in record supporting damages awarded by jury and it is inferentially approved by trial judge by his denial of motion for new trial without reducing damages, appellate court cannot reduce them or hold the award excessive.

**7. Appeal and error ⇐1004(1)**

Evidence failed to show that amount of damages awarded for destruction of house and contents by fire was so excessive as to indicate passion or prejudice on part of jury so as to warrant appellate court to disturb the award.

**8. Evidence ⇐474(16)**

An owner of property may estimate its worth whether he has any special knowledge of such values or not.

**9. Evidence ⇐500, 502**

In action for damages resulting from fire which destroyed plaintiffs' house and contents, plaintiffs were properly permitted to give their estimate of total value of personalty destroyed before giving an estimate of value of items destroyed on direct or cross-examination.

**10. Appeal and error ⇐1050(1)**

In action for damages caused by fire, alleged error in admitting list of personalty destroyed with values of various articles appearing on the list was not prejudicial to defendant, where total value of articles listed was less than that claimed, so that list tended to impeach testimony of plaintiffs.

**11. Electricity ⇐19(4)**

In action against electric company for damages resulting from fire caused by defendant's negligence, evidence of defendant's custom requiring its customers to bring the house wiring to outside of the house and rules to the same effect filed with Railroad Commission should have been admitted as bearing on ownership of stranded wires which allegedly caused the fire.

**12. Appeal and error ⇐1056(1)**

In action against electric company for damage caused by fire resulting from defendant's negligence in maintaining service wires, alleged error in excluding evidence of defendant's custom requiring customers to bring house wiring to outside of house was not prejudicial, where record disclosed that stranded wires were part of house wiring belonging to plaintiffs and that defendant had no responsibility for them, and plaintiffs' evidence pointed to but one conclusion that fire originated from defect in service wires under control of defendant.

**13. Electricity ⇐19(13)**

In action against electric company for damages from fire caused by defendant's negligence in maintaining service wires, instruction that, if jury found it to be more probable that fire was caused as result of defective wire owned by defendant than from any other cause, finding upon origin of wire should be accordingly, was not erroneous as permitting jury to speculate and compare all probable causes of origin of fire and as nullifying rule requiring plaintiffs to prove negligence of defendant and its causal connection with fire by preponderance of the evidence.

**14. Negligence ⇐31**

Under statute making person responsible for injury caused by want of ordinary care or skill in management of his property, what is ordinary care must vary with the circumstances. Civ.Code, § 1714.

**15. Electricity ⇐16(4)**

An electric company must exercise a high degree of care in maintaining wires so as to avoid contact with and injury to any person or property, etc.

**16. Electricity ⇐14(1)**

An electric company placing wires upon property of others for transmission of electricity must use all reasonable care necessary to prevent electricity from escaping or damaging property of others and failure to do so constitutes negligence.

**17. Electricity ⇐14(3)**

Electric company was required to use highest degree of care practicable to avoid injury to property of others and to use highest or utmost degree of care in construction, maintenance, and operation of wires, and to use best materials and most approved methods of construction to prevent injury to property of others.

**18. Electricity ⇐19(13)**

In action against electric company for damages to house and contents from fire caused by defendant's negligence, instruction permitting recovery in "such sum as will reasonably compensate said plaintiffs for the property lost or destroyed in, or because of, the fire", was not erroneous under evidence that practically all of belongings of plaintiffs were burned or rendered useless as result of the fire.

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Appeal from Superior Court, Riverside County; Hon. G. R. Freeman, Judge.

Action by Oliver W. Holmes and others against the Southern California Edison Company, Limited, a corporation, to recover damages caused by fire resulting from defendant's negligence. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Gail C. Larkin and E. W. Cunningham, both of Los Angeles, for appellant.

Clifford E. Lewis and E. Eugene Davis, both of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of Oliver W. Holmes and Leah Holmes, his wife, in the sum of $25,000, and in favor of Theodore R. Gardner and Marguerite Gardner, his wife, in the sum of $2000 for damages suffered by them in a fire on March 28, 1944, which destroyed a house owned by Mr. and Mrs. Holmes, and such of its contents as was owned by them, and furniture and personal effects owned by Mr. and Mrs. Gardner.

No witness knew the exact date of the erection of the house but one witness estimated that from its construction and general type it must have been built about 1913. It was of good materials and construction according to the customs and usages of that period.

The house faced east of north. The main portion was two-story with a living room, den, dining room, bedroom, bath and closets on the first floor, and three or four bedrooms, hall and closets on the second floor. There was a one-story portion on the rear which contained the kitchen, service porch and a closet.

Electricity was first used in the house in 1931. Three service wires were run to it by defendant and were connected to the house wiring. They ran from a pole northeast of the house to insulators on a brace on the upper portion of the south east corner of the two-story part, thence down to

insulators on the five foot roof over-hang of the one-story part where they were connected to three stranded wires which ran under the roof, through the rear wall of the service porch and connected with a meter which was owned by defendant. There is considerable argument about the ownership of these stranded wires. They were not in a conduit, which construction was permissible when the wiring was installed in 1931. We have studied the entire record and believe that the only reasonable inference to be drawn from the evidence is that these stranded wires were part of the house wiring and were not owned or controlled by defendant.

Mr. and Mrs. Holmes purchased the property in February, 1941, for $7,000. It consisted of between 60 and 75 acres of land, the house and other improvements.

The house was in very poor repair at that time. Bees had swarmed in the north and west walls and bats had gathered in the east wall necessitating the removal and reconstruction of this portion of the exterior. A new roof and new floors were installed and many other improvements made at a total cost of between $6,000 and $6,500, according to Mr. Holmes. These repairs were completed during May, 1941. The electric wiring was extended to new outlets but otherwise was not changed. Mr. Holmes testified that, other than the particulars already mentioned, the house structurally was in good condition; that the dimension lumber used in it was unusually large and was sound.

Mr. Holmes installed a new electric stove and a new electric water heater. An electrically operated pumping plant situated about 150 feet from the house was fed through the house meter. The plant was capable of producing about 150 inches of water.

The house was situated on the top of a small hill where it was exposed to frequent winds, especially winds from the desert which during certain periods often reached considerable velocity.

There was considerable sag in the feed wires leading from the pole to the house. Mr. Holmes and other witnesses testified that when the wind was blowing these wires were so loose they would tangle; that ordinarily they were untangled by a person standing on the ground and using a broom handle with which to reach them.

These were number four weather proof wires with three ply insulation. Witnesses for plaintiffs testified that prior to the fire the insulation was in poor condition; that some of it was hanging down in strips and that in one place one wire was bare of insulation so the copper wire was exposed; that for about a year prior to the fire the lights in the house would flicker and the radio would growl when a wind was blowing; that frequent complaints were made of these conditions to the agents of defendant but nothing was done to correct them.

On the day of the fire Mr. and Mrs. Holmes were in Los Angeles, leaving Mr. and Mrs. Gardner the sole occupants of the house. There was a strong, dry desert wind blowing. Mr. and Mrs. Gardner had their lunch and repaired to the living room where Mr. Gardner, who was in poor health, rested and Mrs. Gardner worked with an electric sewing machine. Just how long she used it or how long before the discovery of the fire she stopped using it is not determinable from the record. After she stopped using the sewing machine no other electric current was in use and there was no fire in the house.

Mrs. Gardner left the living room and started up the stairs to the second floor when she noticed a peculiar odor. She returned to the kitchen to see if she had left a burner of the stove energized with some cooking utensil over it. All electric outlets were turned off. She went up the stairs to the second floor and into her bedroom at the southeast corner of the house. Through the south window of this room she saw flames on the outside. While it is not definitely determinable, it may be probable, that the flames were coming from the one-story part of the house near one of the points of attachment of the service wires of defendant. She called to her husband telling him the house was on fire, telephoned the fire department and Mr. and Mrs. Holmes and then proceeded to throw water on the fire. Mr. Gardner went to the back of the house and attempted to at-

tach a hose to a hydrant but the flames spread so rapidly that he had to abandon this effort. The house was entirely destroyed, together with its contents, except some furniture which had been carried out by neighbors. All furniture taken out belonging to Mr. and Mrs. Holmes was ruined either by being broken in the process or by being left too close to the burning house and being partly or totally consumed by the fire or by sparks from it. A few pieces belonging to Mr. and Mrs. Gardner were saved.

[1] A fireman from Corona reached the scene shortly after the fire was discovered. He climbed the electric power pole and cut the service wires leading to the house. The power lines on the high side of the transformer carried 11,000 volts. The fuses in the transformer were not blown. The insulation on the house ends of the service wires was burned off for a number of feet.

Defendant first seriously argues that the evidence is insufficient to show any negligence on its part or that the fire was of electrical origin. The evidence on this question is sharply conflicting and the conflict is irreconcilable. The trial started on November 13 and was concluded on November 29, 1945, so it is impossible to summarize the testimony of the various witnesses in an opinion of conscionable length. It should be sufficient to say of the testimony offered by defendant, had it been accepted as true by the jury, that it would have entirely absolved defendant from all responsibility for the fire and no judgment against it could have been sustained. However, as we have observed there is a sharp conflict in the evidence as to the cause of the fire, and conflicts in the evidence are addressed to and settled by the trier of fact and not in an appellate court. Our sole duty is to determine if there is substantial evidence in the record supporting the inference drawn by the jury that the fire was of electrical origin and was a result of the negligence of defendant in the maintenance of its service wires.

We have already pointed out evidence indicating the dilapidated condition of the insulation of the service wires. It was further developed that one of the service wires had been spliced, the splice taped and the tape loosened so that a short portion of the wire in the splice was exposed.

After the fire the service wires and some of the stranded wires were removed by defendant and taken to Los Angeles where they were examined by experts and various experiments performed with them or with similar wires. Various lengths were cut off from one of these wires. One of the service wires was burned in two less than two feet from its end on the house.

Plaintiffs produced a mechanical and electrical engineer of many years experience who examined the wires produced in court by defendant. He was of the firm opinion that the wire was burned in two by an electrical short and not from the heat of the fire. He based this opinion on two facts: First, on the appearance of the ends of the severed segments; and second, that the heat from the fire was not sufficient to melt the copper wire in two. He testified that it required a heat of from 1700 to 1800 degrees to melt the copper; that the heat generated by the fire from a burning building of the construction here involved, with the fire unconfirmed, as was the case here, would be from 1200 degrees to 1400 degrees; that such a temperature was not sufficient to melt the copper. He also testified that an electrical short for a brief time would produce heat without blowing the fuses in the transformer.

He agreed with the experts for defendant that the service wires with three coats of insulation intact could come into contact without producing a short circuit. He could find no wire other than the one burned in two that showed electrical burns but remarked that one segment of wire seemed to be missing. He also testified that if the two outer layers of insulation had been stripped off leaving but one layer, and if that portion of a wire came into contact with a bare wire, a serious short circuit would result sufficient to cause a fire. He further testified that the insulation on the wires was inflammable and would ignite at a temperature of about 600 degrees; that in a strong wind the fire in the insu-

lation would burn along the wire for a number of inches before it burned itself out.

[2] The foregoing evidence is substantial and supports the conclusion drawn by the jury that the fire was of electrical origin and was caused by the negligence of defendant in the poor condition in which it maintained its service wires leading from the pole to the Holmes house wiring.

Defendant next contends that the award of $25,000 damages in favor of Mr. and Mrs. Holmes is so excessive as to show such passion or prejudice on the part of the jury that the judgment should be reversed. It does not contend that the award of $2,000 to Mr. and Mrs. Gardner is excessive.

We regard the award of $25,000 to Mr. and Mrs. Holmes most liberal to say the least. The evidence of Mr. and Mrs. Holmes would have supported a reduction in those damages by the trial judge by a sum not exceeding $10,000 on the motion for new trial if such a reduction had been made.

In the original complaint filed in this action, verified by Mr. Holmes, the damages to them were alleged to be $19,463.28. In the first amended complaint, also verified by Mr. Holmes, damages by reason of the loss of the house were placed at $9,695.48 and of the personal property at $9,767.80. Late in the trial these allegations were amended to conform to the proof and damages by reason of the loss of the house were raised to $17,000 and of the personal property to $15,000.

Early in the trial Mr. Holmes testified that the total value of the property before the fire, including the personal property in the house, was between $35,000 and $37,000 and that after the fire its value was $20,000, showing the loss from the fire to be between $15,000 and $17,000. Just before the close of the trial he was recalled to the stand and testified that these values represented the money invested and did not represent values at the time of the fire. It needs no evidence to demonstrate that values of the building and personal property had increased by March 28, 1944, over the values in the spring of 1941. This is common knowledge of every person who has had to consider the problem of either building, improving, repairing, buying or selling a house or of furnishing one.

Mr. Holmes also testified as to the value of the personal property in the various rooms and closets in the house with the exception of one room and two closets or storage rooms. He placed the total of these values at between $15,085 and $17,995.

Mrs. Holmes testified in considerable detail as to the personal property in the house; that the reasonable market value of the personal property belonging to herself and her husband was between $12,000 and $15,000. All witnesses agreed that the house was unusually well furnished.

Mrs. Holmes also testified that once each year she and her husband went to stores and purchased an entire year's supply of canned goods at one time; that at the time of the fire the storage room was full of cases and cases of canned goods of considerable value. She failed to explain how this could have been done during the years that food rationing was in effect.

To refresh her memory Mrs. Holmes used a list of the personal property in the house which she said she prepared with the aid of her husband a few weeks after the fire. A value was placed on each article. The total of these values was $9767.80, which equals the total damage to personal property alleged in the first amended complaint. Counsel for defendant used this list in cross-examination of Mrs. Holmes and it was offered by plaintiffs and admitted in evidence over the objection of defendant. It is now admitted that the list contained fixtures of the estimated value of $171 which were part of the realty and were not personal property.

[3-6] The powers and duties of a trial judge in ruling on a motion for new trial and of an appellant court on an appeal from a judgment are very different when the question of an excessive award of damages arises. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and

the question is presented, it becomes his duty to reduce them. Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P. 2d 213. When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors. Generally speaking, in cases of this kind, when damages are recovered for the destruction of property, if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive. Therefore we must examine the evidence on the value of the property lost by Mr. and Mrs. Holmes in the fire.

As we have already seen Mrs. Holmes placed a value of between $12,000 and $15,000 on the personal property destroyed and Mr. Holmes placed a value on the major portion of it of between $15,085 and $17,995. If this evidence was competent and substantial, which question is raised by defendant and will be considered later in the opinion, there is evidence to support an award of $15,000 for the loss of the personal property which is the amount of that damage alleged in the amendment to the complaint.

There is no direct evidence as to the value of the house. Mr. Holmes testified that at least the frame, including the dimension timbering was in good condition when he rebuilt so there must have been some value there. He testified that he spent between $6000 and $6500 in rebuilding. A witness for defendant testified that costs for houses of similar construction had increased $1.58 per square foot between 1941 and the time of the fire. There were approximately 2300 square feet in the house which would make an increase of $3634 over construction in 1941. This added to the $6500 reconstruction cost would give $10,134, without any allowance for the value of the framework and other parts of the house that were used in reconstruction. Thus we cannot say that an allowance of $10,000 for the loss of the house would be without evidentiary support.

[7] The loss from the destruction of the personal property, $15,000, with the proved loss from burning the house, $10,134, totals $25,134, or more than the amount awarded by the jury. Of course there is much evidence in the record of less values than those we have just indicated. This merely creates a conflict which was settled in the trial court. Under these circumstances we cannot say that the amount of damages awarded is so excessive as to indicate passion or prejudice on the part of the jury although we agree with defendant that the award is high.

Defendant argues there is no competent evidence to support the implied finding as to the reasonable market value of the personal property lost. It argues that Mr. and Mrs. Holmes had no special knowledge of such market value and that instead of being permitted to give their estimate of the total loss they should have first detailed each item of property lost and should have given its market value. In this connection it should be observed that both witnesses went into considerable detail in descriptions of various articles lost and placed values upon each, but not all of them. Their cross-examination was not limited.

[8, 9] Under the rule prevailing here an owner of property is allowed to estimate its worth whether or not he has any special knowledge of such values. Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 P. 594; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286. We can see no good reason why the owners of property destroyed by fire should not be permitted to give their estimate of the total value of such property before giving an estimate of the value of the items destroyed either on direct or cross-examination. Razzo v. Varni, 81 Cal. 289, 22 P. 848; Ward v. Sherman, 155 Cal. 287, 100 P. 864.

[10] Defendant argues that it was error to overrule its objection to the admission in evidence of the list of personal

property destroyed, with the values of the various articles appearing on the list we have mentioned, as it was in effect a self serving declaration of Mr. and Mrs. Holmes. If this argument be sound we can see no prejudice suffered by defendant from the introduction of the list in evidence. As we have observed, the list was prepared by Mr. and Mrs. Holmes shortly after the fire and the total value of the articles listed was $9,767.80 which tended to impeach the testimony of Mr. and Mrs. Holmes that the total value of the personal property destroyed was between $12,000 and $17,995. If the document had been offered by defendant as a declaration against interest and as impeaching Mr. and Mrs. Holmes, it would have been properly admitted. We can see no prejudice to defendant from admitting the same evidence when offered by plaintiffs.

Defendant complains of rulings by the trial court excluding evidence of its custom requiring its customers to bring the house wiring to the outside of the house, and in excluding defendant's rules and regulations to the same effect filed with the Railroad Commission.

[11, 12] We believe this evidence should have been admitted as it bore on the ownership of the stranded wires we have mentioned. Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670; Shearer v. Pacific Gas & Electric Co., 43 Cal.App.2d 306, 110 P.2d 690. However, we can see no prejudice in the ruling as a careful study of the entire record leaves no doubt in our minds that these stranded wires were part of the house wiring belonging to Mr. and Mrs. Holmes and that defendant had no responsibility for them. Further, the evidence offered by plaintiffs points to but one conclusion, namely, that the fire originated from defects in the service wires owned and under the control of defendant.

[13] Defendant complains of instruction number 34 which concludes as follows: "* * * if * * * you find it to be more probable that the fire was caused as a result of a broken or defective wire owned by the defendant herein than from any other cause, your finding upon that point, to-wit: the origin of the fire, should be accordingly."

Defendant argues that this instruction permitted the jury to speculate and compare all probable causes of the origin of the fire and nullified the well recognized rule requiring plaintiffs to prove negligence of defendant and its causal connection with the fire by a preponderance of the evidence. The wording of the instruction lends considerable support to this argument. However, it is taken from an instruction considered and approved in the case of Liverpool, London & Globe Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 58 P. 55, where the same argument was made and rejected by the Supreme Court. We are bound by and must follow the decision of that court. See also, Quint v. Dimond, 147 Cal. 707, 82 P. 310.

Defendant complains of instructions numbered 21, 27, 28 and 29, given at the request of plaintiffs. We will only quote two of them.

Instruction number 21 reads as follows: "Owing to the highly destructive power of electricity when carried in quantities sufficient for power purposes and to the fact that it is not visible to the eye or apparent to the other senses, a company maintaining an electric power transmission line is required to exercise a high degree of care in placing and maintaining its wires so as to avoid contact with and injury to any person or property. The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent man, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances, in order to prevent injury. Where injury may be caused by an agency lawfully in use, ordinary care required that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

Instruction number 28 is as follows: "You are instructed that it is the duty of an electric power company which places wires upon the property of others for the transmission of electricity to use all rea-

sonable care which is necessary to prevent the electricity from escaping or damaging the property of others. Failure of such an electric power company to use such reasonable care as may be necessary to prevent injury, is negligence.

"It is the duty of such electric power company not only to make transmission of such electrical energy safe by proper installation of transmission facilities, but it is also the duty of such company to thereafter keep such transmission lines in constant oversight and repair."

Instruction number 27 is along the same line but required defendant to use "great care to see that injury is not caused" and to "guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men under the circumstances."

Instruction number 29 required defendant "to use the highest degree of care practicable to avoid injury to the property of others or the property of its customers" and to "use the highest or utmost degree of care in the construction, maintenance and operation of said wire, and he must use the best materials and most approved methods of construction to prevent injury to the property of others or to its customers."

[14] It must be admitted that these instructions might have been more happily worded. However, electricity is a dangerout instrumentality. While section 1714 of the Civil Code makes a person responsible for injury caused by "want of ordinary care or skill in the management of his property," what is ordinary care must vary with the circumstances. An ordinarily prudent person should anticipate that danger to others is more likely to occur when he is handling an inherently dangerous product than when he is dealing with something which in itself is harmless.

[15] Instruction number 21 closely follows the language of Fairbairn v. American River Electric Co., 179 Cal. 157, 175 P. 637, and the same case reported in 170 Cal. 115, 148 P. 788, which cites with approval Perham v. Portland General Electric Co., 33 Or. 451, 53 P. 14, 40 L.R.A. 799, 72 Am.St.Rep. 730, in which an instruction as drastic as any given in the instant case on this subject was approved. See also, McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678; Sweatman v. Los Angeles Gas & Electric Corp., 101 Cal.App. 318, 281 P. 677.

In Bergen v. Tulare County Power Co., 173 Cal. 709, 161 P. 269, 273, an instruction requiring a power company to use "very great care" in its operations was approved so we cannot regard the use of "great care" in instruction number 27 as reversible error. See also, Stott v. Southern Sierras Power Co., 47 Cal.App. 242, 190 P. 478.

[16] The principal complaint of instruction number 28 is that it made defendant an insurer against injury. This instruction follows the rule laid down in Robinson v. Western States Gas & Electric Co., 184 Cal. 401, 194 P. 39; Tackett v. Henderson Bros. Co., 12 Cal.App. 658, 108 P. 151, and Howell v. San Joaquin Light & Power Corp., 87 Cal.App. 44, 261 P. 1107.

[17] Instruction number 29 closely follows the rule announced in Tackett v. Henderson Bros. Co., supra, which has been cited with approval in Bergen v. Tulare County Power Co., supra, and Stasulat v. Pacific Gas & Electric Co., 8 Cal. 2d 631, 67 P.2d 678.

We can well close this phase of the case with the following quotation from Polk v. City of Los Angeles, 26 Cal.2d 519, at page 525, 159 P.2d 931, at page 934:

"On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. [Citing cases.] Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury

to persons or property therefrom. [Citing cases.] Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. [Citing cases.] And, in the places where there is a probability of injury, they must not only make the wires safe by proper insullation, but as stated in Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 186, 106 P. 587, 589, 'keep them so by vigilant oversight and repair.'"

[18] Defendant complains of instruction number 36 because it permits recovery in "such sum as will reasonably compensate said plaintiffs for the property lost or destroyed in, or because of, the fire." Defendant points to evidence showing that a considerable part of the furnishings were carried out from several of the first floor rooms. It argues that some of this furniture could not be found after the fire and was not accounted for. Particular emphasis is placed on a valuable Oriental rug which was carried out of the living room.

We do not so construe the testimony of Mr. and Mrs. Holmes as to the loss of their property. They admit that furnishings were carried out of the burning building by neighbors. They testified that much of it was placed so close to the building that it caught fire and was burned or ruined. They could find only small pieces of the rug, the rest of it having been burned. They also testified that other furniture was broken and rendered useless when being carried out; that all of their personal property was either burned or broken beyond usefulness.

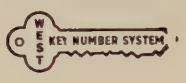
Of course no legitimate question can be raised as to the right of the plaintiffs to recover for furnishings destroyed by fire after it had been carried out of the house, and no sound reason has been advanced why they should not be able to recover for furniture ruined in being carried out of the house. Neighbors are willing but usually excitable workers in endeavoring to save the furnishings of a burning home. They are unskilled and in the excitement of the occasion breakage is not only a foreseeable but a probable result of a fire. Under the circumstances appearing here where practically all of the belongings of Mr. and Mrs. Holmes were either burned or rendered useless as a result of the fire we can see no prejudicial error in the instruction.

When all of the instructions are read together we see no error in them that is sufficiently prejudicial to warrant a reversal of the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.




78 Cal.App.2d 216

**WALTERS v. STIVERS et al. (two cases).**

**Civ. 3508.**

District Court of Appeal, Fourth District, California.

Feb. 20, 1947.

**1. Master and servant ⇐80(9)**

In actions for compensation due under contracts of employment as manager and assistant manager of defendants' orange packing house, evidence justified denial of recovery on ground that plaintiffs did not exercise reasonable degree of competence and were discharged by defendants because of unsatisfactory conditions in packing house and estranged relations between plaintiffs and one of defendants because of plaintiffs' fault.

**2. Master and servant ⇐73(3)**

Provisions of employment contracts that persons employed as manager and assistant manager of orange packing house should perform their duties to "best of their ability" did not permit their use of less than ordinary ability in carrying out such duties, but required them to devote, to business, ability suggested by their previous long experience in such line of work, so as to preclude their recovery of compensation for remainder of contract terms after their discharge for failure to perform

their contractual obligations to best of their ability.

See Words and Phrases, Permanent Edition, for all other definitions of "Best of Ability".

Appeals from Superior Court, Tulare County; Frank Lamberson, Judge.

Actions by S. E. Walters and by Delmar E. Walters, respectively, against Morgan A. Stivers and another to recover compensation for services rendered under two employment contracts. Judgments for defendants, and plaintiffs appeal.

Affirmed.

McFadzean & Crowe, of Visalia, for appellants.

Jas. R. McBride and McBride & Moore, all of Lindsay, for respondents.

BARNARD, Presiding Justice.

These actions, which were consolidated for trial and on this appeal, arose out of two written contracts of employment. The defendants are brothers and the two plaintiffs are father and son.

In the summer of 1943, the defendants, who were building contractors at Long Beach, acquired a considerable acreage of orange groves in Tulare County and also acquired a packing house near Lindsay. It was planned that Morgan A. Stivers would continue the building business at Long Beach and that Raymond K. Stivers, the younger brother would look after the orange business.

On September 22, 1943, the defendants employed S. E. Walters as manager of this packing house. He had had about twenty-five years' experience in the citrus business, including some eleven years as a packing house manager. The contract fixed his compensation as manager and provided that it should continue for a term of three years, with an additional two years at his option. The portion of the written contract of employment which is material here reads as follows:

"The second party agrees to manage the employers packing house to the best of his ability and to work for what he deems to be the best interests of his employers, to hire available help necessary to properly conduct the operation of the packing plant, set the pay for same and to discharge any one whom he considers is not working for the best interests of all concerned.

"The employer agrees to provide funds promptly on regular pay days to meet the payroll of the plant or to pay off any dismissals.

"He will order supplies for the plant's operation and supervise the accounting for same as well as the records of fruit through the house, in short, he will operate the plant to the best of his ability in the customary manner for a packing house manager."

On the same day the defendants entered into a written contract with Delmar E. Walters, who had had considerable experience in the packing house business, employing him for the same term, with the same option, as assistant manager and house foreman for this packing house. The contract fixed his salary and, so far as material here, also provided as follows:

"The party of the second part will be under the direction of the house manager and act in his capacity during the manager's absence, also assist him to the best of his ability and experience in the conduct of the operations of this plant."

Shortly after these contracts were signed the plaintiffs entered upon their duties thereunder. At first, these duties consisted largely of getting things ready to receive the crop of navel oranges, the packing of which was expected to begin in November. This included overseeing certain alteration and construction work which was carried on during this period by an outside contractor, and which was not completed for a week or so after the packing of oranges began. The actual packing of oranges began on November 19, 1943, and about three weeks later, on December 11, 1943, the defendants served written notices on the plaintiffs terminating their respective employment "because of your unwillingness or inability to perform your obligations or discharge the duties according to your agreement."

These actions were then brought to recover the compensation named in the agree-

ments for the remainder of the term provided for. No question was raised as to compensation up to December 11, 1943. The complaints alleged the willingness and ability of the respective plaintiffs to perform. The answers admitted the making of the contracts and the discharge of the plaintiffs. It was denied that the plaintiffs kept or performed their obligations under the contracts, and various matters were alleged in justification of the discharge of the plaintiffs.

The court found in favor of the defendants in each case. In the first case, it was found that it is not true that S. E. Walters fully or faithfully kept or performed his agreements as set forth in this contract, but that he had failed to keep or perform his agreement and had breached and made default therein in certain respects. It was then found that, while he was obligated by the contract to discharge the duties of packing house manager in a competent manner and to exercise a reasonable degree of skill, knowledge and ability in that service, that he did not possess and did not exercise such reasonable degree of competence, skill, knowledge or ability in managing this packing house in that (1) certain large sums of money belonging to the defendants were handled by him in an imprudent, careless and wasteful manner; (2) that he failed to keep accurate accounts or records of the money so handled by him and did not possess or exercise competence or ability in the finding and procurement of materials and supplies necessary for the operation of the business; (3) that he did not possess or exercise such competence or ability in the sale or disposition of low-grade fruit; (4) that he did not possess or exercise such competence or ability in connection with the acceptance of or handling of profitable business; and (5) that he did not possess or exercise such competence or ability in obtaining or maintaining the efficient operation of the packing house. It was then found that in his management of this packing house he persistently pursued such a course of conduct toward the defendants and the customers of the packing house as to bring the defendants into disrepute, and to render them objects of ridicule and contempt; that he failed and refused to obey and comply with the reasonable orders and instructions of the defendants and was defiant, insubordinate and contemptuous toward them; and that he had failed to render an account of the monies expended by him when requested so to do. Other findings were made which need not be considered in view of our conclusion on the main issues raised. Similar findings were made in the other case with the exception of certain things which were not within the line of duty of the plaintiff Delmar E. Walters.

A judgment was entered in each case in favor of the defendants therein and the respective plaintiffs have appealed.

[1] The appellants contend that even on the theory which was adopted by the trial court, that they were required to exercise a reasonable degree of skill, knowledge, ability and competence in these employments, the evidence is not sufficient to sustain the court's findings in this regard. It is argued that they were operating under difficulties in that this was an old packing house with antiquated equipment; that the remodeling and repairs extended into their packing season; that they were delayed by maturity tests of the fruit and the lack of sufficient picking boxes; that they were unable to obtain sufficient or experienced help; that they were annoyed by an employer who countermanded their orders; and that they were required to please a third party who was financing the respondents in these operations. It is then argued that their ability and successful operation of this business is fully shown by the fact that, in spite of the difficulties under which they were laboring, they packed and shipped before November 27, the date when prorate regulations went into effect, a larger percentage of their fruit than was picked or shipped by the average of all other packing houses in that district; and that by December 11, 1943, the date of their discharge, they had packed a larger percentage of their entire volume for the year than was packed by the average of all other packing houses in the district. It was further argued that the only reason which appears in the evidence, for the discharge of the appellants, is that the respondents had then succeeded in getting their packing house into successful operation through the efforts and abilities of the appellants, and

felt that they could then continue its operation with less expensive help.

We can find no evidence in the record which would reasonably sustain the latter contention. The evidence, as a whole, strongly indicates that the conditions in this packing house were far from satisfactory at the time the appellants were discharged; that the relations between the appellants and the respondent Raymond K. Stivers, who was in charge of the business for the employers, were more than strained; that the appellants to a very large extent, if not entirely, were to blame for this situation; that the appellants had failed to carry out the reasonable orders of the respondents or to reasonably cooperate with them; and that the appellants were discharged because of a situation which could not reasonably be expected to be allowed to continue, and not because of any desire or with any purpose of operating with cheaper help.

The mere fact that larger percentages of fruit had been packed and shipped at certain dates, in proportion to the output for the season, than had been packed and shipped on the average in other packing houses is neither controlling nor too significant. In a new enterprise with a smaller total business the amount handled in the first few weeks might well be larger proportionately, as compared to other older and larger businesses.

With respect to the claimed difficulties under which the appellants were operating the most that can be said is that the evidence is conflicting. While these matters were arguable in the trial court they failed to convince the trial judge and cannot be controlling here. There was considerable evidence, much of it from experienced packing house men, indicating that conditions in this packing house were far from what they should be, that there was very serious neglect in the way the business was managed, and that there was ill feeling and lack of cooperation on the part of the appellants toward at least one of the employer defendants, that this was the fault of the appellants, and that it was interfering with the successful management of the business. We can find no evidence in the record justifying the contention that the respondents improperly interfered in the business or countermanded orders given by the appellants. In the incident most relied upon by the appellants, the so-called "roller" incident, the written record indicates that the appellants were entirely in the wrong and that they unreasonably took offense at a helpful act by the respondent Raymond K. Stivers during a breakdown in the machinery. In this instance, the elder appellant became angry and took the part of his son, who was in the wrong, and after calling this respondent a name told him to "get to hell out of there," grabbed him and tried to shove him out of the building.

It would serve no useful purpose to review all of the evidence, which is quite lengthy. It is sufficient to say that in spite of the many conflicts the evidence, as a whole, strongly supports most of the particular findings made by the court and above referred to, and we think it may be added that the others of these findings are sufficiently supported. There was evidence of neglect in the management of this business, of waste, of over-employment of help, of lack of direction and efficient use of the help, of lack of cooperation, of neglect or refusal to obey proper instructions, of confusion, congestion and lack of orderliness in carrying on the operations of the packing house, of calling the respondents names, of insulting behavior towards them in the presence of customers, of telling employees that they need pay no attention to directions of Raymond K. Stivers who was in charge for the employers, of overdrawing the bank account by more than $5000 on two occasions, of refusing to give information as to the financial condition of the business, of refusing to give other information, and of refusal or neglect to handle business that was offered. While the appellants offered, and here argue, some explanation of most or all of these matters the question was one of fact for the trial court. Not only was there some evidence to sustain the controlling findings, but a reading of the written record gives a distinct impression that there was actual mismanagement in many important respects, and that the appellants failed to justify themselves or to satisfactorily explain the evidence produced as to their shortcomings.

[2] The appellants further contend that, in spite of these findings and any evidence in support thereof, no breach of their contract appears because it is provided therein that each appellant was only required to perform the duties of his employment to the best of his ability, and that they are entitled to recover no matter how little ability they had. It is argued that each appellant testified that he had performed his duties to the best of his ability and that there is no evidence in the record to the contrary. There is evidence that these appellants had had long experience in this kind of work, and the evidence justifies the inference that they knew how this work should be performed and that they had the ability to perform it properly. It sufficiently appears that they were hired for this work because of their previous experience. Under these circumstances, we cannot accept appellants' construction of this contract to the effect that it was intended thereby to provide that the appellants might use less than ordinary ability in carrying out the work for which they were employed. This argument, if accepted, would lead to an absurdity. Under the circumstances, the provisions that the work should be done to the best of their ability would seem to indicate an intention that they should bring to, and devote to, the business the ability suggested by their previous experience in this line of work. If anything, it seems to connote that more, rather than less, than average ability was contemplated by the parties. The evidence not only indicates that the appellants had a better knowledge of and ability to perform this work than was exercised by them, but that a wrong impression of their power and position, with an animosity toward at least the respondent who was in charge of the work, seriously interfered with the operation of the business and prevented the exercise of their best ability in carrying on the work and in serving the best interests of their employers. The evidence would support a finding that the appellants did not perform their obligations under the contract to the best of their ability. While the court did not make a finding directly to that effect it did find, in the case of each appellant, that it is not true that he fully or faithfully kept or performed the promises or agreements contained in his contract and by him to be kept or performed. In our opinion, both the findings and the evidence are sufficient to support the judgment.

The judgments are affirmed.

MARKS and GRIFFIN, JJ., concur.




77 Cal.App.2d 905

**MARSHALL v. LYON et al.**

**Civ. 15463.**

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1947.

Hearing Denied March 31, 1947.

**1. Negligence ⇐124(2)**

In action against owners and operator of market by customer for injuries sustained in fall on ramp between market and sidewalk, admission of sections of uniform building code adopted by city as an ordinance and dealing with requirements for ramps, was proper.

**2. Appeal and error ⇐837(11)**
**Evidence ⇐32**

Appellants' arguments based on sections of building code adopted by city as ordinance were required to be disregarded by the District Court of Appeal, where such sections were not in evidence, since appellate courts are not allowed to take judicial notice of city ordinances that have not been received in evidence in the trial court.

**3. Negligence ⇐124(2)**

Portions of uniform building code, which had been adopted by city as an ordinance, and which related to ramps serving as an "exit", were admissible in personal injury action, though injury took place on a ramp that was allegedly an "entrance" to market, since ramp was an exit though it was also used as an entrance to market.

See Words and Phrases, Permanent Edition, for all other definitions of "Exit".

**4. Municipal corporations ⇐601**

Uniform building code which was adopted as city ordinance and which provided that ramps might be constructed at an exit where a full stairway was not needed, and provided for ramps used in lieu of stairways required by various provisions of the code, did not prevent substitution of a ramp in cases where a stairway was not required by code.

**5. Negligence ⇐134(5)**

In action against owners and operator of market by customer for injuries sustained in fall on ramp between market and sidewalk, evidence that slope of ramp was 12 and ⅜ inches in a distance of seven feet four inches supported jury's implied finding that defendants were negligent in not complying with city ordinance requiring that ramps should not have a greater slope than one foot in eight feet.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Jeanne Marshall against W. Parker Lyon, Jr., and others to recover damages for injuries received by plaintiff in fall over a ramp appurtenant to a market owned by two of the defendants and operated by another defendant. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

Gibson, Dunn & Crutcher and Sidney A. Moss, all of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries received when plaintiff fell on a ramp appurtenant to a market operated by Gertmenian and owned by defendants Lyon, defendants appeal.

The facts are these:

Defendants Lyon owned a market building in the city of Monrovia of which their co-defendant was the leasee and in which he operated a public market. The market building is located on the west side of Myrtle Avenue, a street lying north and south. The street sloped downhill from north to south at the point where the building is situated. The floor of the market is above the level of the sidewalk on the west side of and paralleling Myrtle Avenue, and the descent from the floor to the sidewalk is made by means of a cement ramp. Due to the north to south grade of Myrtle Avenue the floor of the market at its northermost side is very slightly above the sidewalk while at the southermost side it is at least a foot and a half or possibly two feet above the sidewalk. At a position six feet north of the most southerly side of the building the market floor level is about twelve and three-eighths inches above the sidewalk level. The length of the ramp from the floor of the market to the sidewalk is seven feet four inches. Thus at a point six feet north of the most southerly side of the building the slope of the ramp was twelve and three-eighths inches in seven feet four inches.

On November 21, 1944, plaintiff, after having purchased merchandise in the market, prepared to leave the store. At a point six feet north of the most southerly side of the building she stepped onto the ramp. As she placed her right foot on it she started to slide down and being unable to regain her balance, she fell and received serious personal injuries. It is conceded that there was no foreign substance on the ramp. It was constructed of more or less smooth cement.

There was received in evidence, over objection, portions of the Uniform Building Code adopted by the city of Monrovia as an ordinance and in effect at the time of the accident. The pertinent portions of such code received in evidence are as follows:

Section 1104: "Stairs and exits shall be provided as specified in Chapter 33."

Section 3301: "All exits as required for buildings in this code shall comply with the requirements specified in this chapter for a stairway, ramp or smokeproof tower. Wherever stairways are mentioned, ramps may be substituted when constructed as specified in section 3310."

Section 3305: "All stairways shall have walls or well secured balustrades or guards on each side and handrails shall be placed on at least one side of every stairway and for stairways exceeding 44 inches in width shall have handrails placed on each side. Stairways over seven feet wide shall be provided with one or more continuous intermediate handrails substantially supported and the number and position of intermediate handrails shall be such that there is not more than 66 inches between adjacent handrails. Handrails and railings shall be placed 30 inches above the nosing of treads and ends of handrails shall be returned to the wall."

Section 3310: "Wherever stairways are required by this code, ramps with a slope not greater than one foot in eight may be substituted. Ramps shall comply with all the requirements for stairways as to construction, width, enclosures, landing, lighting and ventilation. Ramps shall be surfaced with an approved non-slip material. Handrails shall not be required where the slope of the ramp is less than one foot in ten feet."

Section 3316: "Outside stairways of the return platform or straight run type may be used as a required means of exit for buildings not exceeding five stories or 55 feet in height but in no case shall such stairways constitute more than 50 per cent of the required exit capacity. All outside stairways shall be located so as to lead directly to a street or alley or to a yard directly connected with a street or alley. The stairways, landings, platforms and balconies shall be constructed as specified for stairways in this chapter, except that they shall be of incombustible materials throughout; provided that stairways serving only the second floor may be constructed of combustible material."

The foregoing provisions of the Uniform Building Code were embodied in instructions read to the jury.

Defendants rely for reversal of the judgment on the proposition that *the trial court committed prejudicial error in receiving in evidence the sections of the Uniform Building Code quoted above and in reading such sections to the jury.*

[1, 2] This proposition is untenable. In defendants' briefs they predicate certain arguments upon sections of the building code not received in evidence. Such arguments must be disregarded by us since the law is settled that appellate courts are not allowed to take judicial notice of city ordinances that have not been received in evidence in the trial court. (City of Oakland v. Brock, 8 Cal.2d 639, 641, 67 P.2d 344; Marysville Woolen Mills v. Smith, 178 Cal. 786, 791, 175 P. 13; In re Wacholder, 1 Cal.App.2d 254, 256, 36 P.2d 705).

[3] Defendants also urge that the sections of the ordinance were improperly received in evidence for the reason that the aperture through which plaintiff was passing in leaving the market was not an *"exit"* but an *"entrance"* to the building and that the sections of the ordinance above referred to apply only to exits and not entrances to buildings. Hence such ordinance is not pertinent to the facts in the present case.

Such argument is without merit. Webster's New International Dictionary, Second Edition [1939] Volume 1, page 894, defines "exit" as "a way of departure; passage out of a place; egress". Clearly the ramp on which plaintiff was leaving the store falls within the above definition as a way of departure or passage out of a place. The fact that it might also be used as an entrance or way into the store would not destroy its character as an exit.

[4] There is likewise no merit in defendants' contention that a ramp could be substituted only when a stairway was required by the ordinance. Section 3301 of the ordinance clearly provides that "all exits" for buildings "shall comply with the requirements specified in" the ordinance for a "ramp". It is apparent that the language of the section contemplates ramps in two categories: (1) ramps constructed at an exit where a full "stairway" is not needed or required but where nevertheless a slope exists; and (2) ramps used in lieu of stairways required by various provisions of the ordinance. The word "ramp" is used in each sentence of the section; in the first sentence as a device on a par with stair-

ways; in the second sentence as a permitted substitute for a stairway.

[5] Since the ordinance was properly received in evidence the trial court was correct in reading the sections received to the jury with other instructions. The evidence that the slope of the ramp was twelve and three-eighths inches in a distance of seven feet four inches supports the jury's implied finding that defendants were negligent in not complying with the provisions of section 3310 of the ordinance requiring that ramps should not have a greater slope than one foot in eight feet. (Cf. Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777.)

No error appearing in the record the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.




77 Cal.App.2d 917

**PEOPLE v. LETT.**

**Cr. 4064.**

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1947.

**1. Automobiles ⇐355(13)**

Evidence established all elements of corpus delicti sustaining conviction for manslaughter without gross negligence in operation of automobile which struck pedestrian at crosswalk. Pen.Code, § 192, subd. 3(b); Vehicle Code, §§ 510, 560(a), 671(b).

**2. Automobiles ⇐344**

Inability of motorist to see objects in front of him, because lights of automobile approaching from opposite direction blinded motorist, enlarged his obligation to be cautious at an established public crosswalk, and motorist was required to be vigilant and anticipate presence of a pedestrian in crosswalk who could not be seen by reason of bright lights and motorist could not assume that the road was clear. Vehicle Code, §§ 510, 560(a), 671(b).

**3. Automobiles ⇐344**

Lack of knowledge, on part of motorist who was blinded by lights of an automobile approaching from opposite direction, of presence of pedestrian in public crosswalk, did not justify failure to keep proper lookout for pedestrians, or failure to give warning. Vehicle Code, §§ 510, 560(a), 671(b).

**4. Automobiles ⇐344**

Violation of statute prohibiting driving of a vehicle upon a highway at a speed greater than reasonable or prudent having due regard for the traffic on, and the surface and width of the highway, and at a speed endangering the safety of persons or property, was negligence as a matter of law. Vehicle Code, § 510.

**5. Automobiles ⇐355(13)**

Evidence sustained conviction for manslaughter without gross negligence of motorist who, when traveling 25 miles per hour, although blinded by lights of automobile approaching from opposite direction, struck decedent who was crossing road on a public crosswalk. Pen.Code, § 192, subd. 3(b); Vehicle Code, §§ 510, 560(a), 671(b).

**6. Homicide ⇐74**

The statute defining manslaughter without gross negligence eliminates the standard of a reasonably prudent man. Pen. Code, § 192, subd. 3(b).

**7. Criminal law ⇐35**

Contributory negligence furnishes no excuse for the commission of a crime and does not serve to purge an act otherwise constituting a public offense.

**8. Automobiles ⇐346**

In prosecution for manslaughter by automobilist where evidence established violations of law by defendant as cause of decedent's death, contributory negligence of decedent, in that he was intoxicated, was no defense. Pen.Code, § 192.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joseph C. Lett was convicted of manslaughter without gross negligence, and he appeals from order denying motion for a new trial.

Order affirmed.

Donald MacKay, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., of San Francisco, for respondent.

WILSON, Justice.

Appellant was charged with the crime of manslaughter, a felony, in that "while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, and with gross negligence," he killed a human being. He was tried by the court without a jury and was found guilty of "manslaughter without gross negligence." His motion for a new trial was denied, proceedings were suspended and he was placed on probation for a period of two years. The appeal is from the order denying his motion for a new trial.

The points relied upon by appellant for reversal are (1) that the corpus delicti was not established; (2) that the evidence is insufficient to sustain the verdict; and (3) errors of law committed during the trial.

The contentions as to the corpus delicti and the insufficiency of the evidence are interrelated and will be considered together.

The applicable portion of section 192 of the Penal Code reads: "Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds: * * * 3. In the driving of a vehicle—(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; * * * (b) In the commission of an unlawful act, not amounting to felony, without gross negligence; * * *."

These facts are shown by the evidence without contradiction: Decedent was crossing a public street in an established crosswalk; appellant was driving a car along a street at right angles to the crosswalk at a speed of about 25 miles per hour. Appellant testified as follows: Decedent "was directly in front of me when I first saw him, * * * a very few feet in front, * * * about five feet * * *; I was looking ahead"; the lights of a car traveling in the opposite direction blinded appellant; they were 50 or 75 feet distant when they first blinded him; they were "on high" (apparently meaning on high beam); when decedent was struck by the automobile the lights "were right on my eyes"; from the time the lights started to bother him he kept driving at the same rate of speed but he "let up on the gas—the accelerator"; he drove approximately 75 feet before stopping after he struck decedent. There is no evidence that appellant sounded his horn at any time as he approached or crossed the crosswalk.

[1] The evidence establishes all the elements of the corpus delicti: (a) The unlawful killing of a human being; (b) without malice; (c) in the driving of a vehicle; (d) in the commission of an unlawful act not amounting to felony; (e) without gross negligence, and it sustains the verdict.

[2, 3] Since appellant admits that as he approached the crosswalk in which decedent was walking his eyes were blinded by the lights of another car, it became his duty to be vigilant and to anticipate the presence of a pedestrian in the crosswalk who could not be seen by reason of the bright lights. His inability to see objects in front of him enlarged his obligation to be cautious at the street intersection. He had no right to assume that the road was clear, and the fact that he did not know that decedent was in the crosswalk is no excuse for his failure to give warning. Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066; Meyers v. Bradford, 54 Cal. App. 157, 159, 201 P. 471. His lack of knowledge of the presence of decedent in the crosswalk did not justify his not keeping a proper lookout for pedestrians. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125; Zarzana v. Neve Drug Co., 180 Cal. 32, 37, 179 P. 203, 15 A. L.R. 401; Schomer v. R. L. Craig Co., 137 Cal.App. 620, 624, 31 P.2d 396.

[4, 5] Appellant failed to yield the right of way to decedent in violation of section 560(a) of the Vehicle Code; he failed to sound his horn as required by section 671(b); he failed to observe the provisions of section 510 which reads as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Violation of the statute was negligence as a matter of law. Nicholas v. Leslie, 7 Cal.App.2d 590, 595, 46 P.2d 761; Clinkscales v. Carver, 22 Cal. 2d 72, 75, 136 P.2d 777; Devecchio v. Ricketts, 66 Cal.App. 334, 338, 226 P. 11; Cleveland v. Petrusich, 117 Cal.App. 71, 79, 3 P.2d 384. His admission that the lights were 50 or 75 feet distant when they first shone in his eyes, that he did nothing to slow his car except to "let up on the accelerator," and that he traveled 75 feet after he struck decedent before stopping, fixes his responsibility. The case might be different if the blinding lights had flashed suddenly, allowing insufficient time for appellant to check his speed.

In Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914, a pedestrian was struck by an automobile in a crosswalk on a dark, stormy night. We held that the failure of the defendant to see the plaintiff, by reason of the atmospheric conditions and absence of light, was not a defense. In the instant case appellant did not see decedent on account of too much light, instead of too little, but the duty of the driver to be diligent was the same, whatever may have been the reason for his not seeing the pedestrian.

[6] It is not necessary to refer to the cases cited by appellant in which gross negligence is defined and discussed, since that element has been removed by the verdict of the trial court finding appellant guilty of homicide without gross negligence. The definition of the crime of which appellant was found guilty (Penal Code, sec. 192) excludes from our consideration the standard of a reasonably prudent man which is argued at length in appellant's brief. That standard is eliminated by the statute under which appellant was prosecuted. It is sufficient to say that a reasonably prudent man would not drive at a speed of 25 miles per hour into a place where pedestrians are expected to be and have a right to be when conditions are such that he is unable to see any object in front of him.

[7, 8] The errors of law complained of by appellant are two in number. The first relates not to the admission or rejection of evidence but to the construction placed by the court upon the evidence and the applicable law. This has been disposed of by what we have already said concerning the evidence. The second error assigned is that the court did not take into consideration the question of the contributory negligence of decedent. There is evidence that he was intoxicated to a certain extent at the time of the accident. Negligence of decedent would be appropriate as a defense only if such negligence had been the sole proximate cause of the accident. People v. Pociask, 14 Cal.2d 679, 687, 96 P.2d 788. Contributory negligence, not a novel defense in criminal cases, as often as presented has been rejected as furnishing no excuse for the commission of a crime or as serving to purge an act otherwise constituting a public offense. People v. Pociask, supra; People v. Marconi, 118 Cal.App. 683, 687, 5 P.2d 974; People v. Leutholtz, 102 Cal.App. 493, 498, 283 P. 292; People v. McKee, 80 Cal.App. 200, 205, 251 P. 675. Since the evidence established violations of the law by appellant as having been the cause of decedent's death, the intoxication of the latter, if admitted as a fact, is pleaded in vain as a defense.

The order denying the motion for a new trial is affirmed.

MOORE, P. J., and McCOMB, J., concur.

77 Cal.App.2d 915

**DE MIRJIAN v. LUTINSKY et al.**

**Civ. 15644.**

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1947.

**1. Appeal and error ⇐757(1)**

Appellant's purported statement of facts that was merely a statement of appellant's contentions which court found were not sustained by the evidence, would not be accepted on appeal because of failure to comply with court rule. Rules on Appeal, rule 13.

**2. Appeal and error ⇐1010(1)**

Where findings of trial court complained of by appellant were sustained by substantial evidence, findings and judgment would not be disturbed on appeal.

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Appeal from Superior Court, Los Angeles County; James M. Allen Judge.

Action by Edward De Mirgian against Morris S. Lutinsky and others. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Pearlson & Singer, of Los Angeles, for appellant.

Mortimer Vogel, of Los Angeles, for respondents.

WILSON, Justice.

[1] What purports to be a statement of facts in appellant's brief does not relate the facts as required by the Rules on Appeal* but is merely a statement of appellant's contentions, which the court found were not sustained by the evidence. We therefore accept the statement of facts set forth in respondent's brief, the correctness of which has not been disputed by appellant. Judgment was in favor of defendant. Plaintiff appeals.

Appellant agreed to sell his service station to respondent for the sum of $2,000, to transfer the lease and to obtain the consent of the lessor to the transfer. Appellant handed the lease to respondent and informed the latter that he should pay the rent to the lessor. The lessor substituted respondent as the lessee, agreed to look to him for the rental, and released appellant from further liability by reason of the lease. Respondent took possession of the service station and arranged with the various governmental authorities to change all permits into his name. The parties went to the bank where respondent paid appellant $2,000 by certified check and an additional sum of $232 which represented the value of merchandise on hand, and $50 which had been deposited by appellant for the last month's rental under the lease. There is substantial evidence in the record sustaining the foregoing statement of facts.

[2] Appellant contends that a formal written agreement concerning the sale of the premises was never entered into, and asserts that in the oral negotiations preceding the transfer of the lease and the payment of the money respondent agreed that until August 15, 1946, he would sell gasoline distributed by appellant, and that when the written transfer was made respondent refused to include such agreement as one of the conditions of the sale. This contention is answered by the finding of the court that appellant's allegation on such issue is untrue. Since the finding is sustained by substantial evidence of the facts above recited the findings of the court and the judgment will not be disturbed. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756, and cases cited.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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* The Rules on Appeal became effective on July 1, 1943. Rule 13, 22 Cal.2d 1, 12, requires that the appellant's opening brief "shall contain a statement of the case, setting forth concisely, * * * the nature of the action or proceeding and the relief sought, a summary of the material facts, and the judgment or ruling of the superior court."

78 Cal.App.2d 37

**BUFFINGTON et al. v. NICHOLSON et al.**

**Civ. 15514.**

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1947.

Hearing Denied April 3, 1947.

**1. Animals ⇐24**

A keeper, in contrast to an owner, is not an insurer of dog's good behavior, but must have scienter or knowledge of animal's vicious propensities to be liable for injuries inflicted by the dog. Gen.Laws, Act 384a.

**2. Animals ⇐24**

Evidence authorized recovery from dog's owners for injuries to bailees of dog, on ground of owners' failure to inform bailees of dog's vicious propensities. Gen. Laws, Act 384a.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Mae Buffington and another against Edward C. Nicholson and another for injuries inflicted by defendants' dog. From a judgment for plaintiffs, and from an order denying a motion for new trial, named defendant appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Gold & Needleman and Denny Fred, both of Los Angeles, for appellants.

David Welts and John S. Cooper, both of Los Angeles, for respondents.

YORK, Presiding Justice.

The plaintiffs Buffington, husband and wife, sued to recover damages for injuries alleged to have been sustained by Mrs. Buffington when she was attacked and bitten by defendants' dog. From a judgment awarding said plaintiffs the sum of $5,268 and costs, and from an order denying his motion for a new trial, defendant Edward C. Nicholson has perfected this appeal.

It appears from the record that appellant, the owner of a male pedigreed Doberman pinscher dog named "King", and respondent W. L. Buffington, the owner of a female pedigreed Doberman pinscher dog named "Tina", entered into an oral agreement in April of 1944 to mate the dogs, appellant to receive one female puppy as a "stud fee". Pursuant thereto, appellant delivered his dog to respondents at their residence and turned him over to Mr. Buffington. About two weeks thereafter, on May 6, 1944, around five o'clock in the afternoon, when Mrs. Buffington, who had been feeding both dogs for about a week, entered the gate of the kennel carrying two pans of food, the dog King came toward her showing his teeth, leaped upon her with both paws and bit her on the right wrist and hand. She held the dog's mouth, from which the tissues of her hand were hanging like cords of thread, whereupon the dog relaxed his hold on her right hand but grabbed and bit her on the left forearm. Mrs. Buffington then kicked off her yard shoes, opened the gate and turned around in an effort to get away from the dog which grabbed her on the left side below the waist inflicting severe lacerations.

Mrs. Buffington's acquaintance with the dog King dated from the day he was brought to her residence. However, some weeks prior thereto, Mr. Buffington had witnessed a demonstration of King's "police training" at the movie studio where he was employed, at which time his business associate, Mr. Weston, who participated in the demonstration, told Mr. Buffington: "Don't use a club with that kind of dog." Mr. Buffington testified: "He had the dog there * * * I believe somebody else held the dog by the collar and he picked up a paper or something, it looked like a stick. Q. And made a threatening gesture at the dog? A. Yes. Q. And what did the dog do? A. He showed his teeth then." Mr. Buffington further testified that he acquired no knowledge from this demonstration of any propensities of the dog King to attack or bite, except when threatened with a stick; that neither Mr. Weston nor appellant ever demonstrated to him the male dog's watch or guard training. Also, that previous to

the attack, the dog showed no signs of being a dangerous animal; never threatened to bite any one while in his possession; showed no signs of viciousness when he whipped the dog to make it mind; that he had no occasion to warn his wife about the dog and did not do so; and that his information that the dog was vicious and had bitten several people was acquired after the attack on Mrs. Buffington.

Mrs. Nicholson testified to two instances occurring prior to the incident here, when King bit other persons: (1) when the dog had been put into the den of appellant's home and told to stay there, Miss Moore, a guest, who had been drinking "came screaming into the house and rushed into the den and the dog jumped at her and attacked her;" (2) "Mrs. Chapman and her son came up to visit me in the afternoon. I was alone at the house and the dog was with me in the living room, and Billy and I were sitting there talking and his mother came up to the back door, instead of calling or ringing the doorbell she walked in, and before I had a chance to get hold of King he had grabbed her when she was not more than about four or five feet inside the door. She also said, 'I should never have walked into the door without ringing or without letting you know I was there.'"

Appellant, Edward C. Nicholson, testified that when he delivered the dog to respondents he "expressed the thought to Mr. Buffington that he (the dog) was police trained, he was aggressive, and he wouldn't stand for any strangers. * * * Q. Was anything said or discussed by any of you with respect to how King should be approached in the kennel? A. Yes. I mentioned that since he was in a strange environment with strange people that he could be handled, he would in time become very loyal and affectionate to them, and I said, 'The first couple of weeks that he is here', I said, 'be just a little cautious and call his name, and when the dog comes toward you, stop for just a minute and let him recognize you, and you will be all right.' Q. Did you say that in the presence of Mrs. Buffington? A. I don't remember; I mean it was a four-way conversation all the way around and she was talking to Mrs. Buffington and I was talking to Mr. Buffington, and then we talked back and forth. * * * Q. Are you sure that at least Mr. Buffington heard that statement? A. Mr. Buffington heard that statement because we talked dogs there for at least an hour and a half." This witness also testified to other situations subsequent to May 6, 1944, when the dog King bit other persons:

"Mr. King was part of the real estate firm that sold me my house, and his office was on Laurel Canyon and Ventura Boulevard, * * * I would stop in and talk to him. * * * This one day I was driving along down there and I stopped, and I had King on the leash with me * * * it was rather hot, and I said, 'Would you care to go across the street and have a glass of beer? * * * I will put my dog in the car' * * * and he said, 'No, it is so hot * * * we will leave the dog in the office.' I said, 'I don't dare leave the dog in the office because somebody might come in, a stranger might come in, and then there would be trouble.' He said, 'I am the only person who has a key to the office, I will lock it, and I will not come back in until you do.' I said, 'Well, if you promise me on your word of honor not to go back in * * * I will agree to it.'" The two men had their drink and appellant left Mr. King to make a telephone call. When he returned "and looked for Mr. King he was not there. So I went back across the street and he had opened the door with his key, and he had gone in, and no sooner had he put his hand in than the dog got him, so he went against his promise and all my warnings."

On another occasion, when appellant was giving a party at his house, the dog was "running loose * * * not bothering anybody", when a young woman under the influence of liquor came in. Appellant said to her "Please do not molest the dog * * * if he wants to come to see you, that is all right, but just leave him alone". Appellant then placed King way over in the corner and told him to lie down and stay there, which he did. "Well, this girl came in, she borrowed a bathing suit and went swimming, and she came back and

had two or three more drinks, and she said, 'I want to pet the dog'. I said, 'Please leave the dog alone; please don't bother him.' * * * I turned to mix another drink. In the meantime I saw her walking over to try to pet the dog, and she said, 'Hello, fellow,' or something like that, and stumbled around, and King just looked at her and growled just to warn her to please stay away from him. So she used some very foul language, picked up an empty bottle that was sitting on the bar, and went to strike at him. I tried to climb across the bar, but by the time I got to her King had done his damage."

It is here contended that the owner of a dog is not liable under the California dog bite statute when the person bitten has exclusive possession of the dog under a bailment agreement, appellant urging in this regard "that the liability rests on the keeper and not the owner as such, unless at the time of the incident he had actual possession of the dog or had constructive possession through an agent or servant."

The so-called dog bite statute, Act 384a, Deering's General Laws, Stats.1931, p. 1095, reads as follows: "The owner of any dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness. * * *"

In Hicks v. Sullivan, 122 Cal.App. 635, 639, 10 P.2d 516, 518, the court analyzed said statute as follows: "This statute does not purport to limit the recovery of damages actually suffered as the result of an attack by a savage dog, to the physical wound from biting. It creates a liability when the complainant is actually bitten without the usual necessity of proving the previous vicious character of the dog, or the knowledge of its dangerous habits on the part of the owner."

Similarly in Goldberg v. Rabuchin, 65 Cal.App.2d 111, 114, 149 P.2d 861, 862, it was stated: "Under the Dog Bite Statute of 1931, supra, the (1) former viciousness of a dog causing injuries, or (2) owner's lack of knowledge of such viciousness, is immaterial."

On the other hand, it is stated in 2 Am. Jur. 734, sec. 53: "A statute imposing liability on the 'owner' of a dog without regard to knowledge of his vicious nature does not apply to one merely harboring or keeping a dog not owned by him, and, to render him liable, previous knowledge of the dog's vicious nature must appear." Likewise, in Menches v. Inglewood Humane Soc., 51 Cal.App.2d 415, 417, 124 P.2d 870, 871, the court stated: "Much of the discussion presented by respondents' brief is to the effect that the society was the owner of the animal and therefore itself and its servants are liable, while appellants contend that the society was merely a keeper and had no title or ownership of the dog or knowledge of its vicious tendencies. It may here be observed that liability for the bite of a dog may attach not only to the owner without reference to knowledge, but to a keeper also as well *if the latter has knowledge of the viciousness of the animal.*"

Since the gist of the tort "is the keeping of a thing known to be dangerous, one who keeps or harbors an animal owned by another may be liable, if he has such knowledge. A bailee with scienter is of course liable." Prosser on Torts, Ch. 10, sec. 57, p. 441.

"A person, although not the owner of a vicious dog, may make himself liable to others by knowingly keeping or harboring the dog upon his premises, *after knowledge of his vicious propensities,* and this is true even when such keeping is without the consent and against the wishes of the animal's owner. * * * The owner of an animal is the person to whom it belongs. Whether or not a person is a keeper depends upon the peculiar facts and circumstances of each individual case. A man may own an animal and yet not be its keeper. The word 'keeper' is equivalent to 'the person who harbors.' Harboring means protecting. So one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law; *but the casual presence of an animal on his premises, if not so treated, does not consti-*

*tute him* such owner or keeper." 3 C.J.S., Animals § 165, p. 1266. (Emphasis added.)

[1] From the foregoing it is obvious that a keeper in contrast to an owner, is not an insurer of the good behavior of a dog, but must have scienter or knowledge of the vicious propensities of the animal before liability for injuries inflicted by such animal shall attach to him.

Appellant concedes that there was a duty on his part to inform the bailees with whom he dealt of any dangerous propensities of the bailed dog, but, he urges that he "adequately disclosed the dangerous nature of the dog when he participated with Mr. Weston in the demonstration for Mr. Buffington. * * * The important point is that appellant did inform respondent, Mr. Buffington, that the dog was trained to attack and bite people, if necessary, in certain circumstances, which automatically makes him a dangerous dog and that the dog's propensity to do what he actually did do, presumably an unprovoked attack on his keeper, was as unknown to appellant as it was to respondents."

Respondents deny that appellant ever cautioned them of the dog's vicious propensities and further deny that they had any knowledge thereof, except that he would attack if threatened with a stick.

[2] In the condition of the record, it became a question of fact for the court to decide whether respondents had such knowledge of the vicious propensities of the dog here in question as would relieve appellant from liability for the injuries received by Mrs. Buffington. The court found upon directly contradicted evidence that appellant "negligently and carelessly failed to disclose to plaintiffs, or either of them, at or prior to so placing his said dog 'King' with plaintiffs, that said dog was vicious, or that he had theretofore attacked and seriously injured other persons, all of which said facts the court finds were true and well known to the said defendant Edward C. Nicholson at and prior to the time he placed his said dog 'King' with plaintiffs" and also that the injuries inflicted upon respondent were the direct and proximate result of such carelessness and negligence of appellant.

The record discloses amply sufficient evidence to support the findings made by the trial court.

For the reasons stated, the judgment is affirmed; the appeal from the order denying motion for a new trial is dismissed.

DORAN and WHITE, JJ., concur.




77 Cal.App.2d 885

**FOSTER v. PESTANA et al.**

**Civ. 13161.**

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1947.

**1. Evidence ⇐123(11)**

In action for personal injuries sustained in unloading pipe from a truck-trailer, exclamation by foreman, made immediately after a pipe had bounced off ground and struck plaintiff's hand, to effect that the injury was foreman's fault and that foreman should have looked, was admissible under the res gestæ rule.

**2. Evidence ⇐123(10, 11)**

Spontaneous exclamation of foreman, made immediately after accident, was admissible under res gestæ rule against employer as well as foreman.

**3. Automobiles ⇐245(4)**

In action for personal injuries sustained in unloading truck-trailer, whether foreman made an exclamation immediately after a pipe had bounced off ground and struck plaintiff's hand, to the effect that the injury was the foreman's fault and that foreman should have looked, was for jury.

**4. Automobiles ⇐245(4)**

In action for personal injuries, weight of exclamation of foreman, to effect that the injury was the foreman's fault and that foreman should have looked, was for jury.

**5. Automobiles ⇐244(3)**

In action for personal injuries sustained when unloading pipe from a truck-trailer, exclamation by foreman, made immediately after a pipe had bounced off ground and struck plaintiff's hand, to effect that the injury was foreman's fault and that foreman should have looked, was sufficient to establish negligence.

**6. Automobiles ⇐244(3)**

Evidence sustained verdict for plaintiff on question of liability of employer and foreman for injury resulting when a sewer pipe pushed off loaded truck-trailer by foreman in process of unloading, bounced on ground, and struck hand of plaintiff, who with another, was carrying the unloaded pipes away.

**7. New trial ⇐157**

Trial judge, in deciding motion for new trial in personal injury action which had resulted in verdict for plaintiff, could consider the evidence anew, determine anew the facts, and set aside the verdict if excessive.

**8. Appeal and error ⇐1004(3)**

Trial judge's conclusion, in denying motion for a new trial of personal injury action, that the verdict for plaintiff was not excessive, was persuasive on appeal in determining whether verdict was based upon passion or prejudice.

**9. Damages ⇐127**

In considering question of excessiveness of verdict, court can consider the decreased purchasing power of the dollar.

**10. Damages ⇐100**

In considering question of excessiveness of verdict for a manual laborer, his ability to earn, rather than record of past earnings, is a proper factor in computing earning power.

**11. Damages ⇐134(3)**

$16,769.58 damages to 27-year-old laborer with wife and small son, whose earning ability of $85 weekly before injury was materially impaired by injury to hand, was not excessive.

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Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Lee N. Foster, Jr., against John Pestana and Leonard C. Jensen for personal injuries. From an adverse judgment, defendants appeal.

Judgment affirmed.

Kenneth C. Gillis, of Oakland, for appellant Gillis.

Mathew Weber, of Oakland, for appellant Jensen.

Augustin Donovan and Louis B. De Avila, both of Oakland, for respondent.

GOODELL, Justice.

The respondent recovered a verdict for $16,769.58 for personal injuries. From the judgment and from an order denying a new trial this appeal was taken.

The appellant Pestana had a contract to lay sewer pipe and storm drains at a housing project in San Mateo county. On July 18, 1944 respondent drove a truck and trailer loaded with terra cotta pipe from a factory across the bay to the building site. On arrival the appellant Jensen, who was Pestana's foreman, got aboard the trailer and while the respondent drove slowly Jensen dropped over the side of the trailer 50 or so sections of pipe along the route of the projected pipe-line. They then parked and proceeded to unload and stack the rest of the pipe. Jensen stood on the trailer and dropped the pipe, section after section, over the side onto the ground, while respondent and one Thornley, an employee of Pestana, carried it by hand to a stock pile about 15 feet away. The bed of the truck was about 4 feet above the ground and the top of the load was about 4 feet above the bed. Each section of pipe was 3 feet long, 10 inches in diameter and weighed 70 pounds. One end was bell-shaped, which somewhat flared out that end.

In addition to the 50 or so sections dropped off along the trench line, 25 or 30 had been dropped over the trailer's side near the stock pile and carried away by respondent and Thornley without incident.

Respondent testified that as he returned from the stack for another section he looked up when about 5 feet from the trailer and saw Jensen standing erect on the parked trailer, his hands at his side. Respondent testified that he then bent over, took hold of the pipe, and was about to

lift it when his left hand was struck by a section of pipe just dropped over the side by Jensen. He said the section of which he had hold was on the ground about 3 feet from the trailer and right beneath where Jensen stood. Jensen and Thornley both testified that respondent, instead of being immediately underneath Jensen, was 3 or 4 feet toward the rear of the trailer. They also testified that respondent had already lifted the first piece of pipe from the ground and had started away with it when the second piece bounced and caught his left hand which had hold of the section he was carrying.

Respondent testified that he did not see the pipe before it hit him. Jensen and Thornley both testified that it landed on the ground on end, bounced 2 or 3 feet in the air, and then struck respondent's hand. Jensen testified that in unloading all this pipe he slid the sections over the edge of the trailer's side in such a way that they would land on end and fall over on their side, coming to rest a few feet from the trailer; that all of them previously had done just that; that none had bounced before the one that injured respondent, and that he had handled that one the same way as the others. Thornley, a witness for the defense, testified on cross-examination that "They all bounced up a little" and on redirect examination he stated that none had bounced "in the same manner" as the one that hit respondent. The fact that about 50 sections had been dropped off while the truck and trailer were in motion and 25 or 30 after parking, presented a picture of the way the pieces might have acted before respondent was hit, if the jury accepted Thornley's version as against Jensen's version that none had previously bounced. Jensen was cross-examined as to the manner in which he slid the sections over the side of the trailer, as follows:

"Q. How do they get by the edge, the bell sticks out, doesn't it? A. Yes, you just lift it over.

"Q. That's more or less of a drop, instead of a slide? A. Yes.

"Q. You have to clear that edge, or the thing would go topsy-turvy, get hooked on the edge of the sliding surface? A. Yes.

"Q. So you had to sort-of shove that one off, partially toss it, you might say? A. Yes, but not in this particular instance.

"Q. Some of them were tossed and some of them were slid? A. In this particular instance, we were taking off the top row, and they were all bell-down, that's all we were taking off.

"Q. And they are heavier at the bell-end, aren't they? A. They would be."

Jensen testified with respect to the piece that struck respondent: "It hit the ground, and there must have been different character of ground there, because the pipe dropped, bounced."

Respondent testified that immediately after the pipe hit him Jensen exclaimed, "Damn, I didn't see it, it was my fault, I should have looked." Jensen denied making any such statement, and Thornley, who was but a few feet away, said he heard no such statement, but would not testify that it was not made. He said he heard Jensen say he was sorry. Respondent testified also that while Jensen was taking him to the hospital Jensen said several times that he had not looked and that "he was sorry, it was kind of stupid of him for not watching what he was doing." Jensen denied that he had admitted fault, then or at any time, but did admit that he had said he was sorry, and that he had "waited for him to get out of the way but the pipe jumped, I couldn't help it." On the stand he stated that the two others could not carry the pipe away as fast as he could put it over the side. He admitted that he had given no warning before letting the pipe go. He said when he saw the respondent he "had a piece of pipe slid out, ready to drop" and "waited for him to get out of the way before I dropped it."

Appellants contend that because the pipe bounced in an unusual way respondent's injury was a pure accident and not the result of negligence. Respondent on the other hand argues that whether it was accident or carelessness was purely a jury question; that with all the facts and circumstances before them it was their question, but in addition thereto he argues the

spontaneous exclamation "Damn, I didn't see it, it was my fault, I should have looked," was sufficient, without more, to establish negligence.

[1-6] The exclamation immediately after the impact was unquestionably competent evidence under the res gestae rule, and admissible against the appellant employer as well as against the appellant employee, who uttered it. Showalter v. Western Pacific R. Co., 16 Cal.2d 460, 467, 106 P.2d 895; Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 582, 160 P.2d 21. The making of any such statement was denied. Whether it was made was a question for the jury. If made, its weight was likewise a jury question. Fawkes v. Reynolds, 190 Cal. 204, 213, 211 P. 449, 453. In the last case it is said: "Under this instruction they were not precluded from determining the case solely upon the defendant's admission if they felt that the admission was in fact conclusive against the contentions advanced by the defendant * * *." Eliminating altogether the admissions which respondent claims were made on the way to the hospital, we are satisfied that the spontaneous exclamation alone was sufficient, if believed, to establish negligence. When taken in connection with all the other evidence, including Thornley's testimony that all the pipe had "bounced up a little" although not "in the same manner" that the last piece did, (which, if believed, would show that Jensen must have known of a tendency to bounce) plus the fact that Jensen was handling a heavy piece of material 6 or 8 feet above respondent, we have no doubt that there was sufficient evidence to sustain the verdict on the question of liability.

The prayer of the complaint was for $16,769.58, and the jury awarded every cent prayed for. Appellant complains that the verdict was excessive. The latest restatement of the rule on this subject is found in the case of Roedder v. Rowley, 28 Cal.2d 820, 172 P.2d 353, 354, as follows: "In assessing general damages, the jury should consider all relevant circumstances, including the age and sex of the injured person, his physical condition before and after the injury, the extent, severity and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom. Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as a reasonable person would estimate as fair compensation. Hence, necessarily, the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury, and a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment. Deevy v. Tassi, 21 Cal.2d 109, 120, 121, 130 P.2d 389; Loper v. Morrison, 23 Cal.2d 600, 610, 145 P.2d 1; Turnipseed v. Hoffman, 23 Cal.2d 532, 535, 144 P.2d 797."

[7, 8] The trial judge was called on to exercise his discretion on this important question, and his denial of a new trial indicates that he, with power to "consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just" (see Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83, 84), concluded that the verdict was not excessive. As said in Roedder v. Rowley, supra, his "conclusion in that regard is persuasive in determining whether the verdict was based upon passion or prejudice. Deevy v. Tassi, supra, 21 Cal.2d 109, 121, 130 P.2d 389; Ostertag v. Bethlehem, etc., Corp., 65 Cal. App.2d 795, 805, 151 P.2d 647."

We might add that the trial judge not only heard the testimony of the doctors but saw the x-rays of the hand and also saw the doctor demonstrate with it before the jury.

[9] To contrast the size of this award with verdicts in other instances of hand injuries, a number of cases from outside states are cited by appellants. All of them involve fingers and thumbs while respondent's injury was quite different. But for an entirely distinct reason they are valueless as criteria, for the earliest case was

decided over 50 years ago and the most recent 33 years ago. See Connor v. Henderson, 108 Cal.App. 237, 242, 291 P. 641. Appellants also cite Diehl v. Swett-Davenport Lumber Co., 14 Cal.App. 495, 112 P. 561, decided in 1910 where the operator of a machine in a planing mill lost his right forearm and was awarded only $5,000. The contention that it was excessive was dismissed by the court with the curt comment that it had no merit. It does not follow that because a plaintiff 36 years ago received a none too generous verdict, the award herein was too generous.

The verdict in this case would have presented an altogether different problem some years ago than it presents today. In O'Meara v. Haiden, 1928, 204 Cal. 354, at pages 366–368, 268 P. 334, at pages 339, 340, 60 A.L.R. 1381, will be found an interesting discussion of the bearing of the purchasing power of money on the size of verdicts. Therein the court declined to use as a criterion one of its own decisions rendered in October of 1917, and had this to say respecting happenings and trends in the intervening eleven years: "Since the decision thereof radical changes have taken place in social conditions, and particularly in conditions affecting the costs of living. Courts have recognized this fact in passing upon the size of verdicts and have almost invariably made allowances therefor [citations]".

In Rowe v. Rennick, 1931, 112 Cal.App. 576, 297 P. 603, 607, the District Court of Appeal without referring to O'Meara v. Haiden, uses the same reasoning as follows:

"In an extended note covering approximately 196 pages appended to the case of Quinn v. Chicago, Mil. & St. Paul Ry. Co., 46 A.L.R. 1298, are collected a large number of cases dealing with verdicts in personal injury cases. A considerable number of these cases involve causes which were tried at a time when the purchasing power of money was much greater than at present, which fact must be taken into consideration when considering an award of damages, as an award of damages in the sum of $7,500 made prior to the World War would, in purchasing power, we think, equal the award in this case. The difference in the purchasing power of money is a common fact of which we think we may properly take notice." The verdict in that case was rendered in March, 1929, and was for $10,800.

What has happened in the 15 or more years since these two cases were decided is common knowledge and serves but to reaffirm the fairness and soundness of their reasoning. Many cases have followed the O'Meara case on that subject.

The respondent was 27 years of age at the time of the injury and has a long expectancy of life. He is married and has a small son. He has worked ever since he was 17, driving trucks and doing heavy manual labor. His injury was characterized by the doctor who attended him as a severe crushing injury; the x-rays "showed that the third metacarpal, that is the bone that is at the base of the middle finger, had been badly crushed and shattered, very near to the joint * * *. It was a bad sort of an injury to treat, on account of the proximity of the joint." The doctor testified further: "I knew that unless we could maintain the alignment of this row of joints across the base of the fingers that it would pretty badly cripple him." The hand was put in a cast and traction applied. This did not accomplish the expected results, and some months later the doctor found the hand in worse shape than before, without any fresh injury intervening. The doctor testified that an operation would be necessary to improve the hand, but that its success was not a certainty and if not successful the respondent might have a claw hand. In his opinion the injury was a permanent one. He demonstrated to the jury and judge with respondent's hand how the metacarpal in question was then movable, and how it inclined over toward the little finger instead of maintaining normal alignment along the middle of the hand to form junction with the middle finger at the joint. In this doctor's opinion there was no bony union.

The doctor who testified for the defense was of the opinion that there was bony union. He saw no necessity for an operation, but felt that everything had been done

that could be done for the hand. He did not say that the injury was not permanent.

The evidence showed that after respondent had returned to work and had resumed the driving of the same truck (on which adjustments were made to render it easier for him to handle) he found he could not continue, and took a lighter job. From that he changed to a still lighter job, running a delivery truck for a fish company, and from that he went into a service station on his own account, the earnings from which were not permitted by the court to be shown. His income during the time between his injury and the trial had been decreased from about $85 to about $65 a week according to respondent's showing.

Special damages amounted to $1,769.58.

[10] In a case such as this a person's ability to earn, rather than the record of his past earnings, is the proper factor in computing the impairment of his future earning power. Hosman v. Southern Pacific Co., 28 Cal.App.2d 621, 83 P.2d 88; Holmes v. California, etc., 69 Cal.App. 779, 232 P. 178; Storrs v. Los Angeles Traction Co., 124 Cal. 91, 66 P. 72; Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 784, 117 P.2d 850. It needs no extended argument to show that the respondent's earning capacity and ability has been materially impaired by the very nature of this injury, according to the testimony of the doctors who testified on *both* sides of this case. The medical testimony shows that the grip in his injured hand has been substantially weakened, which factor directly affects his ability to do the kind of work he has always done. Whatever loss of earnings respondent suffered before trial —discussed by counsel for appellant in their brief—is comparatively unimportant compared to what loss in the future—in the 40 or so years of his expectancy—he may be reasonably expected to suffer. This is but one of the elements, but an important one.

An operation will, according to his doctor's testimony, confine him to a hospital for some time but it will immobilize his hand for a great length of time, and after that there will be a considerable period while the hand by exercise, and otherwise, is brought back to relative mobility and functioning. This presupposes a successful operation. If it is unsuccessful a claw hand might result, and the connotations of such a deformity (a possibility only it is true) need not be enlarged on. The doctor who testified for the defense did not say that a claw hand was not a possible consequence of an operation.

The respondent testified that only a few days before the trial the hand had given him considerable trouble.

[11] Added to these elements there is that of pain and suffering.

In Hicks v. Ocean Shore Railroad, Inc., supra, the hand injury was somewhat comparable with that in this case. A verdict there of $15,000 was reduced by the trial judge to $8,500. On appeal it was claimed that even the $8,500 was excessive, but held to be not so. That was in 1941, before our entry into World War II, and we feel that a court passing on the same question now, would have thought twice before making such a reduction. In Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449, a verdict of $11,500 was held to be not excessive for a hand injury. That was in 1916, 30 years ago. In May v. Farrell, 94 Cal.App. 703, 714, 271 P. 789, a verdict of $10,000 was held to be not excessive for a hand injury. That case was decided in 1928, the same year as the Supreme Court expressed itself in O'Meara v. Haiden, supra. Verdicts in each case for substantially larger amounts undoubtedly would be upheld under present economic conditions.

We adopt what was said in Roedder v. Lindsley, supra, on this subject: "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion (Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 586, 81 P.2d 894), and we cannot say that the amount awarded by the jury in this case is so large as to indicate that it was the result of passion or prejudice."

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

78 Cal.App.2d 175

## PEOPLE v. LEW.

Cr. 2429.

District Court of Appeal, First District, Division 1, California.

Feb. 20, 1947.

**1. Infants ⇐20**
**Rape ⇐20**

An information, charging defendant with rape on a female under 18 years old and registration at a hotel and occupation of same room with a 16 year old female not defendant's wife, thereby contributing to such female becoming and remaining a person leading or in danger of leading an idle, dissolute, lewd or immoral life, was not demurrable as not stating facts sufficient to constitute public offense, not substantially conforming to statutory requirements, and containing matter constituting legal justification of or excuse for offense charged. Pen.Code, §§ 261, 950-952; Welfare and Institutions Code, §§ 700, 702.

**2. Infants ⇐20**

In prosecution for contributing to minor female's delinquency, prosecutrix' testimony that she was 16 years old at time of alleged offense was sufficient to prove that she was a minor, though based on information given by her parents or others qualified to know. Welfare and Institutions Code, § 702.

**3. Criminal law ⇐1168(2)**

In prosecution for contributing to minor female's delinquency, where prosecutrix testified that registration card, certifying that she was 23 years old, was false and issued to her under fictitious name by police department of another city than that in which offense was committed, and defendant had opportunity to interrogate prosecutrix as to falsity of age given on card, defendant was not injured by prosecution's failure to produce card in evidence. Welfare and Institutions Code, § 702.

**4. Criminal law ⇐1159(4)**

The credibility of testimony is for trial court.

**5. Infants ⇐13**

In prosecution for contributing to minor female's delinquency, fact that prosecutrix may have been already a delinquent, leading idle, dissolute and immoral life, is no defense. Welfare and Institutions Code, § 702.

**6. Infants ⇐20**

In prosecution for contributing to minor female's delinquency, whether acts complained of contributed to prosecutrix becoming and remaining a person leading a dissolute and lewd life within statute is fact question for jury. Welfare and Institutions Code, § 702.

**7. Criminal law ⇐720(7), 1171(3)**

In prosecution for contributing to minor female's delinquency, district attorney's statements in argument to jury that certain drinks, purchased by defendant for prosecutrix, contained hard liquor, and that defendant impressed prosecutrix by taking her to expensive place where he fed her some liquor and a few highballs, were unwarranted, but not prejudicial to defendant, in view of prosecutrix' testimony that she consumed soft drinks. Welfare and Institutions Code, §§ 700, 702.

**8. Criminal law ⇐1037(1, 2)**

Alleged misconduct in district attorney's remarks to jury need not be considered on appeal from conviction, where defendant did not assign such remarks as misconduct nor request trial court to instruct jury to disregard them.

**9. Criminal law ⇐1174(1)**

Defendant was not prejudiced by trial court's denial of a juror's request for further instruction where court gave instruction, not complained of, in answer to question posed by such juror after such ruling.

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Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

Tom Lew was convicted of contributing to the delinquency of a minor female, and he appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment of conviction of violating section 702 of the Welfare and Institutions Code, and from the order denying appellant's motion for a new trial.

[1] The information in the present case charged two causes of action: 1. Rape upon a female person under the age of eighteen years, Penal Code, sec. 261, and 2. That the defendant registered at a hotel with a sixteen year old female, who was not the wife of appellant, and occupied the same room with her, thereby contributing to the female becoming and remaining a person who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life, Welfare and Institutions Code, secs. 700, 702. Defendant was acquitted of the rape charge and convicted on the charge of contributing to the delinquency of the minor. Defendant demurred on the ground that "the information does not state facts sufficient to constitute a public offense; that said information does not substantially conform to the requirements of sections 950 and 951 and 952 of the Penal Code of California; that said information contains matter which, if true, would constitute a legal justification or excuse of the offense charged." The court overruled the demurrer and appellant pleaded not guilty. The grounds of the demurrer are without merit.

The prosecutrix is from a midwestern state. There she was married by "a preacher" during the year 1945, but remained with her husband only one night. Evidently no license was demanded, nor was any question of age considered. In the present proceeding the prosecutrix testified that she would reach the age of seventeen on July 10, 1946. The information alleges, and the evidence shows, that the offense was committed on March 21, 1946.

On March 8, 1946, the prosecutrix was living with her parents in Contra Costa County. On that date she returned from school and dressed for a "junior prom" to be held in an adjoining district. However, with four other girls and a boy, she attended a dance in a different district. After the dance she returned to her home town with two of the girls and the boy. From there she visited a nearby city alone, where she attended a midnight show. She then started home on a bus, San Francisco bound, which passed through her home town. On the bus she met one Lee Wong, who invited her to San Francisco to see Chinatown. They arrived in San Francisco at about 3:15 a.m. and proceeded to Wong's apartment on Grant Avenue. The girl remained there for the night, sleeping on a couch in the dining room. Appellant, Tom Lew, and Lee Wong occupied the bedroom. The next day she had lunch with Wong, who gave her $5; she already possessed $7. That evening she had dinner with appellant, Tom Lew, and left by train for home. On the train she met a man and his wife, with whom she remained for several days. While with these people she procured, through the man, according to her testimony, a false registration card showing her age as twenty-three years. She met a sailor and accompanied him out of town for a night; also she visited a girl friend some 50 miles away. About March 20th or 21st she returned to San Francisco and telephoned Wong. Appellant Tom Lew answered the telephone and, by appointment, met her in front of Wong's apartment. Appellant testified that the girl told him she was supposed to meet a sailor in one of San Francisco's "sky rooms" and that he accompanied her there. From here the appellant and the girl visited a Chinese sky room and several inns and a restaurant. On the way out of the restaurant one of the high heels of the prosecutrix' shoes broke; she told appellant that she could not have it repaired; that she had no money and no place to stay. Appellant took her to a hotel, the register of which shows the following: "Name—Tom Lew and Alice [stipulated to be in appellant's writing] Street—blank City and State—Bakersfield, Calif. [stipulated to be in the prosecutrix' handwriting] Room—205, the date, 3/20/46 Rate—three dollars Cot—one dollar—four dollars Number in party—two Arrived—ten p.m. Initials of the clerk F. B." On the other side of the card: "Room 205—Lew, Tom & Alice." Prosecutrix testified to an act of sexual intercourse, after which appellant went to a

couch in the room. Appellant testified that he did not stay in the room more than ten minutes; that he left with the broken shoe and did not return until about 11:30 the next morning with a new pair of shoes. The prosecutrix testified that he left with her broken shoe and brought her new shoes the next day. Later in the day she went to Wong's apartment. Wong was not there but arrived at about 3 a.m. She complained of not feeling well and went to another room in the apartment to lie down. Appellant and Wong were preparing to eat when police officers arrived; they arrested appellant, Wong and the prosecutrix between 3:15 and 3:30 a.m. The police asked the men what the girl was doing there, and they replied that she had no place to stay. Appellant, when asked whether he had any act of sexual intercourse with the girl, answered "Just once." Appellant denies making such statement.

Appellant contends: 1. That the evidence does not support the verdict; 2. That appellant did not contribute to delinquency; 3. That the second count does not charge a public offense; 4. That the District Attorney is chargeable with prejudicial misconduct in his argument to the jury; and 5. That the court's denial of a juror's request for an instruction was error.

[2] The first contention is based upon the claim that it was not established by pleading or proof that the prosecutrix was a minor; that is, a person under the age of twenty-one years. The age of the alleged delinquent is a material issue under the provisions of the Welfare and Institutions Code, sec. 702. The count upon which the appellant was convicted alleged the prosecutrix to be "sixteen years of age" and "a person under twenty-one years." The evidence shows that the prosecutrix testified that she was sixteen at the time of the alleged offense. This evidence, though based upon information given by the prosecutrix' parents or others qualified to know, is sufficient to prove that issue. In People v. Pribnow, 61 Cal.App. 252, 258, 214 P. 475, 478, it is stated: "The testimony of a prosecutrix as to this fact [her age] is admissible, although her knowledge of it is derived from the statements of her parents or by family repute. People v. Ratz, 115 Cal. 132, 46 P. 915. Moreover, the jury was entitled to consider the appearance of the prosecuting witness as indicating her age. People v. Koosistra, [58] Cal.App. [277,] 208 P. 316."

[3, 4] Appellant claims that certain evidence was suppressed and that therefore the conclusion should be reached that such evidence if produced would be adverse. The evidence referred to is the card issued to the prosecutrix under a fictitious name, certifying her age to be twenty-three years. Although the prosecution did not produce the card, the prosecutrix testified as to its falsity. On cross-examination she testified that it was issued under a fictitious name in another city by the police department. Appellant had an opportunity to interrogate the witness relative to the falsity of the age given on the card. An accused should be given the advantage of every legal right in an effort to maintain his innocence. Nevertheless, under all the facts it should not be held that the appellant was injured by the prosecution's failure to produce the card. The credibility of testimony is a matter to be determined in the trial court. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Conterno, 51 Cal.App.2d 167, 124 P.2d 610; People v. Schultz, 49 Cal. App.2d 38, 120 P.2d 893.

[5, 6] The next point urged is that appellant's conduct toward the prosecutrix was not that condemned by Welfare and Institutions Code, sec. 702. The information follows the portion of the section applicable to the facts as set forth in the information. Such portion of the information, and the evidence sustaining the allegations of the information have been set forth heretofore. The gist of the offense alleged is that Tom Lew registered and occupied a room in a hotel with the prosecutrix, thereby contributing to the prosecutrix becoming and remaining a person leading a dissolute and lewd life. In passing it may be well to observe that the fact that the prosecutrix may have been already a delinquent leading an idle, dissolute and immoral life, is no defense to a prosecution for contributing to delinquency, since the

statute punishes acts which cause or tend to cause a minor not only to become but to remain delinquent. People v. Hanford, 35 Cal.App. 799, 171 P. 112. The question whether the acts complained of have the effect denounced by section 702 is one of fact for the jury. In People v. Calkins, 48 Cal.App.2d 33, 119 P.2d 142, a minor girl occupied a bedroom with Calkins for two weeks; it was held that the facts were sufficient to support the judgment finding a violation of sec. 702.

[7-9] Prior to registering at the hotel the prosecutrix and Lew visited several sky rooms and a restaurant. The District Attorney argued to the jury, against the objection of appellant's counsel, that certain drinks purchased by Lew for the prosecutrix contained hard liquor; that Lew impressed the girl by taking her to an expensive place where he fed her "some liquor" and "a few highballs." The statements were unwarranted but not prejudicial, in view of the testimony of the prosecutrix that she consumed soft drinks. Upon the objection of appellant's counsel, the court stated that they were soft drinks and the District Attorney expressly stated that whatever they were drinking, it was a question for the jury. In no instance did appellant assign the remarks of the District Attorney as misconduct nor did he request that the jury be instructed to disregard the District Attorney's remarks. Under such circumstances the alleged misconduct need not be considered on appeal. People v. Yecny, 53 Cal.App.2d 474, 478, 128 P.2d 146. Lastly, appellant contends that the court erred in denying the request of a juror for further instruction. After his request was denied, the juror nevertheless posed his question for he asked, "About the age?" The court then instructed that the only matter which the jury was to consider on the issue of age was "evidence that has come from the lips of witnesses; and it is a question of fact for the jury to determine as to the age of the girl; and you are further instructed that a girl under the age of eighteen years cannot consent to the act of sexual intercourse." No complaint is made of the foregoing instruction. Under these circumstances appellant was not prejudiced by the court's ruling. The contentions made by appellant are without merit.

The judgment and order denying the motion for a new trial are affirmed.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.




78 Cal.App.2d 87

## POLLIND v. POLICH.

Civ. 15337.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1947.

Rehearing Denied March 13, 1947.

**1. Automobiles ⇐171(13)**

In determining negligence of defendant whose automobile on through street collided at intersection with automobile in which plaintiff was riding, defendant had right to assume that other automobile would make required stop until he observed, or in exercise of ordinary care would have observed, that the driver was not making a stop, and that the automobile would not enter intersection so closely to defendant's automobile as to constitute an immediate hazard. Vehicle Code, §§ 552, 577.

**2. Automobiles ⇐245(14, 44, 61)**

In action for injuries to plaintiff when automobile in which he was riding was struck by defendant's automobile proceeding on through street across intersection, whether defendant was negligent in assuming that driver of plaintiff's automobile would remain at boulevard stop sign until other automobiles had passed, whether defendant's automobile proceeding at 35 miles per hour was driven at negligent rate of speed, and whether negligence of driver of plaintiff's automobile was sole proximate cause of accident, were for jury. Vehicle Code, §§ 552, 577.

**3. Automobiles ⇐246(22)**

In action for injuries to plaintiff when automobile in which he was riding was

struck by defendant's automobile at street intersection, instructions were not erroneous as being susceptible of interpretation that plaintiff could not recover unless defendant's negligence was shown to have been the sole proximate cause of the injuries. Vehicle Code, §§ 552, 577.

**4. New trial ⇐143(1)**

The verdict of jury cannot be impeached by affidavits of jurors, except upon ground that it was arrived at by resort to chance, except where it is shown by statements made by juror during course of trial and by his voir dire examination that at time of examination he intentionally concealed facts which would tend to show that he entertained a state of mind which would render him disqualified to serve as a fair and impartial juror. Code Civ.Proc. § 657, subd. 2.

**5. New trial ⇐143(1)**

Affidavits of jurors as to statements of foreman that he knew the intersection involved in automobile collision well, and that he had opinion that "kid drivers shouldn't be allowed on streets", were incompetent as evidence on motion for new trial in action for injuries to 17-year-old boy on ground that foreman falsely answered questions on voir dire examination, where jurors were not asked as to their knowledge of intersection or as to their prejudice against young drivers. Code Civ. Proc. § 657, subd. 2.

**6. Appeal and error ⇐110, 782**

Attempted appeals from order striking out affidavits of jurors on motion for new trial and order denying motion for new trial would be dismissed.

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Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Walter Pollind, a minor, by his guardian ad litem, Mrs. A. Pollind, against John P. Polich to recover for injuries to plaintiff when an automobile in which he was riding was struck by defendant's automobile. From a judgment for defendant, plaintiff appeals.

Judgment affirmed, and attempted appeals from orders striking out affidavits of jurors on motion for new trial and order denying motion for new trial dismissed.

McCarroll & McCarroll, of Los Angeles, for appellant.

Bauder, Veatch & W. L. Gilbert, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff and Buddy Stansfield were guests riding in the Ford automobile of Roy Secrest, the three being boys approximately 17 years old. The car entered the intersection of 43d Street and Leimert Boulevard from the west, traveling from 5 to 10 miles an hour as is crossed the intersection. Leimert Boulevard at 43d Street is approximately 90 feet in width, bisected in the center by street car tracks extending parallel with Leimert Boulevard. When the front wheels of the Ford were either over, or very close to, the westerly rail of the southbound street car tracks, it was struck in the left rear portion by a Buick automobile driven by defendant, traveling south on Leimert Boulevard at approximately 35 miles an hour. There was a boulevard stop sign on 43d Street at Leimert but none on the latter street. Plaintiff brought suit for injuries sustained in the accident. The case was tried to a jury, a verdict returned in favor of defendant, and plaintiff appeals.

[1, 2] One of the points on appeal is that the evidence established as a matter of law that defendant was guilty of negligence which was a proximate cause of the accident. In plaintiff's brief it is said: "The only conflict of any importance is as to whether or not the driver of the Ford car, in which appellant was a passenger, made the boulevard stop prior to entering the intersection." The evidence is then analyzed for the purpose of showing that there was no substantial evidence that the driver of the Ford car did not make the boulevard stop. That, however, was not the decisive question in the case. Section 577 of the Vehicle Code reads as follows: "The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop before enter-

ing the nearest crosswalk or, if none, then at a limit line when marked, otherwise before entering such highway or intersection." The jury was instructed in the language of that section and also of section 552, Vehicle Code, that "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." Defendant had a right to assume not only that the car in which plaintiff was riding would make the required stop at 43d Street, until he observed or, in the exercise of ordinary care, would have observed that the driver was not making a stop, but also that the Ford car would not enter the intersection in front of cars approaching so closely as to constitute an immediate hazard. Defendant's car was traveling behind and in a line to the left of the car of one Pulliam. Defendant testified that he saw the Ford car approaching when it was about 30 feet west of the intersection, but as he was passing the Pulliam car his view of the Ford was obstructed as he approached the intersection, and that he assumed that Secrest, the Ford driver, would stop long enough to allow his car and the Pulliam car to pass through the intersection first. He also testified that he next saw the Ford when it was about 12 or 15 feet in front of him, but that he, the defendant, could not swerve to the right to avoid a collision because of the Pulliam car. Secrest testified that he saw the Pulliam car approaching but did not see that of defendant. It was clearly a question of fact whether defendant was guilty of negligence in assuming that Secrest would not enter the intersection in front of his car and that of Pulliam, but would remain at the boulevard stop sign until the two cars had passed. De Priest v. City of Glendale, 74 Cal.App.2d 464, 169 P.2d 17. It was also a question of fact whether under the circumstances defendant's car was being driven at a negligent rate of speed. Greenwood v. Summers, 64 Cal.App.2d 516, 149 P.2d 35; Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 57, 58, 15 P.2d 217. We are satisfied from an examination of the evidence that the jury was justified in finding defendant to have been free from negligence and that the negligence of Secrest was the sole proximate cause of the accident. The verdict finds support in the evidence and no reason appears why it should be disturbed.

[3] An instruction requested by plaintiff was modified by the court to read as follows: "If you find that the injuries of plaintiff were proximately caused by the negligence of defendant John Polich, your verdict should be for the plaintiff. The driver of the car in which plaintiff was riding is not a party to this action. His conduct is not to be considered by you, except as it may or may not tend to show whether or not defendant was negligent in a way which proximately caused plaintiff's injuries." An instruction requested by defendant was modified by the court to read: "The fact that the plaintiff was riding as a guest in the Ford car, and was not chargeable with the negligence, if any, of the operator of said vehicle, does not relieve the plaintiff of his burden of proving that his injury was the result of the negligent conduct of the defendant." Appellant complains that in modifying these two instructions, the court did not properly instruct the jury on the doctrine that the negligence of a driver is not imputed to a guest passenger. The instructions were omitted from the settled statement under a stipulation that they might be transferred to this court as a part of the record on appeal. We have examined the original requested instructions and find no reversible error in the modifications thereof. Plaintiff's requested instruction was not a clear or adequate statement of the rule that the negligence of the driver was not imputable to his guests, and in its original form would have been no more favorable to plaintiff than it was as modified. No other instruction on the rule of imputed negligence was requested by plaintiff and none was given. The jury was, however, instructed

that plaintiff should recover if it should be found that defendant was negligent and that his negligence proximately contributed to the accident. The two modified instructions, read together, are not susceptible of the interpretation claimed by plaintiff, namely, that plaintiff could not recover unless defendant's negligence was shown to have been the sole proximate cause of the injuries.

Plaintiff's third contention is that the trial court should have granted his motion for a new trial because of alleged misconduct of the jury which materially affected his substantive rights. It is claimed that one of the jurors, Haden, falsely answered questions on his voir dire examination, in that he falsely denied having any knowledge of the intersection where the accident occurred, and falsely concealed his personal knowledge and opinion of the intersection, and that he was prejudiced against a class of persons to which appellant belonged, namely, boy drivers, and falsely concealed such fact on his voir dire examination. It appeared by the affidavits of other jurors on the panel that Mr. Haden, who was foreman, stated many times that he knew the intersection well, that he had traveled Leimert Boulevard at that point many times and that it is a highly traveled boulevard; "that you don't expect cross traffic at that intersection"; also, that Mr. Haden made statements to the effect that "kid" drivers were reckless and "shouldn't be allowed on the streets."

[4, 5] The verdict of a jury cannot be impeached by affidavits of the jurors, except upon the ground that it was arrived at by resort to chance. Code of Civ.Proc., sec. 657, subd. 2; People v. Gidney, 10 Cal. 2d 138, 146, 73 P.2d 1186; Maffeo v. Holmes, 47 Cal.App.2d 292, 117 P.2d 948. Exception is made to this rule where it is shown or attempted to be shown by statements made by a juror during the course of the trial and by his voir dire examination that at the time of the examination he intentionally concealed facts which would tend to show that he entertained a state of mind which would render him disqualified to serve as a fair and impartial juror. Estate of Mesner, 77 Cal.App.2d 667, 176 P.2d 70. Particular conditions under which affidavits of jurors are admissible need not be considered. The present case is clearly not within the exception to the general rule. We might well disregard this point altogether, since the engrossed statement does not contain the voir dire examination of the jurors. However, respondent concedes for the sake of the argument, as contended in appellant's brief, that the jurors, including Mr. Haden, gave a negative answer to the question by the court: "Do you know anything about this collision * * * at the intersection of 43d Street and Leimert Boulevard?" They were not asked any questions as to their knowledge of the intersection, traffic conditions in the vicinity, or as to their prejudice against young drivers. If it had been feared by plaintiff that the jurors might be prejudiced against the driving of automobiles by young boys, they should have been questioned on that point. Davilla v. Liberty Life Ins. Co., 114 Cal.App. 308, 312, 299 P. 831. And it may be, too, that Mr. Haden's thoughts on the subject were developed during the trial from testimony indicating that the Secrest car was driven slowly through the intersection without regard to oncoming traffic on the arterial highway. The fact that he was familiar with the intersection is of no consequence. A diagram was introduced in evidence and there was much testimony as to the traffic conditions in the locality. If there were merit in appellant's argument, it would frequently be impossible to find either qualified jurors or judges to try actions arising out of traffic accidents. The affidavits of the jurors as to the statements of Mr. Haden were incompetent as evidence on the motion for new trial, for the reason that, taken with the voir dire examination of the juror, they did not tend to prove any false statement or concealment by him of a material fact or the existence of a prejudicial state of mind at the time of his examination.

[6] The judgment is affirmed. The attempted appeals from the order striking out the affidavits of jurors on motion for new trial, and the order denying the motion for new trial are dismissed.

DESMOND, P. J., and WOOD, J., concur.

77 Cal.App.2d Supp. 929

**PEOPLE v. MARINE PRODUCTS CO. et al.**

**No. 136841.**

Appellate Department, Superior Court, San Diego County, California.

Jan. 17, 1947.

Rehearing Denied Feb. 4, 1947.

**1. Commerce ⇐10**

In absence of any action taken by Congress on subject matter, state, in exercise of its police power, may establish quarantines against human beings, animals, or plants, the coming in of which may expose the state's inhabitants, stock, trees, plants, or growing crops to disease, though such quarantines necessarily affect interstate commerce.

**2. Commerce ⇐10**

In absence of any action taken by Congress on subject matter, a state may forbid exportation of game taken within its territorial limits on theory that state in its sovereign capacity is owner of such game and entitled to confine its use to its inhabitants, or to forbid possession or importation of game animals, birds, or fish under conditions which would further the evasion of its own seasonal or other restrictions on the taking of such game within territorial limits.

**3. Constitutional law ⇐48**

The presumption of validity attaches to an act of Legislature, purporting to have been enacted in pursuance of the police power, and therefore, if there is any tenable theory on which the legislation can be held to further any legitimate concern of the state, it must, as against attack that it is merely an arbitrary interference with the liberty of the individual, be upheld.

**4. Commerce ⇐8(10)**

The statute making it unlawful to sell spiny lobster cooked or otherwise prepared for human consumption outside the state, is void under the commerce clause on ground that the federal government has fully occupied the field in view of federal statute providing for importation, both of lobster and shellfish, "fresh or frozen" or "prepared or preserved in any manner." Fish and Game Code, § 786.5; Tariff Act of 1930, § 201, par. 1761, 19 U.S.C.A. § 1201, par. 1761; U.S.C.A.Const. art. 1, § 8.

**5. Judgment ⇐563(1)**

Denial of application by District Court of Appeal for writ of prohibition forbidding municipal court to enter on trial of prosecution for violation of the Fish and Game Code, on ground that statute was invalid and invested court with no jurisdiction to proceed, and denial of an application for hearing in Supreme Court without opinions was not res judicata of the validity of statute and did not preclude appellate department of Superior Court from declaring the statute invalid. Fish and Game Code, § 786.5.

On Petition for Rehearing.

**6. Appeal and error ⇐832(4)**

Though it is not the usual practice to consider, on application for rehearing, points not previously urged, appellate department of Superior Court was justified in doing so where validity of state statute was involved.

**7. Commerce ⇐79**

Generally, a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown.

**8. Commerce ⇐8(10)**

Congressional act entitled "An Act to enlarge the powers of the Department of Agriculture, prohibit transportation by interstate commerce of game killed in violation of local laws, and for other purposes", though deemed applicable to spiny lobsters, does not indicate Congressional intent to leave to the states the regulation of possession of imported game so as to validate the Fish and Game Code provision making it unlawful to sell spiny lobsters cooked or otherwise prepared for human consumption outside of the state. Fish and Game Code, § 786.5; Lacey Act, §§ 1, 5, 16 U.S.C.A. § 701, 18 U.S.C.A. § 395.

**9. Commerce ⇐8(10)**

The statute making it unlawful to sell spiny lobster cooked or otherwise prepared for human consumption outside the state cannot be sustained as an exercise of the police power in aid of sanitation, since such lobster cannot be used for human consump-

tion unless it is cooked. Fish and Game Code, § 786.5.

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Appeal from Municipal Court, City and County of San Diego; Philip Smith, Judge.

The Marine Products Company, a corporation, and L. Small, were convicted of violating section of Fish and Game Code making it unlawful to sell spiny lobsters cooked or prepared outside the state, and they appeal.

Judgment reversed.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for appellants.

Thomas Whelan, Dist. Atty., James Don Keller, Dist. Atty., and Roland DeFere, Deputy Dist. Atty., all of San Diego, for appellee.

PER CURIAM.

Section 786.5 of the Fish and Game Code of the State of California as amended in 1941 is as follows:

"It is unlawful to sell, expose for sale, offer to sell, barter, trade, or have in possession any spiny lobster which has been cooked or otherwise prepared for human consumption outside of the State of California. This section shall not apply to any canned lobster or other shellfish prepared under the supervision of the Department of Agriculture or the corresponding department of any other State or nation."

In the present action the defendants Marine Products Company, a corporation, and L. Small, were charged with the violation of the above quoted Section 786.5 in that on or about March 5, 1946, in San Diego Township in the County of San Diego, State of California, they "did then and there wilfully and unlawfully sell, expose for sale, offer to sell, barter, trade and have in their possession certain fresh, cooked, spiny lobsters which had been cooked and otherwise prepared for human consumption outside of the State of California, to wit, in the Republic of Mexico." Originally the complaint contained certain further allegations which were, however, stricken out on the plaintiff's motion without objection from the defendants.

Upon their arraignment the defendants moved to dismiss the complaint for failure to state a public offense, in that, according to their contention, the said statutory provision is unconstitutional and void. This motion having been denied, they pleaded "not guilty" and after various continuances the trial proceeded. It was stipulated that on March 5, 1946, the defendants in San Diego Township, County of San Diego, State of California, wilfully had in their possession certain fresh, cooked, spiny lobsters which had been cooked and otherwise prepared for human consumption outside of the State of California, to wit, in the Republic of Mexico. The defendants offered to prove that the said spiny lobsters were cooked and prepared under the supervision of a department of the government of Mexico corresponding to the Department of Agriculture of the United States. The Court ruled this offer of proof immaterial, and, both parties having rested, found the defendants guilty and fined them $25.00 each, from which judgment the defendants' appeal is prosecuted.

Section 782 of the Fish and Game Code establishes an "open season" for the taking of spiny lobster extending from October first of each calendar year to March fifteenth of the following calendar year. Section 786 permits spiny lobster to be brought into the state from Mexico during the open season. The gist of the complaint, therefore, is that the spiny lobster in the defendants' possession, not being canned, had been cooked and otherwise prepared for human consumption not in California but in Mexico.

The sole question before us is whether or not the statute involved is constitutional.

Section 8 of Article I of the Constitution of the United States empowers the Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In pursuance of this power, the Federal Food, Drug, and Cosmetic Act recognizes seafoods as proper subjects of commerce, 21 U.S.C.A. § 372a and in 19 U.S.C.A. § 1201, it is provided that:

"On and after June 18, 1930, except as otherwise specially provided for in this

chapter, the articles mentioned in the following paragraphs, when imported into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, American Samoa, and the Island of Guam), shall be exempt from duty:

"* * * Par. 1761. Shrimps, lobsters, and other shellfish, fresh or frozen (whether or not packed in ice), or prepared or preserved in any manner (including pastes and sauces), and not specially provided for."

[1] As was said in Oregon-Washington Railroad and Navigation Company v. State of Washington, 270 U.S. 87, 93, 46 S.Ct. 279, 281, 70 L.Ed. 482:

"In the absence of any action taken by Congress on the subject-matter, it is well settled that a state, in the exercise of its police power, may establish quarantines against human beings or animals, or plants, the coming in of which may expose the inhabitants, or the stock, or the trees, plants, or growing crops, to disease, injury, or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce." Citing Gibbons v. Ogden, 9 Wheat. 1, 203, 205, 6 L.Ed. 23, and Minnesota Rate Cases, (Simpson v. Shepard), 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18.

"Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments, having no reasonable relation to health (Hannibal & St. Joseph Railroad Co. v. Husen, 95 U.S. 465, 472, 473, 24 L.Ed. 527); but the power of the state to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question." (Minnesota Rate Cases, supra, 230 U.S. at page 406, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18, quoted in Oregon-Washington Railroad and Navigation Co. v. State of Washington, supra, 270 U.S. at page 95, 46 S.Ct. 279, 70 L.Ed. 482, and citing Morgan's etc. Steamship Co. v. Board of Health of State of Louisiana, 118 U.S. 455, 6 S.Ct. 114, 30 L.Ed. 237; Missouri, Kansas and Texas Railway Co. v. Haber, 169 U.S. 613, 18 S.Ct. 488, 42 L.Ed. 878; State of Louisiana v. Texas, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347; Rasmussen v. State of Idaho, 181 U.S. 198, 21 S.Ct. 594, 45 L.Ed. 820; Compagnie Francaise, etc., v. Louisiana State Board of Health, 186 U.S. 380, 22 S.Ct. 811, 46 L.Ed. 1209; Reid v. Colorado, 187 U.S. 137, 138, 23 S.Ct. 92, 47 L.Ed. 108; Asbell v. Kansas, 209 U.S. 251, 28 S.Ct. 485, 52 L.Ed. 778, 14 Ann. Cas. 1101."

[2] Similarly, it is well settled that, in the absence of any action taken by Congress on the subject matter, it is within the competency of the states to forbid the exportation of game taken within their territorial limits on the theory that they are in their sovereign capacities the owners of such game and entitled to confine its use to their inhabitants (Geer v. State of Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; In re Florence, 107 Cal. App. 607, 290 P. 652); or to forbid the possession within their territory or the importation into their territory of game animals, birds or fish under conditions which would further the evasion of their own seasonal or other restrictions on the taking of such game within their territorial limits, by making it easy for evaders to claim that game possessed by them and actually taken illegally within the territorial limits of the state was taken legally outside its territorial limits and imported. Silz v. Hesterberg, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75; Ex parte Maier, 103 Cal. 476, 37 P. 402, 42 Am.St.Rep. 129; Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400, 92 A.L.R. 1264.

In such circumstances, and subject to the paramount right of Congress to regulate interstate and foreign commerce, the circumstance that the state legislation affects such commerce is not deemed any reason for holding it invalid. This, however, is, in general, true only where the Federal government has not, through appropriate legislation, occupied the field, for

where it has not only undertaken to deal with the subject but enacted legislation broad enough in scope to cover it such legislation in ordinary cases under the Federal Constitution necessarily supersedes all right on the part of the state government to deal with the matter at all.

There is, to be sure, some distinction as concerns the respective spheres of the federal and state governments, between state regulations for purposes of sanitation and state regulations intended to conserve the local game supply. While both may affect interstate and foreign commerce, quarantine regulations are not based on any theory that the commodity against which the quarantine is declared is not legitimately an article of commerce, but are based merely upon the proposition that though generally an article of commerce there is some reason affecting the health of the community or the immunity of its inhabitants, livestock or agricultural products from disease which demands that the article involved be excluded. In the case of game, however, an additional principle is involved, namely that creatures ferae naturae, because they are the property of the state, may only become the subject of commerce by its consent. Where, however, as in the case of spiny lobster, the article involved is recognized by the state itself, as a legitimate object of commerce, as spiny lobster is specifically so recognized by Section 786 of the Fish and Game Code, this argument as applied to the respective spheres of the state and federal governments is of strictly limited application. Foster, etc., Packing Co. v. Haydel, 278 U. S. 1, 49 S.Ct. 1, 73 L.Ed. 147. It may still be available where the regulation involved has to do with the manner of taking the game within the territorial limits of the state (In re Florence, supra, 107 Cal.App. at page 614, 290 P. 652), but it can in such circumstances hardly be stretched to the point of upholding, in conflict with federal law, a state enactment forbidding or regulating the importation of the game involved.

[3] It is, in fact, here urged that the provisions of Section 786.5 under attack are no bona fide attempt, either on the one hand to prevent infringement of the laws of California having to do with the taking of spiny lobster within its limits or prescribing the seasonal limits for taking spiny lobster or the sizes of such lobster that may be taken, or on the other hand, any bona fide attempt to protect the healthfulness of spiny lobster meat for human consumption; but are mere attempts to erect a barrier against cooked but uncanned spiny lobster for the financial benefit of those engaged in the lobster industry in California as against those who cook spiny lobster elsewhere, and that the statute, therefore, is not really an effort to exercise any power left to the state by the Federal Constitution, but a mere attempt to protect California industry against competition from elsewhere, and therefore no mere incidental interference with interstate and foreign commerce but a bald usurpation by the state of power exclusively vested in Congress, and as such, void under such authorities as Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55. Such a proposition, under the terms of the statute, is unquestionably arguable; and it may be urged with some show of logic that the statute does not on its face appear to be a legitimate police regulation at all but a mere arbitrary interference with the liberty of the individual of the type involved in such cases as In re Lyons, 27 Cal.App.2d 182, 80 P.2d 745 (but see Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039). The presumption of validity attaches, however, to an act of the legislature purporting to have been enacted in pursuance of the police power, and, therefore, if there is any tenable theory upon which the legislation can be held to further any legitimate concern of the state, it must, as against that species of attack, be upheld.

Whether "spiny lobster," however, is or is not included properly within the designation of "lobster" it is certainly shellfish, and the federal statute quoted provides for the importation both of lobster specifically and of shellfish generally "fresh or frozen" or "prepared or preserved in any manner (including pastes or sauces)."

[4] It appears to us, then, that in this instance the field has been fully occupied by Congressional enactment and therefore

that, under the commerce clause of the Federal Constitution, state legislation on the subject is excluded, and consequently that we are spared the need for entering into any extensive analysis of Section 786.5 for the purpose of discovering whether, had not Federal legislation covered the ground, it could be maintained as a legitimate exercise of the authority of the state and only incidentally affecting state or foreign commerce. Regardless of any such inquiry and because Congress has fully covered the field, we must hold that the statute, as applied to the instant case, is inoperative.

[5] One other contention made for the plaintiff should be noticed. Counsel call our attention to the fact that an application was made to the District Court of Appeal for the Fourth District for a writ of prohibition forbidding the Municipal Court to enter upon the trial of the case at bar on the ground that the statute involved was invalid and invested it with no jurisdiction to proceed, and that such application was denied without the rendition of any opinion; also that an application for hearing of the matter thereupon made to the Supreme Court was also denied by that Court without an opinion. It is claimed as a result that the validity of the statute attacked is res adjudicata. There is no substance in the contention. Neither the proceeding in the District Court of Appeal nor the refusal of the Supreme Court to review it were adverted to at the actual trial before the Municipal Court, nor do they form any part of the record before us. Even if we are entitled to take notice of them upon the present appeal, however, these proceedings are wholly inconclusive as respects the question now before us. The writ of prohibition may have been denied for the mere reason that the Appellate and Supreme Courts did not consider it necessary to anticipate the determination of the trial court upon the validity of the statute and saw no exigency justifying their interposition.

The judgment is reversed.

On Petition for Rehearing.

On the petition for rehearing our attention is directed to the Act of Congress commonly known as the Lacey Act, approved May 25, 1900, entitled "An Act to enlarge the powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes." 31 Stats. at Large, p. 187 et seq.

[6] While it is not the usual practice to consider, on application for rehearing, points not previously urged, we are probably justified in doing so when, as here, the validity of a state statute is involved. Moreover, on further consideration we think it proper to pursue certain inquiries which in our original opinion we had not for the purposes of this case deemed necessary. The Act referred to has been recast, and, in its present form, appears as Section 701 of Title 16 and Sections 391 to 395, both inclusive, of Title 18, United States Code Annotated. Certain, though not all of the functions originally invested by the Act in the Department of Agriculture have now been transferred to the Department of the Interior.

Said Section 701 of Title 16 recites that:

"The object and purpose of this section and sections 391-393, 394 and 395 of Title 18, is to aid in the restoration of such (game and wild) birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed."

These statutory provisions are, as we understand the contention, relied on by the prosecution as evincing the purpose on the part of Congress of leaving to the states, in the exercise of their police powers, the regulation of the possession of all game imported from outside their limits notwithstanding that some such game as, for example, lobsters and shellfish generally, are, as noted in our original opinion, expressly recognized by Federal statute as a legitimate subject of commerce, and spiny lobster specifically so by Section 786 of the California Fish and Game Code.

In Gibbons v. Ogden, 9 Wheat. 1, 200, 6 L.Ed. 23, Chief Justice Marshall defined the issues there involved by saying that:

"The sole question is, can a State regulate commerce with foreign nations and

among the States, while Congress is regulating it?"

And his answer was, No. It was, however, in that case recognized that the states might legitimately pass and enforce reasonable inspection laws affecting imports, notwithstanding that commerce as such was at the same time being regulated by Congress.

The Court said (9 Wheat. at page 203, 6 L. Ed. 23):

"But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the States.

"That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

"No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation."

In other words, the power to regulate commerce among the states and with foreign nations emanates from the express grant in the Federal Constitution, whereas the power to pass and enforce inspection laws is referable to the reserved powers of the states. The Court recognized that Congress in regulating interstate commerce, and the State in passing laws on "subjects acknowledged to be within its control" and with a view to those subjects, might adopt measures of substantially the same character, but noted that in such event, while the one which Congress might adopt would derive its authority from the Constitution, the one adopted by the State would not derive its authority from any particular granted power but rather from the residual power of the State, and went on to say:

"All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

It was further noted that the measures adopted respectively by the Federal and State governments, in pursuance of these distinct powers might be harmonious with each other, but that where conflicting or mutually destructive, that of the State must give way, because of the provision of the Federal Constitution making it and statutes enacted under its authority the supreme law of the land. In Brown v. State of Maryland, 12 Wheat. 419, 446, 6 L.Ed. 678, Chief Justice Marshall again asked:

"What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?"

He answered:

"This question was considered in the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior."

[7] As said in Schollenberger v. Commonwealth of Pennsylvania, 171 U.S. 1, at page 12, 18 S.Ct. 757, at page 761, 43 L.Ed. 49:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In [State of] Minnesota v. Barber, 136 U.S. 313, 10 S.Ct. 862, [34 L.Ed. 455], it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called 'inspection law.' The principle was affirmed in Brimmer v. Rebman, 138 U.S. 78, 11 S.Ct. 213, [34 L.Ed. 862,] and in Scott v. Donald, 165 U.S. 58, 97, 17 S.Ct. 265, [41 L.Ed. 632]."

These observations would be applicable a fortiori where the interference by the State was not merely with interstate but also foreign commerce.

It is said in an article on the subject in 53 Harvard Law Review (pp. 1185, 1186):

"One focal point of danger to national trade, inviting the extended use of federal powers, is created by state enactment of food inspection laws. Although the necessity of state action to preserve the health of its citizens has led the Supreme Court to take a liberal view of the state power to inspect products coming from other states or foreign countries, some limitations have been imposed. The state may not levy an inspection tax on the introduction of extra-state goods which discriminates against those goods because of their origin." (Citing Hale v. Bimco Trading, Inc., 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771; Voight v. Wright, 141 U.S. 62, 11 S.Ct. 855, 35 L.Ed. 638; and Brimmer v. Rebman, 138 U.S. 78, 11 S.Ct. 213, 34 L.Ed. 862.) "Nor may it draw its inspection laws so that it is physically impossible for an extra-state producer to meet local requirements." (Citing State of Minnesota v. Barber, supra, and Foster, etc., Packing Co. v. Haydel, supra, referred to in our original opinion.)

The question, then, with which we have to deal in the case at bar is whether there is or is not any real conflict between the recognition of lobsters and shellfish generally as legitimate articles of commerce and the inhibitions attempted by Section 786.5 of the California Fish and Game Code, and it seems to us that an inhibition directed against the importation of a commodity so recognized as a legitimate article of commerce merely because when imported it is cooked exhibits such a conflict with the policy of Congress as expressed in Par. 1761, Section 1201, Title 19, United States Code Annotated, that it cannot stand unless some ground can be found for resolving the conflict. As we saw, the claim is now made and it is that claim which we are at this point considering, that Congress itself has thrown wide the door for the type of legislation here involved by the Lacey Act as now revamped and in force. The claim that an intention to leave the door open for such state legislation as is here involved can be elicited from the above cited provisions of Titles 16 and 18 of the United States Code Annotated is presumably based on the language of Section 395 of the latter which reads as follows:

"Dead bodies of game animals or game or song birds, subject to laws of State. All dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory,* and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

[8] Even if the expression "game animals," as used in this enactment, is to be taken to include shellfish, such as spiny lobster, which is at least doubtful, it seems to us that the above emphasized language "to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory," is enough not only to negative any such claim but to indicate the contrary.

It is true that there are other grounds than the purity of an article, as a food product, on which state legislation regulating its admission may be allowed, such for example, in the case of game, as the protection of domestic game, though, as noted in our original opinion, when the State recognizes game of a particular kind as a permissible article of commerce it thereby disables itself from wholly excluding it.

But we think it clear that Section 786.5 of the California Fish and Game Code was not designed for the protection of local spiny lobster. It has no connection with our seasonal restrictions on taking them. It purports by its terms to apply even to spiny lobster, if cooked and uncanned, imported during what is in California the open season. If, however, it be claimed that spiny lobster when cooked cannot be satisfactorily measured and, therefore, that to allow the possession here of cooked but uncanned spiny lobster brought from elsewhere would impede the enforcement of local laws against the taking of spiny lobster of either larger or smaller sizes than those here allowed, the obvious answer is that the same argument would be applicable to the possession here of such spiny lobster cooked in California, and therefore that the exclusion of the product when cooked elsewhere is no aid in enforcing our regulations as to the size of such lobster that may be taken. Accordingly, no question of power reserved to the State to protect its own game is, in our opinion, here involved.

[9] The legislation under attack must be sustained, therefore, if it can be sustained at all, as an exercise of the police power of the State in aid of sanitation, but in our opinion it cannot be so sustained. Spiny lobster cannot be used for human consumption unless it is cooked. It is true that Section 785 of the Fish and Game Code undertakes to make it unlawful to pickle, can, or otherwise preserve any spiny lobster, or to sell any spiny lobster meat not in the shell. Since, however, as just observed, spiny lobster in order to be used as human food at all must be cooked, it is apparent that it could not have been the legislative intent by Section 785 to forbid its being cooked in California. We therefore have a bald distinction in Section 786.5 between the possession in California of spiny lobster cooked here and the possession in California of spiny lobster cooked elsewhere. It is obvious that spiny lobster is not intrinsically any more wholesome because cooked in California rather than somewhere else. If, as in the case of canned lobster, Section 786.5 of our Fish and Game Code had forbidden possession or sale of uncanned, cooked lobster imported into California, unless cooked "under the supervision of the Department of Agriculture or the corresponding department of any other State or nation," an entirely different question would be presented. So, also, would a different question be presented if the State of California had set up, within its borders, some system of its own for supervising the cooking of spiny lobster, to make sure that lobster long dead or otherwise unwholesome were not cooked and had then forbidden lobster to be imported in a ready cooked condition because not cooked under California inspection. That would be a case somewhat similar to Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039, referred to in our original opinion. But that is not this case. Here, the State of California, having instituted no supervision of its own of the cooking of spiny lobster here, and having provided no means of ascertaining that spiny lobster are here cooked under sanitary conditions, undertakes baldly to say that spiny lobster shall not be possessed here if cooked elsewhere, whatever supervision may have been exercised over the article cooked or the cooking process elsewhere.

In our view such arbitrary interference on the part of the State with the importation of spiny lobster is in conflict with the recognition by Congress of seafoods as legitimate subjects of interstate commerce and cannot be upheld.

The petition for rehearing is denied.

29 Cal.2d 621

## ADAMS v. ADAMS.

L. A. No. 19617.

Supreme Court of California, in Bank.

Feb. 4, 1947.

**1. Husband and wife ⇐278(1)**

Property settlement agreements occupy a favored position in the law and are sanctioned by the Civil Code. Civ.Code, §§ 158, 159.

**2. Husband and wife ⇐278(1)**

Courts are loath to disturb property settlement agreements except for equitable considerations, and hence such agreement that is not tainted by fraud or compulsion or is not in violation of confidential relationship of the parties is valid. Civ.Code, §§ 158, 159.

**3. Husband and wife ⇐280**

Property settlement contracts, if equitable, are enforceable even though not presented to court in divorce action. Civ. Code, §§ 158, 159.

**4. Divorce ⇐236, 245(1)**

If property settlement agreement is presented to court in action for divorce, court may modify provisions for alimony before, or, if provisions are incorporated in decree, after judgment in accord with its power over alimony generally. Civ. Code, §§ 158, 159.

**5. Husband and wife ⇐279(1)**

Property settlement contracts in which support and maintenance provisions are not in nature of alimony but are part of division of property, including contracts providing solely for payment of monthly or lump sums "in lieu of community property", must be treated like other property settlement agreements dealing solely with division of property. Civ.Code, §§ 158, 159.

**6. Divorce ⇐249(2), 254**

If property settlement contract in which support and maintenance provisions were not in nature of alimony was not fraudulent when made, and there was no violation of confidential relationship, it will be binding on court and there can be no modification of payments after decree without consent of the parties. Civ.Code, §§ 158, 159.

**7. Divorce ⇐236**

The court, in divorce action, may grant alimony to wife and approve property settlement agreement in which support and maintenance provisions are not in nature of alimony but are part of division of property, since such agreements purport to deal only with division of property of the parties. Civ.Code, §§ 139, 158, 159.

**8. Divorce ⇐236**

Where property settlement contract attempted to settle property rights of the parties and contained a waiver of all other payments in consideration of wife's receipt of major portion of community property, such waiver was not void per se and hence trial court could not add a provision for alimony to such contract.

**9. Divorce ⇐235, 236**

Public policy requires protection of wife, and in divorce action, court in its discretion may award her necessary alimony, but court cannot modify valid agreements of the parties pertaining to division of their property, and court cannot purport to approve agreement, and at same time order payment of support and maintenance contrary to its terms. Civ.Code, §§ 139, 158, 159.

**10. Divorce ⇐236**

Court's modification of property settlement agreement to provide for alimony could not be justified on ground that agreement did not award wife major part of community property and that wife was not working at time of trial, where wife was content with agreement at time of trial, wife's earning capacity had not been altered, circumstances of parties were substantially the same, and court did not set aside the agreement upon proper showing of fraud, compulsion, or inequity. Civ. Code, §§ 139, 158, 159.

**11. Divorce ⇐249(2)**

If trial court considered settlement agreement valid, court should have given relief in accordance with its terms, and, if agreement had to be set aside upon any

valid ground at time of trial of divorce action, it should not have been made a part of the judgment.

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Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Jean Ann Adams against George Bryan Adams. From an interlocutory judgment of divorce, defendant appeals.

Modified and, as modified, affirmed.

Prior opinion, 171 P.2d 556.

Courtney A. Teel, of Los Angeles, for appellant.

David A. Matlin and H. Elliot Pownall, Jr., both of Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant appeals from an interlocutory judgment of divorce providing for support and maintenance of plaintiff until further order of the court.

Plaintiff and defendant separated. One month later they executed a "Property Settlement Agreement" providing for the division of all their property and for the support and maintenance of plaintiff and their minor child. Support and maintenance were to cease for plaintiff after 18 months but were to continue thereafter for the child. The agreement stated that plaintiff, "in view of her skill and training as an experienced secretary, and by reason of her ability to become gainfully employed, particularly waives any right to support and maintenance other than, or in addition to, that provided herein in view of the premises and in consideration of [defendant's] agreement to transfer and assign to [her] the major portion of the community property as hereinabove set forth." Earlier in the agreement it was stated that "except as hereinafter specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other * * * including all claims of either party upon the other for support and maintenance as wife or husband * * * it being understood that this instrument is intended to settle the rights of the parties hereto in all respects."

Several months after the execution of this agreement, plaintiff sued for divorce on the ground of cruelty. She prayed for custody of the child, support and maintenance as set out in the agreement, approval of the property settlement agreement, and such other equitable relief as the court deemed just. At the trial of the action, which was uncontested, plaintiff stated that she had received her share of the property under the agreement, as well as payments of support and maintenance, and that the agreement was acceptable to her. In reply to questions by the court, she revealed that she was not employed at the time of the trial and that her husband earned "around $400.00 a month." The court then declared, "Call your next witness. The Court is not going to approve the property settlement." Plaintiff's counsel persisted, however, in showing that plaintiff earned her own living before the marriage and that she worked "for a while" subsequent to the separation, earning $155 per month.

The trial court, after completion of the testimony of the corroborating witness, inquired whether defendant's counsel was in the courtroom. Plaintiff's counsel replied that he did not think so but "I know we spent some time to get this property settlement. It has been after constant negotiation for two months." The trial judge replied that defendant should be advised to stipulate to an amendment of the agreement to provide that the $50 per month until further order of the court was for the support and maintenance of plaintiff as well as the child. "If he refuses to stipulate, serve him with an amended complaint in which that is requested in the prayer, and at that time this Court will make that order."

Defendant refused to stipulate to the change and, about four months later, plaintiff's motion for leave to file an "Amendment to Complaint to Conform to Proof" was heard. This amendment added the words "of plaintiff and" to the prayer, thereby changing it to read, "* * * and then the sum of Fifty Dollars ($50) per month for the support and maintenance of plaintiff and of said minor son, Bryan George Adams." Defendant's coun-

sel appeared specially to question the jurisdiction of the court to allow such an amendment, but the motion was granted. The amendment was served on defendant and he defaulted. The trial court approved the property settlement "except as to the limitation therein with reference to the payments of $50.00 per month," awarded custody of the child to plaintiff, and awarded support and maintenance as requested in the amendment to the complaint. Plaintiff, therefore, obtained permanent support although the agreement provided for her support for a period of 18 months only.

Defendant contends that the property settlement agreement is valid and, in the absence of a finding that it is inequitable or was procured by fraud or compulsion, should have been approved by the trial court. We agree with his contention.

[1, 2] Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417; Hensley v. Hensley, 179 Cal. 284, 287, 183 P. 445; Civ.Code §§ 158, 159. Such agreements are usually made with the advice of counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. Hill v. Hill, supra, 23 Cal. 2d at page 89, 142 P.2d 417. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court. Hough v. Hough, 26 Cal.2d 605, 614, 160 P.2d 15; Hogarty v. Hogarty, 188 Cal. 625, 628, 206 P. 79; In re Belknap's Estate, 66 Cal.App.2d 644, 651-652, 152 P.2d 657; Baxter v. Baxter, 3 Cal. App.2d 676, 681, 40 P.2d 536; Brown v. Brown, 83 Cal.App. 74, 82, 256 P. 595; McCahan v. McCahan, 47 Cal.App. 176, 183, 190 P. 460.

[3, 4] The most difficult problems arising from such contracts are those concerning support and maintenance provisions when the agreement is presented to the court in a divorce action. The parties, upon separation, may agree to provide for support and maintenance in a variety of ways, which generally fall into three categories. The first includes contracts in which the support and maintenance provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. The contract may even provide solely for support and maintenance without reference to a division of property. These contracts, if equitable, are enforceable even though not presented to the court in a divorce action. Sanborn v. Sanborn, 3 Cal.App.2d 437, 442, 39 P.2d 830. If presented to a court in an action for divorce the court has the power to modify the provisions for alimony before or, if the provisions are incorporated in the decree, after judgment in accord with its power over alimony generally. Hough v. Hough, 26 Cal.2d 605, 613, 160 P.2d 15.

[5-7] The second category includes, among others, contracts in which the "support and maintenance" provisions are not in the nature of alimony but are part of the division of property. This category also includes contracts that provide solely for the payment of monthly or lump sums "in lieu of community property." Such contracts must be treated like other property settlement agreements dealing solely with divisions of property. Ettlinger v. Ettlinger, 3 Cal.2d 172, 177-178, 44 P.2d 540. If the contract was not fraudulent when made, and there was no violation of the confidential relationship, it will be binding on the court and there can be no modification of the payments after the decree without the consent of the parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1. The court in the divorce action may grant alimony to the wife and approve the agreement as well, since these agreements purport to deal only with the division of the property of the parties. (Civ. Code, § 139; see Puckett v. Puckett, supra, 21 Cal.2d at page 841, 136 P.2d 1. It is often difficult to determine, in a contract containing provisions for division of property and payments of "support and maintenance," whether the payments are part of the division of property or are in the

nature of alimony. "It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject." Hough v. Hough, supra, at page 615, of 26 Cal.2d, at page 20 of 160 P.2d; Puckett v. Puckett, supra, 21 Cal.2d at page 841, 136 P.2d 1.

[8-10] The third category includes contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property. The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property. We are confronted with such a situation in the present case. Plaintiff contends that the trial court did not make a new property settlement agreement for the parties but approved the agreement except for the provision in which she waived all support and maintenance. The waiver, it is urged, is against public policy and the trial court properly exercised its discretion in awarding support and maintenance in the nature of alimony. She relies upon Moog v. Moog, 203 Cal. 406, 264 P. 490, and Smith v. Smith, 94 Cal.App. 35, 270 P. 463, to support this contention. Moog v. Moog was concerned with a contract that had been made six years before the action for divorce, apparently without advice of counsel. The trial court ordered alimony as set out in the contract, but the monthly payments were to begin at once despite the fact that the wife had already received installments in advance for 14 months. The contract contained no waiver and apparently dealt only with alimony. In view of the grossly inequitable character of the contract, owing to changed circumstances at the time of the trial, it was held that the trial court acted within its power in granting the wife additional alimony. In Smith v. Smith the wife executed a release of all her claims for community property and alimony in consideration of the husband's dismissal of an appeal taken by him from the judgment of divorce. It was there held, in affirming the order of the trial court granting alimony, that the release was not before the trial court when it made its decree. Alternate grounds for the decision were that the release lacked consideration and that it was not a property settlement agreement. These two cases do not support plaintiff's contention. The contract before the trial court in the present case was clearly one that attempted to settle the property rights of the parties. It contained a waiver of all other payments in consideration of her receipt of the major portion of the community property, and that waiver was inseparable from the remainder of the division of property. A waiver under such conditions is not void per se. Ex parte Weiler, 106 Cal.App. 485, 488, 289 P. 645. This court has often considered agreements containing similar provisions without expressing disapproval of the waiver. Puckett v. Puckett, supra, 21 Cal.2d at page 837, 136 P.2d 1; Plummer v. Superior Court of City and County of San Francisco, 20 Cal.2d 158, 164, 124 P.2d 5; Lazar v. Superior Court in and for City and County of San Francisco, 16 Cal.2d 617, 622, 107 P.2d 249; Ettlinger v. Ettlinger, supra, 3 Cal.2d at page 177, 44 P.2d 540; Moran v. Moran, 3 Cal.2d 342, 343, 44 P.2d 546; In re Boeson's Estate 201 Cal. 36, 40, 255 P. 800; In re Brix's Estate 181 Cal. 667, 677, 186 P. 135; Wickersham v. Comerford, 96 Cal. 433, 439, 31 P. 358. In other jurisdictions it is generally held that property settlement agreements may contain such provisions and, if the agreement was valid when made and free from fraud, compulsion or overreaching, the parties are bound by their contract. International Trust Co. v. Liebhardt, 111 Colo. 208, 214, 139 P.2d 264, 147 A.L.R. 700; Gore v. Plair, 173 Ga. 88, 159 S.E. 698, 700; Beard v. Beard, 53 Idaho 440, 452, 24 P.2d 47; Hayden v. Hayden, 215 Ky. 299, 301, 284 S.W. 1073; Westfall v. Westfall, 208 Mo.App. 656, 659, 236 S.W. 393; Lee v. Lee, 55 Mont. 426, 433, 178 P. 173; see 1 Nelson on Divorce §

13.44. It is true that public policy requires the protection of the wife and that in a divorce action the court in its discretion may award her necessary alimony. Civ.Code, § 139. Such discretion, however, does not empower the trial court to modify valid agreements of the parties pertaining to the division of their property. The court cannot, as was attempted in the present case, purport to approve the agreement and at the same time order payment of support and maintenance contrary to its terms. Plaintiff now contends that the agreement did not actually award her the major part of the community property and, since she was not working at the time of the trial, the trial court acted within its discretion in awarding her alimony contrary to the agreement upon the disclosure of defendant's salary. Plaintiff, however, was content with the agreement at the time of the trial and presented no evidence showing that it was unfair, nor was any such evidence elicited by the trial court. Her earning capacity had not been altered and the circumstances of the parties were substantially as they had envisaged them at the time they made the agreement. Further, the court did not set aside the agreement, upon proper showing of fraud, compulsion or inequity, nor was there a reconsideration of the apportionment of the community property.

[11] Both parties rely upon Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64; Peck v. Peck, 52 Cal.App.2d 792, 127 P.2d 94; and Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187. These cases were concerned with decrees granting alimony in default actions where there were no requests for alimony in the relief prayed for. In each case the relief was found to be in excess of that prayed for and the court stated that when the trial court finds that justice requires the payment of support money it should set aside the default and authorize the filing and service of an amended complaint containing appropriate allegations and prayer for support money, after which it would be in a position to include any appropriate orders in its decree. That question is not before us in this case. Although the court ordered plaintiff to amend her complaint to request permanent support and maintenance, the decree purported to approve the property settlement and ordered permanent support contrary to its terms. If the court considered the agreement valid it should have given relief in accordance with its terms. If, on the other hand, it had to be set aside upon any valid ground at the time of trial, it should not have been made a part of the judgment Majors v. Majors, 70 Cal.App.2d 619, 626, 161 P.2d 494. Majors v. Majors, supra, also relied upon by both parties, was concerned with a decree that arbitrarily refused to approve a property settlement agreement, and, at the same time, ordered permanent support contrary to the terms of the agreement. The judgment was reversed because the relief was in excess of that prayed for and the trial court was ordered to approve the agreement on the grounds that neither had objected to its terms and there was no showing of fraud or other invalidity. The mere order by the trial court in the present case causing the complaint to be amended did not remove the inconsistency between the agreement and the decree, and the reasoning in the Majors case on that point (Majors v. Majors, supra, 70 Cal.App.2d at page 626, 161 P.2d 494) is in accord with the reasoning herein.

The rule that a wife may waive alimony in return for a more favorable division of the community property so long as the agreement was valid when made does not deprive her of the protection of the courts. A court in a divorce action will carefully scrutinize the agreements, especially where the parties did not have the advice of counsel. The wife, after being advised of her rights by her attorney, might not wish to sign the agreement; if not, she may request that provisions for alimony and the division of the property be made by the court in the divorce action. If her consent to the agreement was procured through fraud or compulsion, or if circumstances are such that the court finds the agreement inequitable, the court may withhold approval of the agreement. In the present case the wife agreed to waive alimony and accept a major portion of the community property and payments for a period of 18 months. Since nothing was shown to in-

dicate that the agreement was inequitable the parties are bound by the agreement.

The judgment is therefore modified by striking from the third paragraph thereof the following: ", except as to the limitation therein with reference to the payments of $50.00 per month" and by striking from the fifth paragraph thereof the following "of plaintiff and". As so modified the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.




29 Cal.2d 639

**WARDALL et al. v. STATE et al.**

**S. F. 17195.**

Supreme Court of California, in Bank.

Feb. 11, 1947.

**1. Taxation ⇐362, 362½**

Generally, where a statute imposes on the assessor the duty to assess all property of taxpayer or otherwise indicates a power to do so, omitted property or that which has escaped assessment on one occasion may be reached in a subsequent assessment or reassessment in order that all persons or property should share equally the burden of taxation.

**2. Intoxicating liquors ⇐92**

Uncontested assessments by board of equalization for balance due on distilled spirits excise tax originally paid by stamps bought by licensee did not become "final" when paid by licensee so as to preclude a further levy by the board when the licensee protested a levy for a subsequent period, in view of express statutory authority to make additional determination of the amount of the tax after the first levy has been made. Gen.Laws 1937, Act 3796, §§ 24, 27, 27b, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Final".

SCHAUER and EDMONDS, JJ., dissenting.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Consolidated actions by William J. Wardall, as trustee, etc., and others, against the State of California and others to recover distilled spirits excise taxes paid under protest. From judgments of the superior court for plaintiffs, defendants appeal.

Reversed.

Prior opinion 166 P.2d 23.

Robert W. Kenny, Atty. Gen., Carl W. Wynkoop and Miriam E. Wolff, Deputy Attys. Gen., both of San Francisco, and John L. Nourse, Deputy Atty. Gen., of Los Angeles, for appellants.

Sefton & Quattrin and Seibert L. Sefton, all of San Francisco, for respondents.

CARTER, Justice.

Plaintiffs in these consolidated cases are licensed by the Board of Equalization (hereinafter referred to as board) as wholesalers and importers of distilled spirits pursuant to the Alcoholic Beverage Control Act, Stats. 1935, p. 1123, Deering's Gen. Laws, 1935 Supp., Act 3796, and the issue is whether the board may make a deficiency tax assessment and levy after having previously levied an assessment for the same period.

In the Cavagnaro case, from a report by the board's auditors after an audit of Cavagnaro's records, a tax of $647.31 was levied for the period July 1, 1935, to December 31, 1937, and notice thereof sent to Cavagnaro advising him that the levy is "based upon an examination of available records and other information in possession of the Board"; that he could petition for a relevy within 15 days; and that if he failed to do so "the amount of this levy becomes final." Cavagnaro did not request a relevy and paid the tax. In 1939 the board made an audit of Cavagnaro's records for the period January 1, 1938, to June 30, 1939. Following consultation between the board's and Cavagnaro's auditors it was concluded and the auditors' report showed that the tax

for that period was $18.62, but the notice of levy from the board placed the tax at $294.82, and Cavagnaro petitioned for a relevy pursuant to section 27b of the act. The board's decision on such petition was to levy $18.62 for the last mentioned period, $187.49 for the period July 1, 1937, to December 31, 1937, and $72 for the period July 1, 1935, to June 30, 1937, that is to say, making an additional levy of $259.49 for the period first above mentioned.

In the Wardall case substantially the same events transpired.

We thus have a situation in which the taxpayer paid the tax as levied for a certain period. Thereafter he protested the levy for a subsequent period and in the decision rendered therein an additional levy is made for the first period. There is no intimation that the tax so levied was not in fact due under the law; the sole contention is that the assessment and levy for the first period, being uncontested, was final and no further levy could be made by the board.

The Alcoholic Beverage Control Act, supra, embraces the licensing and regulation of the disposal of alcoholic beverages. It imposes a license fee on wholesalers of distilled spirits. In addition "An excise tax is *hereby imposed* upon all distilled spirits sold in this State by rectifiers or wholesalers thereof, at the following rates: * * *." [Emphasis added.] Stats. 1935, p. 1132, as amended, Stats. 1937, p. 2144, § 24, Deering's Gen. Laws, 1937, Act 3796. The method of collecting that tax was by stamps (it has since been changed). "The tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected from rectifiers and wholesalers of distilled spirits and payment of the tax shall be evidenced by stamps issued by the board to such rectifiers and wholesalers." Stats. 1935, p. 1139, as amended, Stats. 1937, p. 2153, § 33, Deering's Gen. Laws, 1937, Act 3796. In order to assure the collection of the tax on all spirits sold, the act provided: "The board may examine the books and records of any person required to make said statement, and may also examine the books and records of any licensee as herein defined, and such books and records shall at all times be subject to the inspection of said board or its representatives during regular business hours.

"If *any* examination*s* or investigation*s* made by the board shall disclose that any reports of manufacturers or importers theretofore filed with said board by said manufacturers or importers pursuant to the requirements of this act, have shown incorrectly the amount of alcoholic beverage sold or the excise tax accruing thereon, said board shall have the power and is hereby authorized, to make *such changes* in *subsequent assessments* of said manufacturers or importers under this act as *it may deem necessary* to correct the errors disclosed by its examination of the records of said manufacturers or importers or its investigations in pursuance of its powers hereunder." [Emphasis added.] Stats. 1935, p. 1135, § 27, Deering's Gen. Laws, 1935 Supp., Act 3796. And further "If, after giving effect to the provisions of section 24.2, *any* examination*s* or investigation*s* made by the board shall disclose that the amount of excise stamps purchased from the board by any rectifier or wholesaler *is not sufficient to represent payment of the excise tax imposed* upon the sale of distilled spirits sold by such rectifier or wholesaler, the board shall have the power, and is hereby authorized, to make a levy against such rectifier or wholesaler in the amount of the deficiency in the payment of the distilled spirits excise tax so disclosed." [Emphasis added.] Stats. 1935, p. 1135, § 27, as amended, Stats. 1937, p. 2147. Notice shall be given of such levy, and within 15 days the taxpayer may petition for a relevy (that is, a correction of the levy). The effect of the procedure is: "If such petition for relevy is not filed within said 15 day period *the amount* of the levy becomes *final* at the expiration thereof." [Emphasis added.] Stats. 1937, p. 2148, § 27b. Plaintiffs urge that the making of the levy final where no request for a relevy is made precludes the board from later making an additional levy for the same period as was done in the cases at bar.

[1] It is clear that the statute itself levies—imposes the tax and the only thing done by the enforcing officials is a determi-

nation of the amount due in a particular case. To that end the board (enforcing officials) may make examinations and investigations of the taxpayer's records and return, and if it finds the tax paid by way of purchase of stamps is not enough, then it may "levy" for the deficiency. Although that process is referred to as a levy, it is more nearly like an assessment; the tax is levied by the statute. The process contemplates an ascertainment of the amount of the tax and in that sense is an assessment thereof. It is the first assessment by the tax officials inasmuch as it is the first action on their part in determining the amount of the tax. Hence in the instant cases the nature of the "levy" or determination of the deficiency was really the first assessment. In that respect it is similar to the assessment of real property for an ad valorum tax by an assessor, and in such case, the general rule is that where the statute imposes on the assessor the duty to assess all property or otherwise indicates a power to do so, omitted property or that which has escaped assessment on one occasion may be reached in a subsequent assessment or reassessment. That is to say, the assessor's assessment is not final as to the taxing agency. See Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P.2d 796; Whiting Finance Co. v. Hopkins, 199 Cal. 428, 249 P. 853; Rosasco v. County of Tuolumne, 143 Cal. 430, 77 P. 148; Kern Valley, etc., Co. v. County of Kern, 137 Cal. 511, 70 P. 476; Security Savings Bank v. City and County of San Francisco, 132 Cal. 599, 64 P. 898; City and County of San Francisco v. La Societe Francaise, 131 Cal. 612, 63 P. 1016; People v. National Bk. of D. O. Mills & Co., 123 Cal. 53, 55 P. 685, 45 L.R.A. 747, 69 Am.St.Rep. 32; Farmers, etc., Bank v. Board of Equalization, 97 Cal. 318, 32 P. 312; 51 Am.Jur., Taxation, § 734. There is the strong policy underlying such a rule that otherwise all persons or property would not share equally the burden of taxation and although the tax may not have been collected it is still payable under the statute.

There is clear statutory authority in the instant cases for the correction of the first assessment (determination of the amount of the tax) that is, for a reassessment or supplemental assessment. The statute imposes the tax and it is the duty of the board to collect. Furthermore, under section 27 if *any* examinations or investigations (plural) (that could apply to subsequent assessments or reassessments) disclose that the tax has not been paid or has been incorrectly computed, the board is authorized to make changes in *subsequent* assessments as it deems necessary to correct the errors. Here we have express authority to make an additional determination of the amount of the tax after the first has been made.

[2] After the original determination the taxpayer may petition for a "relevy," that is, a reconsideration of the original determination. That redetermination contemplates a hearing—a thorough examination of the taxpayer's liability, a situation that does not exist in the original determination. What would be the effect of a decision after such a hearing (as binding on the state and taxpayer) we need not determine. If the taxpayer does not request a "relevy" the amount of the levy becomes final. By reason of the general rule heretofore noted and the power given to the board to make other determinations beyond the original one we do not believe that finality as to the state results from the use of the word "final" Moreover it is the amount of the "levy," that is, the original assessment that becomes final. It is only the amount of that particular deficiency levy—assessment that is involved, not whether there are more taxes which might be due upon a further investigation.

The judgment in each case is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, Justice (dissenting).

I dissent. In my view the opinion of the District Court of Appeal, First Appellate District, Division 1, prepared by Mr. Justice Ward and reported in 166 P.2d 23, affirming the judgment of the trial court, correctly and justly disposes of the issues presented. For the legal reasons therein made amply manifest and, also, because I

believe that governmental agencies should be held to standards of integrity and diligence comparable to those exacted of persons in private life, I would affirm the judgments appealed from.

EDMONDS, J., concurred.




29 Cal.2d 629

**BROCK v. SUPERIOR COURT OF STANISLAUS COUNTY et al.**
**Sac. 5779.**

Supreme Court of California, in Bank.
Feb. 7, 1947.

**Prohibition ⇐10(2)**

In action by fig grower and producer against the Proration Zone, its directors and members and the Director of Agriculture to restrain enforcement of allegedly illegal regulations for the 1945 season, a denial of Director of Agriculture's motion for change of venue to county of his residence was not "without or in excess of jurisdiction" of superior court so as to entitle the director to a writ of prohibition. Code Civ.Proc. §§ 392 et seq., 393, 396b, 395, 963, 1102, 1103; Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Without Or In Excess of Jurisdiction".

Original proceeding by A. A. Brock, as state director of agriculture, for a writ of prohibition directed to the Superior Court of Stanislaus County and others to stay proceedings in an action pending against petitioner upon the ground that the respondent court erred in denying petitioner's motion for a change of venue to the county of his residence.

Alternative writ discharged and peremptory writ denied.

Prior opinion, 165 P.2d 59.

Robert W. Kenny, Atty. Gen., Ward Sullivan and Paul M. Joseph, Deputy Attys. Gen., both of Sacramento, for petitioner.

Bush & Ackley and David F. Bush, all of Oakdale, and Frank B. Collier, of Modesto, for respondents.

CARTER, Justice.

Petitioner, the State Director of Agriculture, seeks a writ of prohibition to stay proceedings in an action pending against him in the Superior Court of Stanislaus County upon the ground that that court erred in denying his motion for change of venue to the county of his residence, Sacramento County.

[1] The decisive preliminary question is whether prohibition will lie. Prohibition is an available remedy only if (1) the trial court's action is denying the motion for change of venue was an act in excess of its jurisdiction as that term is used in section 1102 of the Code of Civil Procedure, and (2) petitioner has no plain, speedy, and adequate remedy by way of appeal from the appealable order denying the change of venue, and also, if necessary, by application for supersedeas to stay proceedings in the trial court pending such appeal. Code Civ. Proc., §§ 1103, 963; Moon v. Superior Court, 59 Cal.App.2d 477, 139 P.2d 84; Chard v. O'Connell, 48 Cal.App.2d 475, 120 P.2d 125.

Considering first the question whether the order denying a change of venue was a proceeding "without or in excess of the jurisdiction" of the trial court, as the term "jurisdiction" is employed in section 1102, supra, it is notable that in late cases decided by this court there are to be found many general statements similar to the comment in Rescue Army v. Municipal Court, 28 Cal. 2d 460, 463, 171 P.2d 8, 11, that "In certiorari and prohibition proceedings the term jurisdiction has a very broad meaning, and a writ may be granted where the court has no jurisdiction to act except in a particular manner, even though it has jurisdiction, in the fundamental sense, over the subject matter and the parties. (Citing cases.)" Such statements, however, must be considered in their relation to the particular matter to be adjudicated by use of the original proceeding, as for example, the fact that in the Rescue Army case, the question under consideration was that of the availability of a proceeding in prohibition to test

the constitutionality of a statute or ordinance. For, as said in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287-291, 109 P.2d 942, 947, 132 A.L.R. 715, the term "jurisdiction," "used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition. At best it is possible to give the principal illustrations of the situations in which it may be applied, and then to consider whether the present case falls within one of the classifications. Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. * * * But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. * * * On a number of occasions the courts of this state have recognized the conflicting senses in which the term 'jurisdiction' is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. * * * Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. And, as a practical matter, accuracy in definition is neither common nor necessary. Though confusion and uncertainty in statement are frequent, there is a surprising uniformity in the application of the doctrine by the courts, so that sound principles may be deduced from the established law by marshalling the cases and their holdings in this field."

The present case concerns only the meaning of the term "jurisdiction" in its application in testing the availability of the remedy of prohibition in a situation created by the trial court's ruling upon a motion for change of venue. That in the first instance the trial court has jurisdiction, in its most fundamental or strict sense, to hear and determine a motion for change of venue is beyond dispute. The question is whether an error in ruling on the motion and in fixing the venue can be denominated an act in excess of jurisdiction within the meaning of that term as employed in section 1102, supra.

The authorities in this and other jurisdictions afford no standard criterion for determining when prohibition will lie in a venue proceeding. Much of the discussion in the textbooks and cases therein cited touches only the question of adequacy of an appeal or other appropriate remedy, or the venue statutes involved are unlike those of this state. See 42 Am.Jur. p. 159, § 21; 50 C. J. p. 679, § 44; Bancroft's Code Practice and Remedies, vol. 2, p. 1487, § 1042; 25 Cal.Jur. p. 916, § 48. But throughout these authorities there is clearly discernible a distinction between situations where the right to the change of venue is absolute or jurisdictional in a fundamental sense, and situations which present merely a question for the trial court's decision. Thus it is said in Bancroft's Code Practices and Remedies, supra: "The case being otherwise a proper one for the issuance of the writ, when a motion for a change of venue is well founded and no question of fact is open to the court, the right to the change being absolute, a court which refuses to grant the motion will be prohibited from further considering the case, inasmuch as it has no jurisdiction except to grant the motion. But when the change is not a matter of right and the motion presents only questions which the lower court has jurisdiction to determine, the error of the court, if any, in refusing a change may not be reviewed in prohibition." For an example of cases from other jurisdictions in which the writ has been held unavailable see State ex rel. Kochtitzky v. Riley, 203 Mo. 175, 101 S.W. 567, 12 L.R.A.,N.S., 900; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 P. 877, 2 L.R.A.,N.S., 395, 111 Am.St.Rep. 925; People ex rel. Lindsley v. District Court, 30 Colo. 488, 71 P. 388.

Research has revealed no California case determining the availability of a remedy by prohibition after an adverse ruling on motion for change of the place of trial under the venue provisions of the Code of Civil Procedure. (§ 392 et seq.) An approach to the subject is found in State of Califor-

nia v. Superior Court, 14 Cal.App.2d 718, 58 P.2d 1322, but that case is not here controlling. It involved a special statute (Pol. Code, § 688, par. 4), providing that upon written demand of the attorney general the place of trial of a suit against the state "must" be changed to Sacramento County. The court held that because of the mandatory terminology of the statute, shown by use of the word "must," any order denying a motion for change in violation of the statutory mandate was an excess of jurisdiction and prohibition would lie to restrain the court from proceeding with the trial.

This holding points to the fact that no general rule can be laid down governing all venue cases wherein prohibition is sought after an adverse ruling. The distinction already mentioned between cases wherein the right to change of venue is absolute or jurisdictional, and cases which present merely a question for decision by the trial court, or of stipulation or waiver, has been preserved in the California law, and this distinction controls the determination of the question of availability of the remedy of prohibition in a venue matter.

An absolute right is conferred by the Constitution, article VI, section 5, which provides that all actions for the recovery of possession of, quieting title to, or for the enforcement of liens upon real estate, shall be "commenced" in the county in which the real estate, or any part thereof, effected by such actions, is situated. This constitutional provision has not been carried in express terms into section 392 of the Code of Civil Procedure, which simply states that the county in which real property, or some part thereof, is situated is the "proper" county for the "trial" of the enumerated actions. But since the constitutional mandate confers an absolute right to have the enumerated actions "commenced" in the county in which the property is situated, any error in determining venue so far as commencement of such an action is concerned goes to the jurisdiction of the court and, in the absence of a plain, speedy, and adequate remedy in the ordinary course of the law (§ 1103, supra), prohibition should lie.

With reference to other cases, there is no constitutional requirement and the statutes (Code Civ.Proc., § 393 et seq.) merely state the "proper county" for trial. Therefore, a failure to fix venue or to proceed to trial in a county specified as "proper" does not go to the "jurisdiction" of the court, even in the broad sense in which the latter term is used in prohibition proceedings.

In fact, the parties may stipulate as to venue, or the right to move for a change of venue may be waived. Section 396b of the Code of Civil Procedure provides that "* * * if an action * * * is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, * * * the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk * * * an affidavit of merits and a notice of motion for an order transferring the action * * * to the proper court. * * *." Under this statute a defendant who fails to demand at the proper time and in the proper manner that the action be tried in the proper county is precluded from later raising the question, except in cases coming within the constitutional requirement, wherein there can be no waiver of the right to have the action commenced in the county in which the real property is situated. 25 Cal.Jur. p. 888 et seq., §§ 25, 26. This confirms the view that in cases other than those coming under the constitutional provision, the venue question is not jurisdictional, and a proceeding in prohibition will not lie to obtain relief upon denial of a motion for change of venue.

This distinction, which makes the question jurisdictional only when the right to a change of venue is absolute, is noted in the early case of Herd v. Tuohy, 133 Cal. 55, 59, 60, 65 P. 139, 140, where this court said: "As to the jurisdiction of the court, there can be no serious question. The superior court is vested by the constitution (article 6, § 5) with jurisdiction over 'all cases in equity'; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. * * * Nor—with an exception to be noted presently—is this

jurisdiction vested in any particular superior court or courts. Every superior court —with the exception alluded to—has jurisdiction of all equity cases that may be brought in it. The exception referred to is that of 'actions for the recovery of the possession of, quieting the title to, or for the enforcements of liens upon real estate,' which, under the provision of the constitution cited above must be 'commenced in the county in which the real estate * * * affected by such action * * * is situated.' With reference to other cases there are statutory provisions determining the proper place of trial (Code Civ.Proc., § 392-395); *but these do not affect the jurisdiction of the court, and hence,* 'if the county in which the action is commenced is not the proper place for the trial thereof,' *the only remedy of the defendant is a demand for change of venue.* [Code Civ.Proc.,] § 396.) * * * In this case there was no demand for change of venue, and it is, therefore, immaterial whether or not the suit was brought in the county proper for trial. If it is one of the kind of cases provided for in section 392 * * * it was brought in the proper county. If it does not fall within that class, then the defendant was entitled to demand its transfer to the county of his residence * * * but, having failed to demand the transfer, he has waived the objection."

The authorities appear to be consistent in holding that in cases involving real property, where the constitutional requirement applies, a violation of the provision is an act in excess of jurisdiction. See Southern Pacific Railroad Co. v. Pixley, 103 Cal. 118, 37 P. 194, where an action involving real estate situate in another county was dismissed for want of jurisdiction, and 25 California Jurisprudence page 861, section 9, and cases cited. See, also, Grangers' Bank of California v. Superior Court, 4 Cal.Unrep. 130, 33 P. 1095, 1097, where during pendency of an action, the defendant bank applied for prohibition to restrain the court from appointing a receiver on two grounds; first, that a receiver was not authorized, and second, that the litigation involved realty situated in another county. In granting the writ on the second ground, this court stated:

"In a question of the kind here presented, we are bound by the provisions of the constitution; and the provisions of the Code of Civil Procedure pertaining to the matter of a change of venue and the proper county in which to commence actions avail nothing as against the declaration of the constitution of the state 'that all actions for the recovery of the possession of real estate * * * shall be commenced in the county in which the real estate, or any part thereof affected by such action, is situated.' As was said in the concurring opinion in the case of People v. Wong Ark, 96 Cal. 125, 30 P. 1115, upon the jurisdiction of this court: 'As the legislature has no power to grant the court jurisdiction, it has no power to deprive the court of jurisdiction. The jurisdiction of the court came from a source of power above and beyond the legislature of the state, and the court can only be deprived of it by the source from whence it came.'"

But just as consistently as the courts have enforced the jurisdictional requirement of the Constitution, they have refrained from extending it, and have frequently declared that because the constitutional provision is a limitation on the general jurisdiction of the superior courts, it must be strictly construed. Dougherty v. California Kettleman Oil Royalties, 9 Cal.2d 58, at page 76, 69 P.2d 155, and cases cited; 25 Cal.Jur. p. 861, § 9. Indeed it has been declared that since the Constitution goes no further than to require the enumerated actions to be "commenced" in the county where the real property is situated (as distinguished from the provision for "trial" in said county specified in Code of Civ.Proc. § 392), such requirement does not prohibit the changing of the place of trial where an impartial trial cannot be had in the county of venue, or for the convenience of witnesses, or because of disqualification of the judge. 25 Cal.Jur., p. 861, § 9, cases cited note 17. In other words, only the constitutional requirement as to commencement of the action is jurisdictional; not the statutory provision as to trial.

Thus in Duffy v. Duffy, 104 Cal. 602, 38 P. 443, the real estate in litigation was situated in Alameda County and the action was there commenced, but it was later

transferred to San Francisco on a stipulation of counsel that the change would promote the convenience of witnesses. In upholding the transfer this court commented that "commencement" of the action in the county where the land was situated satisfied the constitutional requirement, and by that requirement it could not have been intended that under the circumstances mentioned in the applicable statute, the place of trial could not be changed for convenience of witnesses or other proper reason.

Another pertinent case is Fresno National Bank v. Superior Court, 83 Cal. 491, 24 P. 157, 158. There the court was confronted by a conflict between the constitutional provision (art. VI, § 5 supra), which gave it jurisdiction of the subject matter of the action (real property), and section 16 of article XII of the Constitution which appeared to deprive it of jurisdiction of the person of the defendant corporation, in that the latter section provided that a corporation "may be sued" in the county of its principal place of business, or where the contract is made or is to be performed, or the obligation, liability, or breach occurs. The defendant corporation, after denial of its motion to dismiss the action for want of jurisdiction of its person, sought prohibition to restrain any further proceedings in the trial court. In denying the writ, this court commented that "It can hardly be presumed that the framers of the constitution failed to foresee that there might be just occasion for suing a corporation to recover, quiet the title to, or enforce a lien upon real estate not situated in any of the counties enumerated in section 16 of article 12; yet upon the occurrence of such an occasion, if this section is to be deemed mandatory, there would be a square conflict between it and the proviso above quoted, in which one or the other must yield, or there would be no remedy against the corporation." This court then held that whereas the language of section 5 of article VI is mandatory and exclusive, the language of section 16 of article XII, using the phrase "may be sued," is merely permissive, and that defendant corporation was not entitled as a matter of absolute right to a change of venue. It was also held that defendant had a plain, speedy, and adequate remedy by motion for change of venue, and that therefore the proceeding in prohibition would not lie.

These holdings support the conclusion that only where a change of venue is a matter of absolute right, is the denial of such change an act "in excess of the jurisdiction" of the court as that phrase is used in section 1102 of the Code of Civil Procedure.

It is also evident that prohibition cannot avail petitioner here because he had a plain, speedy, and adequate remedy by appeal from the order denying a change of venue, and, if necessary, by application to the trial or appellate court for a stay of proceedings pending the appeal.

The complaint in the basic pending action was filed by a grower and producer of figs in Fig Proration Zone No. 1 during the year 1945. It names as defendants, the Proration Zone, its directors and members, and the petitioner herein as Director of Agriculture of the State of California. It charges that in June, 1945, petitioner put into effect certain approved quality and diversion regulations for the 1945 season. These regulations are set forth in full. They pertain to the sampling, inspection, and certification of figs and, among other things, define marketable figs as any lot of dried figs containing specified percentages of passable, infested, bird-pecked, or split figs, fix similar percentages for substandard figs, provide for a diversion pool, and provide for delivery to it of culls, and unsortable lots. The pleading alleges that in certain respects these regulations are unreasonable, discriminatory, illegal, and void; that defendants have signified an intention to enforce them, and unless they are restrained from so doing, plaintiff will suffer great and irreparable damage. The prayer is for a decree adjudging the invalidity of the regulations and restraining their enforcement. In moving for change of venue to the county of his residence petitioner relied upon section 395 of the Code of Civil Procedure. In denying the motion the trial court applied the statutory exception of section 393b which makes "the county in which the cause, or some part thereof, arose * * * the proper coun-

ty for the trial of" an action "against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office."

The petition for prohibition alleges that the remedy of appeal from the order denying the change of venue is not plain, speedy, or adequate because by the time an appeal could be perfected, the trial court would have ruled upon an application for preliminary injunction and would have proceeded to trial. It also alleges that the public importance of the questions presented, which concern enforcement of the general quality and diversion regulations for the 1945 season affecting fig growers in eighteeen counties, justify the granting of the writ rather than subjecting the interested parties and the general public to the delay incident to an appeal.

However, the questions, although of some public importance, do not appear to be pressing. There is no allegation that petitioner made, or that the trial court wrongfully denied any application for a stay of proceedings pending an appeal from the order denying a change of venue. Any urgency which might originally have existed was bound to be swallowed up in the time necessary to obtain a ruling on prohibition as much as in the longer delay incident to pursuance of an appeal. The complaint was filed on July 20, 1945, and the motion for change of venue was heard in September. The subsequent prohibition proceeding, in the regular course, did not reach a decision in the District Court of Appeal until January, 1946. A hearing was granted by this court in March, thus precluding any final determination prior to expiration of the 1945 marketing season. The matters in dispute concern only proposed quality and diversion regulations for the 1945 marketing season, which were put into effect by petitioner on June 25, 1945. There is no mention of an intent to carry over these regulations, or to enforce the same challenged percentages for the 1946 season. Under these circumstances the remedy by appeal must be deemed plain, speedy, and adequate. An appeal will not be denominated inadequate merely because a question of jurisdiction is raised, nor does it fail to be adequate and speedy within the meaning of the applicable rule simply because it is not so expeditious as prohibition. See discussion and cases cited in 21 Cal.Jur. § 6, p. 586 et seq., and 22 Cal.L. Rev., p. 537 et seq.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

GIBSON, C.J., and TRAYNOR, J., concurred.

EDMONDS, Justice.

I concur in the judgment upon the ground that the trial court's action, in denying the motion for change of venue, was not a proceeding "without or in excess of the jurisdiction of such tribunal." Code Civ.Proc. § 1102.

SPENCE, Justice.

I concur in the judgment. Regardless of any question of the propriety of prohibition as a remedy (which question is not raised by the parties), I am satisfied that the trial court properly denied the motion for change of venue and that therefore the petition for a peremptory writ of prohibition must be denied.

SHENK and SCHAUER, JJ., concurred.

29 Cal.2d 581

## SATTERLEE v. ORANGE GLENN SCHOOL DIST. OF SAN DIEGO COUNTY et al.

L. A. 19502.

Supreme Court of California, in Bank.
Jan. 31, 1947.

**1. Negligence ⇐4**

The standard of care, to which one must ordinarily conform, is usually that of ordinarily prudent or reasonable person under like circumstances. Civ.Code, § 1714.

**2. Negligence ⇐6**

An act below, or failure to act in accordance with, statutory standard of care, is negligence per se or as matter of law.

**3. Negligence ⇐134(9, 11)**

Where evidence establishes that violation of statute or ordinance proximately caused injury and shows no excuse or justification for such violation, responsibility may be fixed on violator without other proof of failure to exercise due care.

**4. Negligence ⇐6, 12**

In emergency or under unusual conditions, cirmumstances may generally be shown to excuse violation of statute or ordinance resulting in injury for which violator would otherwise be liable.

**5. Negligence ⇐6**

Violation of statute or ordinance is presumptive evidence of negligence, which should be deemed conclusive, if not excused by other evidence, including all surrounding circumstances, but must be treated as negligence per se until justification or excuse therefor appears.

**6. Negligence ⇐6**

The fact which will excuse violation of statute, otherwise constituting negligence per se, is one resulting from causes or things beyond control of person charged with such violation.

**7. Negligence ⇐136(9, 25)**

Whether violation of statute or ordinance proximately contributed to accident and was excusable or justifiable are fact questions for jury, unless reasonable men can draw but one inference, pointing unerringly to violator's negligence, from facts.

**8. Negligence ⇐6, 65**

Liability for injury caused by violation of statute, though not excusable under particular circumstances, also depends on proof that violator owed duty to persons of class of injured plaintiff or defendant relying on plaintiff's contributory negligence.

**9. Negligence ⇐56(3)**

Violation of statute must be shown to have been proximately contributing cause of injury to render violator liable therefor, though violation was inexcusable under particular circumstances.

**10. Automobiles ⇐206**

A motorist cannot arbitrarily rely on right of way gained as result of his excessive speed or other negligent act or violation of law by him. Vehicle Code, § 550.

**11. Trial ⇐253(4)**

Requested instruction that plaintiff motorist's failure to yield right of way constituted negligence, if school bus entered intersection before automobile or both vehicles entered intersection at same time, with bus to right of automobile, and plaintiff's violation of right of way statute proximately contributed to happening of accident in slightest degree, verdict must be for defendant, was properly refused as invading jury's province by failure to tender issue whether circumstances excused such violation, in view of evidence of dangerous increase in speed of bus after being observed by plaintiff. Vehicle Code, §§ 513, 550.

**12. Automobiles ⇐245(80)**

Evidence that speed of school bus was increased after plaintiff motorist observed it when it was about twice as far from intersection as plaintiff and that bus driver, having unimpaired visibility, did not observe automobile until almost instant of impact, raised fact question as to whether plaintiff's violation of right of way statute was justifiable or excusable. Vehicle Code, §§ 513, 550.

**13. Negligence ⇐122(1)**

In personal injury suit, presumption created by proof of plaintiff's failure to

comply with statute or ordinance relieves defendant from burden of proving that plaintiff failed to act as reasonably prudent man, and to establish plaintiff's contributory negligence, defendant need prove only that such violation of statute proximately caused accident.

**14. Automobiles ⇐242(8)**

In action for injuries sustained in collision between plaintiff's automobile and defendant's school bus at road intersection, defendant's evidence of plaintiff's violation of right of way statute cast burden on plaintiff to go forward with evidence justifying or excusing such violation, where defendant relied on contributory negligence. Vehicle Code, § 550.

**15. Appeal and error ⇐1170(9)**
**Automobiles ⇐246(25)**

In action for damages caused by collision between plaintiff's automobile and defendant's school bus at road intersection, instruction that one may have right of way and yet be negligent and that rules of law as to right of way are not absolute, but must be considered in connection with what reasonably prudent person would have done under similar circumstances, was erroneous and prejudicial to defendant as minimizing, if not completely negativing, code provisions as to right of way. Vehicle Code, § 550; Const. art. 6, § 4½.

TRAYNOR, J., dissenting in part; CARTER, J., dissenting.

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Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by G. E. Satterlee against the Orange Glenn School District of San Diego County and another for personal injuries and damage to plaintiff's automobile as results of a collision with named defendant's bus. Judgment for plaintiff, and defendants appeal.

Reversed.

Prior opinion, Cal.App., 160 P.2d 919.

Tripp, Callaway, Sampson & Dryden, Lowell L. Dryden and DeWitt W. Manning, all of Los Angeles, for appellants.

William M. Hawkes, of Escandido, Monroe & McInnis and C. M. Monroe, all of San Diego, for respondent.

EDMONDS, Justice.

G. E. Satterlee sued to recover damages for the death of his wife, and also for injury to his person and property resulting from an automobile collision. The principal points relied upon as grounds for a reversal of the judgment in his favor concern two jury instructions stating the legal effect of violation of the Vehicle Code in fixing liability for the accident.

At the time the accident occurred, Satterlee, accompanied by his wife, was driving an automobile in a northerly direction on Citrus Drive. A bus of the school district, operated by Paul Osteraas, was traveling west on Bear Valley Road toward its intersection with Citrus Drive. From a point about 60 feet south of Bear Valley Road, for several hundred feet to the south, Citrus Drive had a six per cent ascending grade. Bear Valley Road was about level on both sides of Citrus Drive and the streets intersected at approximately a 90 degree angle. Neither of these roads was a through highway, although Citrus Drive carried considerably more traffic than the east and west street. The hard surfaced portion of Bear Valley Road, together with its shoulders, was approximately 29 feet wide; that of Citrus Drive was 32 feet.

As the two drivers approached the corner at about 8 o'clock in the morning, both of them had a clear and unobstructed view of the intersecting road for about 600 feet in each direction. The weather was overcast with a drizzling mist, but this did not affect visibility. Their testimony was in direct conflict as to who first entered the intersection, the relative speeds at which the vehicles were traveling, and the distance of the vehicles from the intersection when each operator first observed the other.

Satterlee declared that he was driving at a speed of about 25 miles per hour, and when he was some 75 to 100 feet south of the intersection he first saw the school bus approaching from his right. The bus

then appeared to be about twice as far from the intersection. Satterlee continued on at the "same rate of speed." He said that he thought he had "worlds of time," that he did not see the bus again until just before the impact, and that he thought he was in the intersection first "because I was so far across."

Osteraas estimated that prior to reaching Citrus Drive, the speed of the bus was between 30 and 35 miles per hour when, at a point about 195 feet east of the intersection, he looked to his left and saw the Satterlee automobile. It was then some 300 feet south of the intersection traveling north at a speed of between 35 and 45 miles per hour. He realized that if neither vehicle slackened its speed the two would reach the intersection at approximately the same time, but he expected Satterlee to slow down. He did not see the automobile again until it was too late to avoid the collision. However, he was positive that the bus entered the intersection first, traveling at a speed of 20 to 25 miles per hour.

The testimony of four disinterested witnesses casts considerable doubt upon the bus driver's account of the accident. They quoted Osteraas as saying that he did not see the Satterlee vehicle until just before the collision; also, that he did not know how the accident happened as the first thing he knew, the car was in front of him and he did not have time to stop. According to the evidence, these statements, and other remarks by Osteraas of like import, were made within an hour after the accident.

The point of impact, as estimated by the investigating officer, was approximately one and one-half feet north of the center line of Bear Valley Road and five feet east of the center line of Citrus Drive. Brake marks left by the school bus led up to the point of impact. The marks on the road indicated that the bus had swerved to the right "after the point of impact." The left front corner of the bus struck the right side of the automobile either over the right front wheel or opposite the right front door.

An instruction requested by the appellants and refused by the trial court reads as follows:

"You are instructed under Section 550 of the Vehicle Code, which is the law of the State of California, provides as follows:

"Vehicle Approaching or Entering Intersection.

"(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

"(b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.

"(c) This section shall not apply to vehicles approaching each other from opposite directions, when the driver of one of such vehicles is intending to or is making a left turn. Such movements shall be governed by Section 551.

"I therefore instruct you that if you find under the evidence that the school bus operated by Paul Osteraas entered the intersection before the vehicle operated by the plaintiff, then I instruct you that it was the duty of the plaintiff to yield the right of way to the school bus, and a failure so to do would constitute negligence on the part of G. E. Satterlee.

"In accordance with the provisions of this section just read to you, I further instruct you that if you find under the evidence that the school bus and the Satterlee vehicle entered the intersection from different highways at the same time, and if you further find that the school bus was to the right of the Satterlee automobile, then I instruct you that it was the duty of the plaintiff to yield the right of way to the school bus and a failure so to do would constitute negligence.

"You are therefore instructed that if you find under the evidence that the plaintiff violated the provisions of the Vehicle Code, such violation is negligence, and if you further find that such negligence if any proximately contributed in the slightest degree to the subsequent accident and injury,

then your verdict must be in favor of the defendant, Orange Glenn School District of San Diego County and against the plaintiff G. E. Satterlee."

Upon his own motion the trial judge instructed the jury:

"Now, with reference to this matter of right of way, I wish to tell you members of the jury that one may have the right of way and yet be negligent. One cannot rely on the right of way arbitrarily and force anyone else off the highway. He cannot barge in and claim the right of way over one whose approach may be a menace to his safety or to the driver of that automobile's safety. The same test which I have given you originally applies in cases on intersections of highways, regardless of who was in the intersection first, and regardless of which automobile is on the right, if they approached at the same time; that is, what would a reasonably prudent person have done under the same or similar circumstances. That applies to both the drivers colliding, whether they approach the intersection at the same time, enter it at the same time, or one entered the intersection first. In other words, these rules of law are not absolute. They must be considered in connection with what would a reasonably prudent person have done under the same or similar circumstances * * *

"I have told you substantially of the rules of law and gave you what is called the basic speed law. I told you that when two automobiles enter an intersection at the same time the automobile or motor vehicle, whether bus or lighter vehicle, on the right, has the right of way, and if one motor vehicle enters an intersection before the other, that motor vehicle has the right of way, but that the right of way is not an absolute right to barge through ignoring any danger to the other motorists or to the barging motorist. One cannot arbitrarily rely on the right of way and expect to scatter from his path all of those who have lesser rights. In other words, the same general rule applies, and the test is: What would a reasonably prudent person do under the same or similar circumstances? It is possible for one who has the right of way to be negligent in the operation of that unquestioned right, under a certain set of circumstances."

The appellants contend that in view of their defense of contributory negligence based upon an asserted violation of section 550 of the Vehicle Code, they were entitled to an unequivocal instruction in the form requested by them. The facts of this case, they insist, do not bring it within the rule that circumstances beyond a plaintiff's control may excuse violation of the statute. The court's instruction to the effect that violation of the statute was of no consequence if the plaintiff acted as a reasonably prudent person would act under similar circumstances is also challenged as erroneous. The evidence was evenly balanced upon the issues of negligence and contributory negligence, say the appellants, and as it would support a finding that the bus entered the intersection first, the failure to correctly instruct the jury as to all of the material issues constituted reversible error.

The position of the respondent is that the proposed instruction gives no regard to the circumstances surrounding the accident, such as the speed at which the two vehicles approached the intersection, the attention given by each driver to other traffic, and the respective manner in which the automobile and the bus were operated. Also, the requested instruction does not include as a basis for the jury's consideration circumstances which might properly be considered as excusing violation of the statute. In conclusion, says the respondent, the instruction given correctly and adequately covered the law applicable to the case.

[1] The standard of care to which ordinarily one must conform is usually that of the ordinarily prudent or reasonable person under like circumstances. Civ.Code, § 1714; James v. Frazee, 209 Cal. 456, 288 P. 784; Kelley v. Hodge Transp. System, 197 Cal. 598, 242 P. 76; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Franklin v. Southern Cal. Motor Road Co., 85 Cal. 63, 24 P. 723; Richardson v. Kier, 34 Cal. 63, 91 Am.Dec. 681; Fouch v. Werner, 99 Cal.App. 557, 279 P. 183; Chalmers v. Hawkins, 78 Cal.App. 733, 248 P. 727; Rest., Torts, § 283. But

the proper conduct of a reasonable person under particular situations may become settled by judicial decision or be prescribed by statute or ordinance.

[2, 3] Traffic rules are statutory standards; for example, a parking requirement (Thomson v. Bayless, 24 Cal.2d 543, 150 P.2d 413); direction of traffic on the street (Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A. 1917C, 477, Ann.Cas. 1918E, 560,); limitation upon speed (Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Schilling v. Central Cal. Traction Co., 115 Cal.App. 30, 1 P.2d 53); but section 513 of the Vehicle Code now makes it necessary to establish as a fact that the operation of a vehicle at a greater than prescribed speed constitutes negligence. An act or failure to act below the statutory standard is negligence per se, or negligence as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. Thomson v. Bayless, supra; Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135; Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061; McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 P. 980; Siemers v. Eisen, 54 Cal. 418; Muir v. Cheney Bros., 64 Cal.App.2d 55, 148 P.2d 138; Samuelson v. Siefer, 62 Cal.App.2d 320, 144 P.2d 879; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091; Alechoff v. Los Angeles G. & E. Corp., 84 Cal.App. 33, 257 P. 569; Connell v. Harris, 23 Cal. App. 537, 138 P. 949; see: Rest., Torts, §§ 285, 286, 288.

[4-6] However, in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation. The rule has been aptly stated in Jolley v. Clemens, 28 Cal.App.2d 55, 67, 82 P.2d 51, 58, where it was said (quoting from 1 Shearman & Redfield on Negligence, § 13): "'* * * violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive * * *'". Continuing, the court said: "But unless and until justification or excuse for such conduct appear * * * the general rule applies and it must be treated as negligence per se." To the same effect is Gallichotte v. California Mut., etc., Ass'n, 4 Cal.App.2d 503, 505, 41 P.2d 349, 350, where it was stated: "Violation of an ordinance is negligence per se. In Alechoff v. Los Angeles Gas & Electric Corp., 84 Cal. App. 33, 39, 257 P. 569, 571, it is said: 'It is an axiomatic truth, that every person while violating an express statute is a wrongdoer, and as such is ex necessitate negligent in the eye of the law.' An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. Mora v. Favilla, 186 Cal. 199, 202, 199 P. 17; Rath v. Bankston, 101 Cal.App. 274, 281, 281 P. 1081." However, the fact which will excuse the violation of a statute has been defined by the court as one resulting "from causes or things beyond the control of the person charged with the violation." 4 Cal.App.2d at page 506, 41 P.2d at page 351. See also: Thomson v. Bayless, supra; Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419; Fennessey v. Pacific Gas & Elec. Co., 20 Cal.2d 141, 124 P.2d 51; Johnson v. Griffith, 19 Cal.2d 176, 120 P.2d 6; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Cragg v. Los Angeles Trust Co., supra; Shelby v. Southern Pac. Co., 68 Cal.App.2d 594, 157 P.2d 442; Roberts v. Salmon, 66 Cal.App. 2d 22, 151 P.2d 556; Fietz v. Hubbard, 59 Cal.App.2d 124, 138 P.2d 315; Prescott v. City of Orange, 56 Cal.App.2d 144, 132 P.2d 523; Finney v. Wierman, 52 Cal.App. 2d 282, 126 P.2d 143; Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307; Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368; Hill v. Peres, 136 Cal.App. 144, 28 P.2d 944; Freitas v. Passerino, 131 Cal. App. 585, 21 P.2d 993; Giorgetti v. Wollaston, 83 Cal.App. 358, 257 P. 109.

Thus in Rath v. Bankston, supra, where an automobile was parked partly on the highway in violation of the statute, the defendant was allowed to show that despite reasonably careful inspection the gasoline supply became exhausted, and the car stalled. In another case where a collision occurred with a car which had no taillight, evidence that the light was inspected and found in good order a short time before was held admissible to negative the presumption of negligence. (Berkovitz v. American River Gravel Co., supra.) And in Mathers v. County of Riverside, supra [22 Cal.2d 781, 141 P.2d 422], this court reversed a judgment which followed an instruction to the jury that if the plaintiff violated section 525 of the Vehicle Code which requires driving as close as practicable to the right side edge of the road, she was negligent as a matter of law. "Under all of the circumstances of the case," said the court, "it should have been left to the jury whether or not the position of her car with reference to the white line constituted contributory negligence." 22 Cal.2d at page 786, 141 P.2d at page 422.

A different conclusion was reached where defendant stopped on the roadway side of a parked car to permit his wife to alight. The car behind, in which plaintiff was riding, collided with defendant's vehicle. Defendant's excuse for violation of the prohibition against double parking (Veh. Code § 586) was not accepted, the court holding that the positive mandate of the statute could not be set aside for personal convenience. Mason v. Crawford, 17 Cal.App. 2d 529, 62 P.2d 420.

[7] In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in Scalf v. Eicher, supra, 11 Cal.App.2d at page 54, 53 P.2d at page 373: "Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where 'the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'" See also Mathers v. County of Riverside, supra; Johnson v. Griffith, supra; Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d 113; Berkovitz v. American River Gravel Co., supra; Prescott v. City of Orange, supra; Ebert v. Tide Water Associated Oil Co., 54 Cal.App.2d 497, 129 P. 2d 135; Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25; Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26; Osgood v. City of San Diego, 17 Cal.App.2d 345, 62 P.2d 195.

[8, 9] But there is, of course, a further question in connection with the issue of negligence. Although a violation of a statute is not excusable under the particular circumstances of the case, liability is also dependent upon proof that a duty was owed to persons in the class of the plaintiff, or the defendant who is relying upon contributory negligence. Bateman v. Doughnut Corp. of America, 63 Cal.App.2d 711, 147 P.2d 404; Figone v. Guisti, 43 Cal.App. 606, 185 P. 694; Corbett v. Spanos, 37 Cal. App. 200, 173 P. 769; see: Flynn v. Bledsoe Co., 92 Cal.App. 145, 267 P. 887; Rest., Torts, § 286.

It is also necessary to show that the violation was a proximately contributing cause of the injury. Burtt v. Bank of California, 211 Cal. 548, 296 P. 68; Williams v. Southern Pac. Co., 173 Cal. 525, 160 P. 660; Hitson v. Dwyer, 61 Cal.App.2d 803, 143 P.2d 952; Sharick v. Galloway, 19 Cal.App. 2d 693, 66 P.2d 185.

[10, 11] In the present case the requested instruction advised the jury that if the school bus entered the intersection before the vehicle operated by Satterlee, his failure to yield the right of way constituted negligence; if the two vehicles entered the intersection at the same time, and the school bus was to the right of the Satterlee vehicle, his failure to yield the right of way constituted negligence; and if Satterlee's violation of these Vehicle Code sections proximately contributed in the slightest degree to the happening of the accident, the verdict must be in favor of the school district and its driver. But an operator of a motor

vehicle cannot arbitrarily rely upon the right of way gained as a result of excessive speed or by other negligent act or violation of the law. Lindenbaum v. Barbour, 213 Cal. 277, 2 P.2d 161; Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717; Miller v. Cranston, 41 Cal.App.2d 470, 106 P.2d 963; Groat v. Walkup Drayage etc., Co., 14 Cal. App.2d 350, 58 P.2d 200; see Page v. Mazzei, 213 Cal. 644, 3 P.2d 11; Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Pattisson v. Cavanagh, 18 Cal. App.2d 123, 63 P.2d 868, 64 P.2d 945; 136 A. L.R. 1497 supplementing annotation in 89 A. L.R. 838. And although the instruction correctly left the question of fact of violation to the jury, it invaded the province of the trier of fact by not tendering the consideration the issue as to whether the circumstances were such as to excuse violation. From the evidence, the jury might reasonably have found that the bus increased its speed while traveling the 200 feet immediately east of the point of impact. If, as stated by Satterlee, when he observed the bus it was about twice as far from the intersection and traveling at approximately the same speed as his own vehicle, then he reasonably was justified, the jury could have concluded, in assuming that the bus would not dangerously increase its speed in order to enter the intersection first. Certainly by his own act of increasing speed or "racing for the intersection" an automobile driver should not be allowed to charge the operator of the other vehicle in the collision with negligence per se without the right to prove justification for the statutory violation.

[12] Furthermore, the testimony of disinterested witnesses shows that the bus driver, having unimpaired visibility, did not observe the automobile until almost the instant of impact. Under these circumstances it was a question of fact whether Satterlee's violation of the code provisions, if any, was justifiable or excusable. And although judicial discretion may be exercised in the adoption of a standard of care for the purpose of imposing civil liability, the refused instruction did not afford the jury an opportunity to pass upon the question as to whether the circumstances shown by the evidence afforded excuse or justification. For these reasons, to have instructed the jury in the terms proposed by the appellants would have constituted prejudicial error. See Mathers v. County of Riverside, supra; Fietz v. Hubbard, supra; Finney v. Wierman, supra; Marston v. Pickwick Stages, Inc., 78 Cal.App. 526, 248 P. 930; Hagenah v. Bidwell, 46 Cal.App. 556, 189 P. 799.

[13-15] The instruction given by the trial judge upon his own motion presents a more difficult question. He refused to adopt the standard of care established by the Legislature and did not instruct the jury that violation of the statutory standard constituted prima facie evidence of negligence which could be rebutted by evidence of justification or excuse. Instead, upon the issue of contributory negligence, the court adopted the reasonable man standard of care exclusively, and allowed the jury to determine what constituted due care under the circumstances. The question presented for decision upon this aspect of the case is, therefore, whether the trial court arrived at a proper standard.

By the instruction which adopted the reasonable man standard of care, the jury, in effect, was told that the school district and its driver had the burden of establishing the failure of Satterlee to act as a reasonable man under the circumstances although he had violated a statute and such violation proximately caused the accident. That is not the law. The presumption created by proof of the failure to comply with a statute or ordinance relieves a defendant from the burden of proving that the plaintiff failed to act as a reasonably prudent man. All that the defendant need prove to establish contributory negligence is that plaintiff's violation of the statute in question proximately caused the accident. The burden cast upon the defendant where such violation is relied upon, is therefore more easily established than a failure to act as would a reasonably prudent man under similar circumstances. If there was a violation of the applicable statute, the burden of going forward is then cast upon the plaintiff, if the defendant is relying upon contributory negligence, to present evidence justifying an excuse for violation. If the jury does not believe that the evidence is

sufficient to excuse violation, it must find for the defendant.

For these reasons the adoption by the trial court of the standard of care imposed by a statute or ordinance becomes an important factor in imposing liability. The instruction given by the court on its own motion had the effect of minimizing, if not completely negativing the code provision. It was, therefore, erroneous and considering the direct conflict in the evidence, constituted "a miscarriage of justice" within the meaning of article VI, section 4½ of the California Constitution.

The judgment is reversed.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, Justice (dissenting in part).

I concur in the judgment. I cannot agree, however, with the doctrine set forth in the majority opinion that an act or a failure to act in violation of a statute like the Vehicle Code is merely "presumptive evidence of negligence," which may be rebutted by showing that the act or omission was justifiable or excusable under the circumstances, with the excuse or justification a question of fact for the jury. This doctrine is in effect a modified form of the doctrine that the violation of a statute (herein used to include an ordinance) is merely evidence of negligence. Under the ordinary evidence-of-negligence doctrine the jury, while obliged to consider the statutory standard, is free to substitute a standard of its own. Under the majority opinion it is likewise free to do so, if the one violating the statute offers evidence of excuse or justification. Since it is a question of fact for the jury whether the excuse or justification is sufficient, the result is that one violating the statute need only offer proof that he acted as a reasonably prudent person under the circumstances, and the jury is then free to conclude therefrom that he was justified in violating the statute unless "reasonable men can draw but one inference * * * pointing unerringly to * * * negligence."

The statement is frequently found in the cases that an act in violation of a statute "is presumptively an act of negligence, and while the defendant is permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive." (Mora v. Favilla, 186 Cal. 199, 202, 199 P. 17, 18; see, also, Berkovitz v. American River Gravel Co., 191 Cal. 195, 199, 215 P. 675; Dewhirst v. Leopold, 194 Cal. 424, 431, 229 P. 30; Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; Rath v. Bankston, 101 Cal.App. 274, 281, 281 P. 1081. The vice of such a statement is that it leaves to the jury the determination of the effect of a statute, a question of law that properly belongs to the court. Presumptions are used in ascertaining what the facts are, not in determining what the law is. See, Wigmore, Evidence, 3d Ed. § 2490. If the "presumption" can be rebutted merely by showing that one charged with violating the statute acted as a reasonably prudent person under the circumstances, the controlling standard is no longer the statutory rule, but the view of the jury as to what constitutes reasonable conduct.

The vital question, presented at the outset, is whether the statutory standard is applicable at all. If it is, the conduct of the parties must be measured by that standard, and the jury is not free to determine what a reasonably prudent person would have done under the circumstances. If there is sufficient excuse or justification, there is ordinarily no violation of a statute, and the statutory standard is inapplicable. If a statute is so drawn as not to be susceptible of such a construction, so that it would impose liability without fault, the statutory standard is ordinarily not an appropriate one in a negligence case and should be rejected by the court. Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777; see Morris, Criminal Statutes and Tort Liability, 46 Harv.L.Rev. 453, 457. It is needlessly circuitous and confusing, and productive of caprice and conflict in decisions, to instruct the jury that they should first determine whether the conduct in question fell below the statutory standard and that they should then determine whether such conduct was justifiable under the circumstances. It is a question of law in each case whether the acts were in violation of

the statute, or excepted therefrom, or if not excepted, whether liability without fault would be imposed by adopting the statutory standard. It is of course a question of fact whether the alleged acts occurred.

A majority of American courts have adopted the doctrine that the violation of a statute constitutes negligence per se towards persons harmed as a result of acts or omissions constituting such violation, if the statute was designed to protect such persons against that kind of harm, even though the statute provides criminal sanctions only and makes no reference to civil liability. See James, Accident Liability, 55 Yale L.J. 365, 367; Prosser, Torts, § 39; Thayer, Public Wrong and Private Action, 27 Harv.L.Rev. 317; Restatement, Torts, § 286. The courts of this state have frequently followed this doctrine. Siemers v. Eisen, 54 Cal. 418, 420; Driscoll v. Market Street, etc., Ry. Co., 97 Cal. 553, 565, 32 P. 591, 33 Am.St. Rep. 203; McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 486, 42 P. 980; Benjamin v. Noonan, 207 Cal. 279, 283, 277 P. 1045; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061; Baillargeon v. Myers, 180 Cal. 504, 507, 182 P. 37; Clinkscales v. Carver, 22 Cal. 2d 72, 75, 136 P.2d 777; Hopper v. Bulaich, 27 Cal.2d 431, 434, 164 P.2d 483; King v. City of Long Beach, 67 Cal.App.2d 1, 6, 153 P.2d 445; Alechoff v. Los Angeles G. & E. Corp., 84 Cal.App. 33, 39, 257 P. 569.

It is clear that the legislative standard is controlling if the statute expressly provides for civil liability. Confusion has arisen in the past from a failure to understand why the legislative standard governs civil liability when the statute prescribes criminal sanctions only. The reason is simply that the courts under common law principles make the legislative standard controlling and take the formulation of a standard from the jury, when they find that the criminal statute has been enacted not merely in the interest of the community as a whole but to protect a general class of persons, of which the party invoking the statute is a member, against the kind of harm that has been sustained. The decision as to what should be the controlling standard is made by the court, whether it instructs the jury to determine what would have been due care of a man of ordinary prudence under the circumstances or to follow the standard formulated by a statute. The latter standard determines civil liability, not because the Legislature has so provided, but because the courts recognize that, with respect to the conduct in question, the duties of the parties are determined by the statute. (The legislative standard may be controlling even in situations in which there is technically no crime. Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777; see, also, Polk v. City of Los Angeles, 26 Cal.2d 519, 541, 542, 159 P.2d 931. If the forbidden conduct were merely evidence of negligence, the jury would be free to substitute its own standard of reasonable conduct, and to approve conduct that the Legislature has declared so dangerous as to call for criminal punishment. "Negligence is failure to exercise the care required by law. Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then, as we have said, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard imposed by statute is negligence, as matter of law." Lehman, J., in Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987, 990. "By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. * * * Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have." Cardozo, J., in Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815.

Some statutes, such as traffic laws, are enacted, not to prevent acts that the community may regard as inherently undesirable, but to prescribe uniform and certain rules of conduct in the interest of safety. Such rules are authoritative declarations as to how persons shall act, and must be observed because regulations of some kind are essential. "Vehicular traffic can proceed safely and without recurrent traffic

tangles only if vehicles observe accepted rules of the road. Such rules, and especially the rule that all vehicles proceeding in one direction must keep to a designated part or side of the road—in this country the right-hand side—have been dictated by necessity and formulated by custom. The general use of automobiles has increased in unprecedented degree the number and speed of vehicles. Control of traffic becomes an increasingly difficult problem. Rules of the road regulating the rights and duties of those who use highways, have, in consequence, become increasingly important. The Legislature no longer leaves to custom the formulation of such rules. Statutes now codify, define, supplement, and, where changing conditions suggest change in rule, even change rules which formerly rested on custom." Lehman, J., in Tedla v. Ellman, 280 N.Y. 124, 19 N.E. 2d 987, 989. In such a field, "when the Legislature has spoken, the standard of care required is no longer what the reasonably prudent man would do under the circumstances but what the Legislature has commanded." Tedla v. Ellman, supra, at page 990 of 19 N.E.2d.

An instructive analogy may be drawn between traffic rules and navigation rules designed to prevent collisions at sea. It it recognized that the navigation rules rather than what the conduct of a person of ordinary prudence would have been under the circumstances furnish the standard as to whether a collision has been caused by negligence of a navigator. The Pennsylvania, 19 Wall. 125, 135, 86 U.S. 125, 135, 22 L.Ed. 148; The Suffolk, 2 Cir., 258 F. 219, 221, 169 C.C.A. 287; Belden v. Chase, 150 U.S. 674, 702, 703, 14 S.Ct. 264, 37 L.Ed. 1218, and that "it is necessary that the courts should rigorously enforce the collision rules that the object for which they were framed may be attained." The Stifinder, 2 Cir., 275 F. 271, 277; The Oregon, 158 U.S. 186, 202, 15 S.Ct. 804, 39 L.Ed. 943. This same reasoning should be applicable to the rules of the Vehicle Code, and this has been the view of the courts of this state, which have held that conduct in violation of the Vehicle Code is negligence as a matter of law. Benjamin v. Noonan, 207 Cal. 279, 283, 277 P. 1045; Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 147, 52 P.2d 922; Lahti v. McMenamin, 204 Cal. 415, 418, 268 P. 644; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 139, 85 P. 152, 5 L.R.A.,N.S., 1059; Ferguson v. Nakahara, 43 Cal.App. 2d 435, 443, 110 P.2d 1091; Reeves v. Lapinta, 25 Cal.App.2d 680, 681, 78 P.2d 465; Scragg v. Sallee, 24 Cal.App. 133, 144, 140 P. 706; Mazgedian v. Swift & Co., 22 Cal.App.2d 570, 572, 71 P.2d 833; Duncan v. J. H. Corder & Son, 18 Cal.App. 2d 77, 83, 62 P.2d 1387; see 2 Cal.Jur. Ten-Year Supp., 226-227; 19 Cal.Jur. 632. The Legislature in revising the Vehicle Code from time to time presumably knew that the courts had established this doctrine, and in 1943 it expressly recognized the doctrine when it provided in section 403.5 that conduct in violation of the provisions of the Vehicle Code shall not be regarded as "negligence per se" if a federal regulation authorizes such conduct.

Extraordinary circumstances may justify conduct that appears to violate the letter of a statute but which is impliedly excepted therefrom, if obedience is substantially impossible or deviation from the letter of the statute is necessary to serve its purpose. "If a criminal statute or ordinance which prohibits a particular act is construed to permit such an act to be done under conditions without criminal responsibility such an act may be done under the same conditions without creating civil liability under the statute or ordinance. Many statutes and ordinances are so worded as apparently to express a universal obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. Thus, the statutory prohibition against parking an automobile on the traveled part of a highway is not applicable to one which has broken down and is incapable of motion and thus remains on the highway while the driver is diligently seeking assistance to remove it. The pro-

visions of statutes, intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede. Thus, a statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travellers to drive upon the other side, if so doing is likely to prevent rather than cause the accidents which it is the purpose of the statute or ordinance to prevent." Restatement, Torts, § 286, comment (c); see Johnson v. Griffith, 19 Cal.2d 176, 180, 120 P.2d 6; Mathers v. County of Riverside, 22 Cal.2d 781, 785, 141 P.2d 419; Umemoto v. McDonald, 6 Cal.2d 587, 590, 58 P.2d 1274; Dewhirst v. Leopold, 194 Cal. 424, 431, 229 P. 30; Berkovitz v. American River Gravel Co., 191 Cal. 195, 199, 215 P. 675; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 667, 98 P. 1063, 16 Ann.Cas. 1061; Fietz v. Hubbard, 59 Cal.App.2d 124, 128, 138 P.2d 315; Prescott v. City of Orange, 56 Cal. App.2d 144, 148, 132 P.2d 523; Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 540, 38 P.2d 193; Fouch v. Werner, 99 Cal.App. 557, 564, 279 P. 183; Dugan v. Fry, 3 Cir., 34 F.2d 723; Long v. Steffen, 194 Wis. 179, 215 N.W. 892, 61 A.L.R. 1155; Cupples Mercantile Co. v. Bow, 32 Idaho 774, 189 P. 48, 24 A.L.R. 1304; Lawson v. Dye, 106 W.Va. 494, 145 S.E. 817, 63 A.L.R. 277. Thus "if some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated." Berkovitz v. American River Gravel Co., 191 Cal. 195, 199, 215 P. 675, 677. "A classic illustration of the same general principle is the Bologna ordinance against blood-letting in the streets, which did not make criminals of surgeons." Edgerton, J., in Ross v. Hartman, 78 U.S. App.D.C. 217, 139 F.2d 14, 16, 158 A.L.R. 1370. A similar exception is expressly formulated in the Navigation Rules as follows: "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger," (33 U.S.C.A. § 212, art. 27.) "The duty is imperative to observe the rules, and to assume that an approaching vessel will do likewise, until after the danger has become so manifest as to show that there is no proper choice of judgment other than that of departing from the rules. Any other course would lead to confusion and be a most prolific source of accidents." The Piankatank, 4 Cir., 87 F.2d 806, 810; Intagliata v. Shipowners, etc., Co., 26 Cal. 2d 365, 377, 159 P.2d 1.

A statute regulating traffic must be reasonably construed not only by limiting its effect to the situations envisaged when it was enacted, but also by reading such provisions in conjunction with one another and with the rules of the common law supplementing them. Thus, provisions governing the right of way at an intersection, by their very nature, apply only to part of the conduct of each operator of a vehicle. The safety of operators who meet at an intersection depends also on the conduct of each of them before he reached the critical juncture. An operator who approaches the intersection at an improper rate of speed, or suddenly increases his speed before he reaches the intersection, may be at fault even though he was first at the intersection and therefore under the letter of the statute entitled to cross it. Lindenbaum v. Barbour, 213 Cal. 277, 281, 2 P.2d 161; Stevenson v. Fleming, 47 Cal.App. 2d 225, 117 P.2d 717; Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 355, 58 P.2d 200; see 136 A.L.R. 1497; Morris v. Bloomgren, 127 Ohio St. 147, 187 N.E. 2, 89 A.L.R. 838. Again, an operator who reached the intersection first after he had properly approached it may be at fault if he proceeds blindly in disregard of danger that is obvious. Donat v. Dillon, 192 Cal. 426, 429, 221 P. 193; Enz v. Johns, 112 Cal.App. 1, 5, 296 P. 115; Blackmore v. Brennan, 43 Cal.App.2d 280, 287, 110 P.2d 723; see 2 Cal.Jur.Ten-Year Supp. 341. Since the duty of each operator to observe the right of way rules is imperative, one who arrives at an intersection first may assume that the operator of another vehicle will obey the rules. Leblanc v. Coverdale, 213 Cal. 654, 657, 3 P.2d 312;

Page v. Mazzei, 213 Cal. 644, 645, 3 P.2d 11; Ebert v. Tide Water Associated Oil Co., 54 Cal.App.2d 497, 501, 129 P.2d 135; Avalos v. Grimale, 30 Cal.App.2d 725, 728, 87 P.2d 392; Couchman v. Snelling, 111 Cal.App. 192, 195, 295 P. 845; see 2 Cal. Jur.Ten-Year Supp. 338. One's right to assume that the other will obey the rules ceases only when the circumstances make it manifest that the other cannot or does not intend to obey the law; even then the one having the right of way is not at fault unless by yielding the right of way, stopping his vehicle, or taking other action, a collision could be avoided.

The issues in the present case related to the approach of each operator to the intersection and his conduct at the intersection. The bus driver testified that the bus was approximately 195 feet from the intersection when he first observed plaintiff's car, which was then approximately 300 feet from the intersection; that he was travelling at approximately 30–35 miles per hour and that plaintiff was travelling at about 45 miles per hour; that he realized that the two vehicles would reach the intersection at approximately the same time if he did not change his speed but that he expected that the plaintiff, coming from the left, would reduce his speed. Plaintiff testified that he was travelling at a speed of approximately 25 miles per hour and first saw the bus when he was approximately 75 feet from the intersection and the bus was at least twice that far from the intersection. The bus driver was at fault if he raced for the intersection or if he became aware that plaintiff would not give him the right of way and if he could have avoided the collision by yielding the right of way, stopping or taking other action. Plaintiff was at fault if he approached the intersection at improper speed or observed that the bus would reach the intersection first or at the same time as he would. If the bus driver approached the intersection at a proper rate of speed and could not anticipate that plaintiff would be there first, the issue became important whether the bus driver perceived that there was a manifest danger of collision to be avoided by his yielding the right of way, stopping, or taking other action to avoid the collision. In this respect his testimony, that he knew that a collision was inevitable when plaintiff's car was about 40 feet from the intersection, was important. It must also have been clear to the plaintiff that the closer he came to the intersection the more he had to be certain that he did not have "worlds of time" as he allegedly thought when he first saw the bus.

The jury should have been instructed in accordance with the foregoing rules.

The trial court's instruction, quoted in the majority opinion, did not advise the jury that the question as to who was at fault was to be determined under the right-of-way provisions, if both cars properly approached the intersection and one was there first or one car came from the right, if they both arrived at the intersection at the same time. The instruction was inadequate in not advising the jury that one cannot gain the right of way by racing for it or otherwise violating the law. The effect of the instruction was to advise the jury that the provisions of the Vehicle Code dealing with the right of way were of no consequence, and that if an ordinary prudent person under the circumstances would have violated the statute, the violation was excused. Instead of describing the scope of the statutory standard the court rejected that standard and in its place adopted the reasonable man standard, leaving it to the jury to determine what was proper conduct under the circumstances.

In cases of this sort the choice of the wrong theory, either as a basis of instruction to the jury or as a rule of decision for the trial court sitting without a jury, may have serious consequences. Any doctrine that allows uncontrolled discretion in the jury or trial court to disregard statutory standards cannot fail to bring about a similar disregard of the standards by those whose conduct is regulated.

CARTER, Justice.

I dissent. The issue in this case is whether or not a purported violation of the traffic law right of way at intersections (Veh.Code, § 550) constitutes negligence *per se;* that is, whether the court should adopt it as the invariable standard of care or the test should be that of the conduct of

a person of ordinary prudence. The latter is preferable for the reason that the rule is not capable of precise application.

A violation of the rule may or may not be negligence *depending upon the circumstances.* That is conceded by the opinion prepared by Justice Edmonds and is supported by the authorities. It is clear that there may be factors indicating that the violation of the rule may not be negligence, such as excuse, emergency, justification, the speed of the vehicles, and their distance from the intersection and the nature of the intersection. See Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419; Lindenbaum v. Barbour, 213 Cal. 277, 2 P.2d 161; Stevenson v. Fleming, 47 Cal. App.2d 225, 117 P.2d 717; Miller v. Cranston, 41 Cal.App.2d 470, 106 P.2d 963; Groat v. Walkup Drayage etc., Co., 14 Cal.App.2d 350, 58 P.2d 200. Being dependent upon the circumstances in the particular case, we have nothing more, in effect, than an application of the ordinary prudence standard, and the provision of the statute should not be made an absolute standard for the determination of either the issue of negligence or contributory negligence. The right of way rule does not lend itself to practical application. It is only in the rare theoretical situation that it can be applied. It must be supposed that the two vehicles are traveling at the identical speed and enter the intersection at precisely the same time; and that the view of oncoming vehicles is equal to both drivers. There must be no disturbing elements or sudden emergencies. Justice Edmonds treats the matter as creating a prima facie case of negligence and then shifts the burden of going forward to the opponent to show exculpatory circumstances. That leads only to confusion of the jury. If there may be such circumstances then the test actually being used is the conduct of a person of ordinary prudence. Hence the jury should be so instructed thus avoiding the complication of shifting the burden of proceeding which must inevitably result in confusion.

The majority opinion states: "The presumption created by proof of the failure to comply with a statute or ordinance relieves a defendant from the burden of proving that the plaintiff failed to act as a reasonably prudent man. All that the defendant need prove to establish contributory negligence is that plaintiff's violation of the statute in question proximately caused the accident. *The burden cast upon the defendant where such violation is relied upon, is therefore more easily established than a failure to act as would a reasonably prudent man under similar circumstances. If there was a violation of the applicable statute, the burden of going forward is then cast upon the plaintiff, if the defendant is relying upon contributory negligence, to present evidence justifying an excuse for violation.* If the jury does not believe that the evidence is sufficient to excuse violation, it must find for the defendant." (Emphasis added.) The foregoing statement will not bear thoughtful analysis. After stating that: "All that the defendant need prove to establish contributory negligence is that plaintiff's violation of the statute in question proximately caused the accident," the opinion states: "The burden cast upon the defendant where such violation is relied upon, is therefore more easily established than a failure to act as would a reasonably prudent man under similar circumstances." Why this result obtains does not appear. We may assume that all available evidence relative to plaintiff's conduct will be offered, and it is for the trier of fact to determine from such evidence in the light of the applicable statute whether such conduct was that of a reasonably prudent person under similar circumstances. If it was, it cannot be said that plaintiff was negligent even if he did violate said statute. The opinion then states that if there was a violation of the applicable statute, "*the burden of going forward is then cast upon the plaintiff * * * to present evidence justifying an excuse for violation.*" (Emphasis added.) If, as asserted in the majority opinion, the violation of a statute or ordinance which is a proximate cause of the accident is negligence *per se,* how can such violation be excused or justified? It clearly appears from the discussion in the majority opinion that it is the position of the majority that the violation of a statute or ordinance is not negligence *per se* unless it is a proximate cause of the accident. It should fol-

low that if such violation is a proximate cause of the accident, it cannot be excused or justified so far as civil responsibility is concerned. That is to say, that if a defendant has violated a statute or ordinance, and such violation is a proximate cause of an accident, he is liable in civil damages for any injury which may flow therefrom. Contributory negligence will not defeat recovery by plaintiff unless it contributes proximately to the happening of the accident. Therefore, in order to hold that the violation of a statute or ordinance by plaintiff constitutes contributory negligence, it must first be determined that such violation was a proximate cause of the accident. If it was a proximate cause of the accident, it cannot be excused or justified. However, the majority opinion purports to lay down the rule that the violation of a statute or ordinance may be a proximate cause of the accident, and therefore constitutes negligence *per se,* and yet may be excused or justified. Such a rule can only lead to confusion worse confounded. How such a rule can be applied in a trial forum is difficult to understand. Negligence cases are presented by the plaintiff first making out a prima facie case of negligence on the part of the defendant which was a proximate cause of the accident. The defendant then presents his defense by attempting to show absence of negligence on his part or contributory negligence on the part of the plaintiff. When the evidence is concluded the court instructs the jury that so far as the burden of proof is concerned, such burden is on the plaintiff to prove defendant's negligence and the burden is on the defendant to prove any contributory negligence on the part of plaintiff unless such contributory negligence affirmatively appears from the evidence presented by the plaintiff. Accepting the theory advanced in the majority opinion that the violation of a statute or ordinance is negligence *per se,* and assuming that there was evidence of a violation of a statute or ordinance by either party, the court could very simply instruct the jury that if they believe that either party was guilty of a violation of a statute or ordinance and that such violation was a proximate cause of the accident the violator was guilty of negligence *per se* unless such violation was excused or justified. This is, in effect, what the trial court did in the case at bar except that it added that a person who violates a statute is not guilty of negligence if he acted as a reasonably prudent person, which is the equivalent of saying that the violation was excused or justified. There is no basis in such a case for talk about the "burden of going forward," or that it is easier to establish contributory negligence by proving that plaintiff violated a statute than to prove that his conduct was not that of a reasonably prudent person, as all of the evidence has been already introduced and the function of the jury is to weigh that evidence and arrive at a conclusion based upon the law contained in the instructions of the court.

This court has recognized that criminal statutes such as traffic laws are not always accepted as approximate standards in civil actions for negligence. Hopper v. Bulaich, 27 Cal.2d 431, 164 P.2d 483; Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777; Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419. In the Mathers case, involving the traffic law (Veh.Code, § 525) requiring that a car be driven as near the right-hand curb as practicable, this court in holding erroneous an instruction that the violation thereof was negligence as a matter of law stated (22 Cal.2d at page 786 141 P.2d at page 422): "Under all of the circumstances of the case it should have been left to the jury whether or not the position of her [plaintiff's] car with reference to the white [center] line constituted contributory negligence."

It should be obvious that the moment the absolute standard, which makes violation of a statute or ordinance negligence *per se,* is relaxed, by permitting a showing of excuse, justification, emergency, etc.; the inevitable result is that the issue of negligence is determined by the trier of fact giving consideration to evidence relating to the conduct of the parties. While the standard provided in the statute or ordinance is a factor to be considered, the ultimate fact to be determined is whether or not the person charged with negligence or contributory negligence failed to exercise that degree of care which a reasonably prudent person would have exercised under

similar circumstances. Hence, the standard applied is the conduct which would be expected of a reasonably prudent person. Experience has shown that this is the standard applied by juries in the general run of negligence cases. Little heed is given to technical and artificial standards which have no practical application, as jurors are familiar with traffic rules and are more capable of applying them to the facts of a particular case than the members of this court.

For the reasons above discussed a violation of the traffic law right of way as constituting negligence *per se* is peculiarly inadequate to test civil liability, and the instruction in the case at bar applying the test of a reasonably prudent person was proper.

The judgment should be affirmed.




29 Cal.2d 606

## COMBS v. LOS ANGELES RY. CORPORATION.

L. A. 19572.

Supreme Court of California, In Bank.
Jan. 31, 1947.

Rehearing Denied Feb. 27, 1947.

**1. Carriers ⇐348(5)**

A requested instruction that plaintiff could not recover damages from defendant street railway company for injuries sustained as result of collision between a street car, on which he was a passenger, and codefendant's automobile, if plaintiff did not comply with city ordinance prohibiting passengers from riding on street car steps, was properly refused, in absence of qualification that such violation of ordinance might be excused under certain circumstances.

**2. Carriers ⇐331(5), 344**

A street car passenger's violation of city ordinance by riding on car step constitutes negligence per se and evidence of such conduct requires presumption of his negligence, but such presumption may be overcome by evidence that such conduct, under all surrounding circumstances was excusable.

**3. Carriers ⇐347(8)**

Whether street car passenger was violating city ordinance by riding on car step at time of collision between car and automobile was question for jury.

**4. Carriers ⇐348(13)**
**Trial ⇐240, 243**

An instruction that violation of city ordinance by riding on street car step requires presumption of negligence, but that such presumption may be overcome by all circumstances surrounding event, was not erroneous as conflicting, argumentative, misleading or confusing.

**5. Carriers ⇐346(2)**

In action for injuries to street car passenger as result of collision between car and automobile, evidence supported finding, implied from jury's verdict for plaintiff, that his violation of city ordinance by riding on street car step at time of collision was excusable.

CARTER, J., dissenting in part; TRAYNOR, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Cecil Combs against the Los Angeles Railway Corporation and another for personal injuries caused by a collision between named defendant's street car and codefendant's automobile. From a judgment for plaintiff and codefendant, named defendant appeals.

Affirmed.

Prior opinion, Cal.App., 162 P.2d 68.

Gibson, Dunn & Crutcher, E. H. Chapman and Gerold C. Dunn, all of Los Angeles, for appellant.

Tripp, Callaway, Sampson & Dryden, Walter L. Gordon, Jr., Lowell L. Dryden and DeWitt Morgan Manning, all of Los Angeles, for respondent.

EDMONDS, Justice.

Combs sued to recover damages for personal injuries, and the appeal of the Los

Angeles Railway Corporation attacks the judgment in his favor upon the ground that he was contributorily negligent as a matter of law. As in Satterlee v. Orange Glenn School District, Cal.Sup., 177 P.2d 279, certain jury instructions are challenged upon the ground that they incorrectly state the law in regard to the effect of a plaintiff's violation of a statute upon his cause of action for negligence.

The accident occurred when a street car operated by the railway company collided with an automobile operated by Joseph Commodore. Combs was standing on the step of the car and the impact threw him to the street. He named both the corporation and Commodore as defendants. Each of them denied the charge of negligence and, as a separate defense, pleaded contributory negligence.

As Combs explained the circumstances of his case, late in the afternoon, he and several other persons were standing at a loading zone waiting for a street car. When it arrived, he made no observation as to the number of persons which it carried, nor did he notice that the rear platform was crowded. However, he saw several persons riding on the rear step.

He was the last person to board the car. He reached the second step and, after the car started, paid his fare to the conductor, received a transfer, and then endeavored to make his way to the platform. However, it was so crowded with passengers that he could not do so. As the street car approached the next stop, and while Combs was still on the second step, the car and the automobile of Commodore collided. The impact ripped the steps from the body of the car and Combs received injuries for which he now claims damages.

At the conclusion of the plaintiff's case, both defendants challenged the sufficiency of the evidence by motion for a nonsuit based upon the claim that the evidence conclusively established that, as a matter of law, Combs was guilty of contributory negligence. This motion was denied. Upon the same grounds, at the close of the trial, each defendant unsuccessfully moved for a directed verdict.

The jury returned its verdict in favor of Combs and Commodore and against the railway company. The appeal of the corporation is from the judgment and from the order denying its motion for judgment notwithstanding the verdict.

The appellant contends that the evidence conclusively established that Combs was guilty of contributory negligence as a matter of law because of his violation of a section of the Municipal Code of the City of Los Angeles which makes it unlawful for one to "ride upon the fenders, steps, or running board of any street car or vehicle." (§ 80.47.) And as there is no conflict in the testimony that Combs was "riding" upon the steps of the street car in violation of the statute and but one conclusion can be drawn from the facts, the question of proximate cause is one of law.

A further ground of attack upon the judgment is that prejudicial error resulted from the action of the trial court in refusing to instruct the jury that if it found Combs had violated the applicable ordinance, he was guilty of negligence as a matter of law. An instruction upon this point requested by appellant and given to the jury as modified is also challenged by the railway corporation as constituting prejudicial error. Violation of the ordinance was conclusive, not presumptive, evidence of negligence, since there were no circumstances presented which would justify or excuse violation. Furthermore, the modified instruction was conflicting, argumentative, and misleading. Also, says the appellant, the instruction given to the jury was erroneous because it failed to state in specific terms circumstances under which a violation of the ordinance is excused, but leaves this entire matter solely to conjecture without reference to legal principles.

On the other hand, Combs contends that the issue of contributory negligence was properly left to the jury. He urges that the evidence presented a question of fact as to whether he was "riding" upon the steps of the street car within the meaning of the ordinance and supports the jury's implied finding that he was not doing so.

The instruction given by the court on its own motion is defended by Combs as being a correct statement of law. Considering the circumstances, he says, the violation of

the ordinance created merely a presumption of negligence, and it was a question of fact as to whether the evidence was such as to excuse such violation.

The railway company's proposed charge to the jury reads as follows: "If you find from the evidence * * * that at the time of the collision between the automobile and street car and immediately prior thereto, * * * Combs was riding upon one or more of the steps of said street car, then * * * Combs was * * * [violating] the Municipal Code * * * and as such was guilty of negligence as a matter of law. If you further find from the evidence that such negligence, if any, contributed proximately in any degree whatever, even the slightest, to the injuries sustained by * * * Combs, then [he] is not entitled to recover * * * against defendant * * * corporation. * * *".

The instruction given by the court as a modification of one submitted by the appellant is No. 149 of California Jury Instructions, Third Revised Edition. It reads: "Conduct which is in violation of the [Municipal] code sections just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that any party to this action did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

The court also advised the jury that "a presumption is a deduction which the law expressly directs to be made from particular facts. It may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption."

[1] These instructions present the same question which was decided in the Satterlee case, supra. The evidence concerning the injury to Combs required, first, a determination as to whether he had violated the ordinance and, if he had done so, the effect of such violation. The instruction refused by the court directed the jury to find that, if he did not comply with the mandate of the ordinance, he could not recover. Because of the omission of the important qualification that such conduct might be excused under certain circumstances, the court's ruling upon it was correct. See Satterlee v. Orange Glenn School District, supra, 177 P.2d 279.

[2, 3] The instruction given by the court was a complete and correct statement of the law. By it, the jury was first asked to determine whether Combs was "riding" upon the steps of the car. In view of the testimony of Combs that he was endeavoring to reach the rear platform and that the street car had traveled only a short distance before the collision, the fact of violation was correctly left to the jury. Connard v. Pacific Elec. R. Co., 14 Cal.2d 375, 94 P.2d 567.

If he was violating the ordinance in that particular at the time of the accident, the jury was told, the question then to be answered was whether the circumstances showed an excuse for his conduct. Bearing upon that issue was the testimony of Combs that when he boarded the street car he did not make any observation as to how many people it was carrying, that he did not notice the crowded condition of the rear platform until the car was proceeding on its way, that he endeavored to make his way into the car but found it was impossible to do so, and that the car had not stopped when the step upon which he was riding was struck by the automobile of Commodore. From this evidence, the jury could find that Combs reasonably thought that the people in front of him would soon move up into the car, but subsequent events beyond his control prevented him from doing so.

[4] The appellant's contention that the instruction was conflicting, argumentative, and misleading and tended to confuse the jury is without merit. The statements in the instruction that violation of an ordi-

nance requires a presumption of negligence and that the presumption may be overcome by "all the circumstances surrounding the event," are neither inconsistent nor confusing. In many other situations a jury is directed that, if it finds certain facts to be true, a certain conclusion follows; however, if additional facts are found then a different determination must be made. The challenged instruction does nothing more than this. In other words, to tell jurors that violation of an ordinance gives rise to a rebuttable presumption of negligence is to say that they are authorized by the law to look behind, beyond, around and outside the violation to see if there are circumstances that justify or excuse the conduct. The statements merely complement each other. This instruction, when combined with the instruction explaining the legal effect of a presumption, clearly states the applicable principles of law announced in Satterlee v. Orange Glenn School District, supra. It thus becomes unnecessary to decide whether a duty was owed to persons in the class of appellant so that it could take advantage of a violation of section 80.47 of the Los Angeles Municipal Code.

[5] The verdict is an implied finding that, under the circumstances, the alleged violation of the ordinance was excusable and it is amply supported by the evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the judgment of affirmance, but as the majority opinion is based upon the unsound reasoning in the Satterlee case, 177 P.2d 279, from which I dissented, I cannot agree with the legal theory upon which said opinion is based.

Once it is conceded, as it is in the majority opinion, that the violation of a penal statute or ordinance by one seeking to recover civil damages, does not necessarily bar a recovery, there is no common sense or logic in talking about presumptions or presumptive negligence arising from evidence of such violation. A person involved in an accident may be guilty of violating several statutes or ordinances but such violations may have no bearing upon his alleged negligent conduct. For example, he may be driving an automobile without a driver's license; his automobile may not have a current license number; and he may be operating his automobile at night without a taillight and have a head-on collision. Obviously, none of these violations can be said to have any bearing upon negligent conduct, and evidence relating to them would be immaterial and irrelevant. Even when we consider a statute or ordinance relating to conduct directly involved in the accident, it is first a question of fact as to whether there has been a violation, second, whether such violation was a proximate cause of the accident, and third, if both of the foregoing are answered in the affirmative, whether such violation was excused or justified. There must necessarily be involved in the latter the question of whether or not the person charged with such violation acted as a reasonably prudent person under the circumstances. If so, he could not be guilty of negligence. So the test must be in every case, what would a reasonably prudent person have done under the circumstances? Applying this test to the facts of the case before us, I can perceive no basis upon which the finding in favor of plaintiff can be reversed. It was certainly a question of fact as to whether he acted as a reasonably prudent person under the circumstances. To say that the technical violation of an ordinance would bar a recovery under such circumstances is too harsh a rule for any court of justice to announce. True, the ordinance was properly introduced as evidence in the case, and its provisions are factors to be considered by the trier of fact in determining the issue of contributory negligence. The trier of fact might have determined that plaintiff was guilty of a violation of the ordinance and his conduct in so doing was not that of a reasonably prudent person. Such a determination would have justified a finding of contributory negligence. On the other hand, the trier of fact might have concluded, as it did, that notwithstanding the proof showing a violation of the ordinance, plaintiff's conduct was that of a reasonably prudent

person, and he was not, therefore, guilty, of contributory negligence. There is no sound basis for the statement that proof of the violation of an ordinance requires a presumption that the violator was negligent. This is not the field in which presumptions operate. They operate in the absence of evidence of the facts of which they are themselves evidence. Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16; Westberg v. Willde, 14 Cal.2d 360, 367, 94 P.2d 590. Here the evidence showed just what the conduct of plaintiff was, and it was for the trier of fact to determine from the evidence whether or not plaintiff's conduct was that of a person of ordinary prudence. Assuming there was evidence that plaintiff violated the ordinance, it must be considered with the other evidence in determining the ultimate fact. When this fact is determined either the presence or absence of contributory negligence has been established. This is accomplished without the aid of a presumption. It was proper for the trial court to read to the jury the provision of the Municipal Code of the City of Los Angeles which makes it unlawful for one to "ride upon the fenders, steps, or running board of any street car or vehicle," and to advise the jury that it was the duty of plaintiff and all other citizens to obey such provision, but in determining whether or not plaintiff was guilty of contributory negligence, the jury should take into consideration all of the evidence relating to the conduct of plaintiff as the time of the accident, and if they determine therefrom that plaintiff's conduct was that of a reasonably prudent person under the circumstances, he was not guilty of contributory negligence.

The instruction given by the court to the jury was much more favorable to the defendant than that which should have been given, and in my opinion it is confusing and does not contain a correct statement of the law. After stating that "Conduct which is in violation of the [Municipal] code sections just read to you constitute negligence per se," it states that if the jury should find "that any party to this action did so conduct himself, it requires a presumption that he was negligent." The element of proximate cause is not mentioned in the instruction. It has been stated many times, and it must be considered as a settled rule of law that contributory negligence which is not a proximate cause of the accident is not a bar to recovery (Pewitt v. Riley, 27 Cal.2d 310, 163 P.2d 873; Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; 19 Cal.Jur. 649), and an instruction which singles out conduct as constituting a basis for a denial of recovery should include the element of proximate cause.

From the foregoing discussion it is obvious that any error which existed in the instruction complained of was more favorable to defendant than to the plaintiff, and defendant could not have suffered prejudice thereby.

TRAYNOR, Justice.

I dissent. In my opinion plaintiff was guilty of contributory negligence as a matter of law. See my concurring opinion in Satterlee v. Orange Glenn School District, 177 P.2d 279. Under the instruction given by the trial court, riding on the street car steps in violation of the ordinance was merely evidence of negligence, and the jury was permitted to apply as a standard, the conduct of a man of ordinary prudence rather than the standard prescribed by the ordinance.

The principal issue in this case is whether the plaintiff was "riding" on the street car steps in violation of the ordinance. In Connard v. Pacific Elec. R. Co., 14 Cal.2d 375, 377, 378, 94 P.2d 567, 568 this court, construing the same ordinance, determined that the plaintiff in that case was not "riding" on the steps of a street car within the meaning of the ordinance if he used the steps preparatory to alighting therefrom after the car had already slowed down for a stop but "had not quite come to a complete stop." In that case the court stated: "There is a clear distinction between the conduct of one who over a period of time deliberately stands or 'rides' on the steps of a moving car, and the conduct of one who merely undertakes, after the signal to stop has been given, to use the steps in the course of a continuous route from car seat to station platform. The former conduct may be a violation of the ordinance, negli-

gence per se, and the latter not come within the terms of the prohibition." Conversely, a person is not "riding" on the steps within the meaning of the ordinance, when he uses the steps with the reasonable expectation of proceeding directly into the street car without stopping on the steps and finds that it is impossible to do so after the car starts to move and he can no longer safely alight. On the other hand, if he cannot reasonably expect to proceed directly into the street car without stopping on the steps but stands on the steps after the car gets under way, even though he intends to remain there only until such time as there is room inside, his conduct is in violation of the ordinance. It is clear that the ordinance was directed against the use of street car steps for transportation while the car is crowded even though a "rider" may expect to move to a proper place as soon as it becomes available. There is greater likelihood of riding on street car steps under such circumstances than when there is ample room inside.

The uncontroverted evidence in the present case showed that when plaintiff boarded the steps, he could not reasonably expect to proceed directly from the steps to the car platform without stopping on the steps and that he stood on the steps after the car started with the intention of remaining there until such time as there was room inside. Plaintiff himself testified that before he boarded the car he knew that other passengers were riding on the steps. He also testified that he paid his fare and took a transfer after the car started, thus showing the lack of any intention to get off at the first safe opportunity in the event he was unable to get inside. Under the circumstances a reasonable jury could only conclude that plaintiff was riding on the steps within the meaning of the ordinance.

Before a verdict may be directed there must be not only a violation of the ordinance, but a causal relation between the conduct in violation of the ordinance and the injuries sustained by the plaintiff. The unconflicting evidence disclosed by the record shows that the automobile struck the side of the street car and ripped off the steps, including the step on which plaintiff was standing. If plaintiff had been standing on the platform or in the interior part of the car, he would not have been injured. No reasonable jury, therefore, could doubt that plaintiff's conduct in violation of the ordinance was in fact a contributing cause of his injuries.

It has been suggested that the ordinance does not provide a proper standard of conduct to determine the question of contributory negligence of persons riding on street car steps, since its purpose is to protect the passengers from harm rather than to protect street railways from liability. A statute or ordinance designed for the protection of the class of persons that includes the plaintiff provides the standard of conduct in determining contributory negligence, for "Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault." Prosser, Torts, § 393; see Rest., Torts, § 466, comment f. The purpose of the ordinance in question was to protect the users of street cars from injuries like that sustained by plaintiff. Violation of a duty to protect oneself, including a duty imposed by statute, constitutes contributory negligence. Meincke v. Oakland Garage, Inc., 11 Cal. 2d 255, 256, 79 P.2d 91; Koeppel v. Daluiso, 118 Cal.App. 442, 446, 5 P.2d 457; see Connard v. Pacific Elec. R. Co., supra, 14 Cal.2d at page 376, 94 P.2d at page 568; Rest.Torts, §§ 469, 475.

Since the uncontradicted evidence showed that plaintiff was contributively negligent as a matter of law and that this negligence was a contributing cause of plaintiff's injuries, defendant's motion for a directed verdict should have been granted.

Rehearing denied; TRAYNOR, J., dissenting.

**In re NORRIS' ESTATE.**

**KING et al. v. KING.**

**Civ. 13269.**

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1947.

Rehearing Denied March 21, 1947.

Hearing Denied April 17, 1947.

**1. Trusts ⇐140(3)**
**Wills ⇐7**

Where trust corpus becomes vested in remaindermen at once, subject to the trust, survivor of a particular remainderman until termination of trust is not a condition precedent to vesting and his interest is subject to his testamentary control upon his death.

**2. Appeal and error ⇐533(1)**

The opinion of trial court is properly a part of record on appeal. Rules on Appeal, rule 5(a, b).

**3. Appeal and error ⇐527(2)**

Document designated "decision and decree," which contained findings of fact and conclusions of law, more properly should have been designated as trial court's "findings and conclusions".

See Words and Phrases, Permanent Edition, for all other definitions of "Findings and Conclusions".

**4. Appeal and error ⇐842(1)**

Where no extrinsic evidence was introduced on issue of proper interpretation of decree of distribution, the issue became a question of law and not of fact.

**5. Appeal and error ⇐1008(3)**

The interpretation of a document, including a will or a decree, is a question of law, and an appellate court must interpret document independently of construction given to it by trier of facts and make a final determination in accordance with the applicable principles of law.

**6. Executors and administrators ⇐315(5)**

Where the issue is the construction and interpretation to be given to a decree of distribution, when distributive portions of decree are unambiguous, resort may not be had to provisions of will in order to create an ambiguity even though incorporated in recitals of decree, but when distributive portions of decree are ambiguous, then resort may be had to will in interpreting that ambiguity, but even then, if distributive provisions of decree are inconsistent with will and cannot be reconciled, distributive provisions of decree prevail. Probate Code, § 1021.

**7. Executors and administrators ⇐315(5)**

Construction of decree of distribution entered by probate court indicated intent of court to provide for vested remainders with possession deferred until termination of testamentary trust, so that remaindermen had testamentary control over their respective shares. Probate Code, § 1021.

**8. Judgment ⇐524**

The weight to be given constructional rules and preferences pertaining to judgments depends upon facts of each case, and if decree under consideration is fairly clear without resort to rules of constructional preference, then such rules need not be considered.

**9. Remainders ⇐4**

Vested remainders can be created in a class, the membership of which is not complete at the effective date of the grant or devise, and the fact that interests of existing members of class may be diminished by increase in class membership by later entrance into the class does not convert interest of such members to contingent remainders.

**10. Executors and administrators ⇐315(5)**

Where decree of distribution designated named children, born of specified parents, as remaindermen of trusts, clause specifying that if any other child or children should be born to named parents, such child or children should share with and have same rights under trust as previously named remaindermen, did not indicate that remainders were contingent rather than vested.

**11. Remainders ⇐3**

Generally, limitation purporting to create a remainder in a designated person or "his children," with certain exceptions, indicates that designated person's survival to the end of all preceding interests is a

condition precedent of his interest, because use of disjunctive "or" tends to show that at termination of life estate a choice is to be made between alternative takers.

**12. Executors and administrators ⇐315(5) Wills ⇐629**

Will and decree of distribution, which provided for distribution of estate to trustees with remainder to named members of a class, when intent of testatrix not to exclude strangers to the blood was taken into account, when policy in favor of vested remainders was weighed and when use of present tense in decree with reference to remainders was considered, disclosed intent to create vested and not contingent remainders.

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Appeal from Superioir Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Julia M. Norris, deceased, on the petition of the trustee thereof for final settlement of its account, termination of trust and determination to whom trust corpus should be distributed. From that part of the decree directing distribution of one-third of corpus of trust to Margaret Webster King, individually and as executrix of the will of William Norris King, deceased, Boswell F. King and Thomas Starr King appeal.

Affirmed.

Erskine & Erskine, of San Francisco, for appellant Boswell F. King.

McCutchen, Thomas, Matthew, Griffiths & Greene, of San Francisco, for appellant Thomas Starr King.

Brobeck, Phleger & Harrison, of San Francisco (Maurice E. Harrison and Moses Lasky, both of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

The trustee of a testamentary trust created by the will of Julia M. Norris, deceased, petitioned the trial court for final settlement of its account as trustee, requested that the trust be terminated, and requested that the trial court determine to whom the trust corpus should be distributed. The present appeals are from that portion of the order instructing the trustee as to the proper distribution of the trust property.

Thomas Starr King and Boswell F. King, the two appellants herein, claimed in the trial court, and now claim on this appeal, that the trust corpus, of the value of approximately $600,000, should be distributed equally between them. Margaret W. King, respondent herein, individually and as the executrix of the estate of her husband William N. King, who died in 1937, claimed in the trial court, and that court so held, that one-third of the corpus should be distributed to her or to the estate of her deceased husband.

The facts giving rise to this controversy are not in dispute and are as follows: Julia M. Norris was first married to Thomas Starr King. This couple had two children, Frederic and Edith. Edith died before the date of distribution of the estate of her mother and in no way figures in this controversy. After the death of Thomas Starr King, Julia married William Norris, who predeceased her. This couple had no children. Frederic married Edith Boswell King, and this couple had three children, Boswell F., Thomas S., the appellants, and William N., the husband of respondent. The will of Julia Norris was executed in 1898, she then being 70 years of age. She died in 1904. The decree of distribution in her estate was made and entered on October 1, 1909. No appeal was taken therefrom, and that decree has long since become final. It is the proper interpretation of that decree that is involved on this appeal.

When the will was executed in 1898 Frederic King, the son of Julia and his wife Edith B. King, had three sons, the only grandchildren of Julia, being the two appellants, and the respondent's decedent. These are the only children of this couple. When the will was executed these grandchildren were aged 12, 10 and 7 respectively. One of these grandchildren, William N. King, married respondent in 1924. This couple had no children. William died in 1937. By his will he made his wife, the respondent, his sole legatee. William N.

King was survived by both his father and mother. His father, Frederic, died on July 8, 1941, and his mother, Edith B. King, died July 10, 1945. The trusts set up in the will of Julia M. Norris terminated upon the death of Edith B. King, and upon such termination, there being a dispute as to whom the corpus should be distributed, this proceeding was instituted.

By the terms of her will Julia M. Norris evidenced an intent to take care of her son and his family, but also clearly indicated great confidence in her daughter-in-law, Edith, and an intent to benefit her. After making certain specific bequests, she devised her entire residuary estate in trust, which trust was to continue until the death of her son Frederic and her son's wife, Edith B. After directing the trustee to pay certain sums to persons not here involved, in paragraph "D" of the trust provisions she directed the trustee to pay to her daughter-in-law, Edith Boswell King, $500 per month for life to be used for the maintenance of Edith and her husband, the testatrix's son, Frederic, and the support, education and maintenance of their children or the survivors. In this paragraph she referred to these three children by name, being Boswell Farrington King, Thomas Starr King, the appellants, and William Norris King, respondent's decedent. In this paragraph she provided that if Frederic should survive Edith the trustee should pay Frederic but $150 per month for life, and to pay $350 per month to "such of the said above mentioned children as may survive their said mother, or their survivors," until the termination of the trust. In the next paragraph—"E"—she directed the trustee to accumulate surplus income and every five years to pay four-fifths of the income thus accumulated to her daughter-in-law, Edith Boswell King, to be used by her "for the benefit of herself and her said husband and their said children," and after her death to pay the same in the ratio and to the persons as provided in paragraph "D". In paragraph "G" she directed the trustee to pay the taxes and insurance on the house occupied by her son and his wife "while owned by my said daughter-in-law, Edith Boswell King." In paragraph "H" she provided that "if either of the above named children of my son Frederic Randolph King and Edith Boswell King" desire a college education, such education shall be paid for by the trustee. Paragraph "I" provides that the trusts are to continue until the death of both Frederic and his wife and "then to be at once at an end." Then follows paragraph "J", which is the specific paragraph that has led to this litigation. It provides that following the termination of the trusts as provided in the preceding paragraph: "Thereupon and at once the said trustee shall grant and deliver all my property then in its hands, or remaining of said trust, unto the children, (share and share alike, or their legal heirs by right of representation) of my said son and his said wife Edith, and I hereby, subject to the trusts aforesaid, give, devise and bequeath all said last named property to the persons last aforesaid in manner aforesaid." There follows two paragraphs not pertinent here, and then in paragraph "M" it is provided: "I provide and declare that any other child or children which may be born to my said son and his said wife Edith may and shall share with and have the same rights under said trusts as their said children herein specifically named."

This will was probated and the final decree of distribution was made and entered by the probate court October 1, 1909. In that decree, which has long since become final, after settling the final account, the will is set forth in toto, it being introduced into the decree with this language: "And it further appearing that said decedent left a last will and testament which has been duly admitted to probate, which last will is in the words and figures as follows, to wit:" After quoting the will and noting that the specific bequests had been paid, the decree ordered, adjudged and decreed that the residuary estate be distributed to the trustee subject to the trusts. In drafting the decree of distribution the probate court followed substantially the language of paragraphs "D", "E" and "H" of the will. In particular the three children of Frederic and Edith were specifically named in paragraph "2" of the decree in connection with the $500 monthly to

be paid their mother for the support of parents and children, and in paragraphs "3" and "6", corresponding to paragraphs "E" and "H" of the will, the three children were referred to as "said children" and "the above named children." Then the probate court in making its decree changed the order of the paragraphs as found in the will. It will be remembered that in the will the so-called "after-born" clause appears in paragraph "M", following the basic paragraph "J". In the decree the "after-born" clause appears in paragraph "8", and the basic paragraph follows the "after-born" paragraph. In paragraph "8" the probate court slightly changed the language of the will. In the decree the "after-born" clause reads: "If any other child or children shall be born to the said Frederic R. King and his said wife Edith Boswell King, such child or children shall share with and have the same rights under this trust as the children hereinbefore specifically named."

This paragraph is followed by paragraph "9" in the decree, which is the principal paragraph here involved. In this paragraph the probate court lumped the provisions of paragraphs "I" and "J" of the will, and changed the language to some extent. It reads: "Said trust shall continue until the death of both said Frederic R. King, son of said deceased, and his wife, Edith Boswell King, and upon the death of the survivor of them, the said trust shall at once be at an end; and thereupon, and at once, the said trustee shall deliver [not "grant and deliver" as provided in the will] all the property so held by it in trust, then in its possession, unto the children, share and share alike, or their legal heirs by right of representation, [leaving out the parenthesis around this clause as they appear in the will] of the said Frederic R. King and his said wife, Edith Boswell King, and subject to the trusts hereinbefore provided, the said children of the said Frederic R. King and the said Edith Boswell King are the owners and entitled to the possession of all the estate of said deceased, upon the termination of said trust." It will be noted that the provisions following the word "representation" above are markedly different from the provisions of paragraph "J" of the will.

The present controversy centers upon the proper interpretation of paragraph "9" of the decree purporting to give effect to paragraphs "I" and "J" of the will. The appellants, the two surviving sons of Frederic and Edith, contend that the will and decree must be interpreted together; that both the will and the decree are susceptible of but one interpretation, namely, that the remainder in the residuary estate was to a class; that that class was the "children" or "their legal heirs by right of representation"; that in such event, where there is an alternative gift over, in order that any person within the class shall be entitled to distribution of a portion of the corpus, he must survive until the termination of the trust. Stated another way, appellants urge that the three sons of Frederic and Edith took contingent and not vested remainders, and that the remainders did not vest until the trust terminated. If these contentions are sound, since William N. King died before the termination of the trust, the entire corpus became vested in the two appellants upon such termination.

[1] Respondent contends that, whatever the interpretation of the will may be, the 1909 decree gave to the then three living children of Frederic and Edith present vested interests in the trust corpus, and that only possession of the trust estate was postponed until the termination of the trusts. If this interpretation be correct, the interest of William N. King became vested in him in 1909, and his survival until the trust terminated was not a condition precedent to such vesting. In this event such vested interest was subject to his testamentary control upon his death.

[2] The trial court rendered an opinion which is properly a part of the record on appeal. Rules on Appeal, Rule 5(a) and 5(b). The opinion states:

"The question presented to the Court is whether Margaret Webster King is entitled to one-third of the trust estate of Julia M. Norris under a decree of distribution made and entered on October 1st, 1909 * * *

"It is the opinion of this Court that the question in dispute in this matter was determined by the decree of distribution made as aforesaid, and that William Norris King, now deceased, inherited one-third of the trust property under the will of Julia M. Norris; that Margaret Webster King, as the surviving wife and executrix of the will of William Norris King, is entitled to his one-third interest of the trust property which became vested in him under the decree of distribution in the estate of Julia M. Norris.

"When a provision of a will is thought ambiguous or inconsistent the decree of distribution supersedes the will and prevails.

"Therefore, it is the judgment of this Court that Margaret Webster King is entitled to her one-third interest of the said trust estate for the reasons heretofore expressed."

[3] This interpretation was reached without the aid of any extrinsic evidence on the issue of interpretation. By its so-called "Decision and Decree," which more properly should be designated as the trial court's findings and conclusions, the trial court found: "Said decree of final distribution conclusively adjudicated, decreed and established:—that, subject only to said trusts, the entire residuary estate of Julia M. Norris was at the time of its rendition, to wit, on October 1, 1909, presently vested in Boswell F. King, Thomas Starr King, and William Norris King, the three sons of Frederic R. King and Edith Boswell King, share and share alike; that each of said three named persons, Boswell F. King, Thomas Starr King, and William Norris King, was the then present owner of, and then had vested title to one-third of the residuary estate of Julia M. Norris, deceased, subject only to the trust; and that said three named persons, Boswell F. King, Thomas Starr King and William Norris King, were entitled to the possession thereof upon the termination of the trust."

In interpreting the "after-born" clause of the decree the trial court held: "Said decree of final distribution provided that any after-born children of Frederic R. King and Edith Boswell King should be entitled to share under the trust, that is, to share in the income of the trust estate, but said decree did not provide that any such after-born children had or should have any right, title or interest in the estate or any part thereof after the termination of the trust."

The court also found that "the provisions of said decree of final distribution are clear and unambiguous."

[4, 5] Before directly discussing the issue as to the proper interpretation that should be given the decree the exact scope of the review on these appeals must be determined. Contrary to the contention of respondent, inasmuch as no extrinsic evidence was introduced on this issue, the question of the proper interpretation of the decree is a question of law and not of fact. Whatever confusion might have existed in the law on this subject prior to 1942 was set at rest by the decision in Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. Since the decision of that case it is settled law that the interpretation of a document, including a will or a decree, is a question of law, and that it is the duty of an appellate court in such cases to interpret the document independent of the construction given to it by the trier of the fact, and to make a final determination in accordance with the applicable principles of law. See Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910; Southern Pac. Co. v. Hyman-Michaels Co., 63 Cal.App.2d 757, 147 P.2d 692; Lane-Wells Co. v. Schlumberger etc. Corporation, 65 Cal.App.2d 180, 150 P.2d 251; Thompson v. Levereau, 66 Cal.App.2d 795, 153 P.2d 206; Estate of O'Brien, 74 Cal.App.2d 405, 168 P.2d 432; La Lumia v. Northern Cal. Packing Co., 75 Cal.App.2d 917, 172 P.2d 94.

[6] The appellants urge that the decree is ambiguous and that, in such event, especially where as here the will has been incorporated in the decree, the will may be resorted to in interpreting the decree. Buttram v. Finley, 37 Cal.App.2d 459, 99 P.2d 1093; Horton v. Winbigler, 175 Cal. 149, 165 P. 423; Estate of Lockhart, 21 Cal.App. 2d 574, 69 P.2d 1001. Respondent urges that the distributive provisions of the decree are alone before us, and she maintains that the

decree is conclusive as to the interpretation of the will and the rights of beneficiaries thereunder. Cook v. Cook, 17 Cal.2d 639, 111 P.2d 322; Estate of White, 69 Cal.App.2d 749, 160 P.2d 204; Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 146 P.2d 962; Probate Code, § 1021. Respondent likewise points out that, although the provisions of the will are incorporated in the decree, they are incorporated only in the recitals of the decree and not in the operative or distributive portions of the decree, and contends that, in such event, in interpreting the decree, resort may not be had to the provisions of the will. We think that it is clear that, if the distributive portions of the decree are free from ambiguity, in order to create an ambiguity, resort may not be had to the provisions of the will, even though incorporated in the recitals of the decree. If, however, the distributive portions of the decree are ambiguous, then resort may be had to the will in interpreting that ambiguity, but even in that event if it be found that the distributive provisions of the decree are inconsistent with the will and cannot be reconciled, then the distributive portions of the decree must prevail.

[7] In the present case the trial court found the distributive portions of the decree "are clear and unambiguous." While in some respects the provisions of paragraph "9" of the decree are not as clear as might be desired, we think that that paragraph unmistakenly indicates that it was the intent of the probate court in 1909 to provide for vested remainders with possession deferred until the termination of the trusts. We think this interpretation, for reasons hereafter mentioned, is compelled whether or not the provisions of the will be considered.

[8] Appellants and respondent have filed exhaustive briefs which, for the most part, are compilations of authorities on constructional rules and preferences, all of which, on both sides, are valid. The weight to be given to such rules, however, depends upon the facts of each case and varies according to the circumstances. If the decree is fairly clear without resort to rules of constructional preference then, of course, such rules need not be considered. Many times these rules of construction are resorted to as a form of a rationalization, that is, to justify a construction already made.

In their briefs appellants place considerable reliance on the "after-born" clause of the decree, urging that such a clause is some indication that the probate court intended the remainders to be contingent, apparently on the theory that if a class can open up the remainder is contingent. At the oral argument appellants' counsel stated that he placed but little reliance on this argument, and merely referred to the "after-born" clause to show that the testatrix was "class conscious."

[9] The law is well settled that vested remainders can be created in a class the membership of which is not complete at the effective date of the grant or devise, so that similar vested interests accrue to those who, by later entry therein, fall within the class. Thus, in the present case, even if the "after-born" clause referred to the remainders as well as to the trust (the trial court found it referred only to the trust), that factor would not indicate that the remainders were contingent. In such a case the remainders could well be vested in the three children of Frederic and Edith, and, had there been any later entrants into the class (there were not), their interests would have vested as they were born, and by virtue of the consequent increase in the class membership, the vested interests of the preceding members would have been proportionately diminished. It is well settled that the fact that the interests of existing members of the class may be thus diminished does not convert the interest of such members to contingent remainders. In such event the remainders are vested subject to a condition subsequent. This is the rule of the Restatement. In 2 Restatement of the Law of Property, § 157, it is provided that: "A remainder can be (a) indefeasibly vested; or (b) vested subject to open * * *." As an illustration of clause (b) the Restatement states: "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B for life, remainder to the children of B.' B has a child C. C has a remainder vested subject to open and let in other children born to B."

Supported by the citation of many authorities, the rule is stated as follows in Gray, The Rule Against Perpetuities (4th ed.), § 110(1), p. 97: "Sometimes a remainder is given to a class of persons, e.g. to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A for life, remainder to the children of A and their heirs as tenants in common. Here, although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each child, nevertheless, on its birth is said to have a vested remainder. The remainder is said to 'open' and let in the after-born children." See, also, 2 Jarman on Wills, p. 168; 2 Underhill on the Law of Wills, § 558, p. 731; 2 Tiffany on Real Property (3rd ed.), § 381, p. 141.

[10] For these reasons it must be held that the so-called "after-born" clause in no way assists appellants' argument that the remainders are contingent. This being so, and there having been no after-born children, we do not find it necessary to determine whether the trial court's interpretation of the "after-born" clause was correct or not. If correct, then it did not apply to the remainder interests; if incorrect it did apply to the remainder interests, but even then would not indicate that such remainders were contingent.

The main contention of appellants is that paragraph "9" of the decree, particularly when read with paragraphs "I" and "J" of the will, created life interests with a gift in remainder in the alternative form—i.e., to the children of Frederic and Edith " 'or' their legal heirs by right of representation"—and it is urged that the alternative form of the gift over demonstrates that the right of the children is contingent and conditional upon their surviving to the time of taking, failing which the property passes to the surviving donees. There can be no doubt that, if appellants have properly interpreted clause "9" of the decree as creating gifts in remainder in the alternative form, then there is a constructional rule to the effect that, other things being equal, the form of such gift is some indication that the gift was intended to be contingent.

[11] This rule of construction is stated as follows in § 252 of 3 Restatement of the Law of Property:

"In a limitation purporting to create a remainder or an executory interest, in 'B or his children,' or in 'B or his issue,' or in 'B or his descendants,' or by other language of similar import, the alternative form tends to establish as to the interest of B that

"(a) a requirement of survival to the end of all preceding interests exists; and

"(b) such survival is a condition precedent of such interest."

The reason behind this rule of construction is clear. The use of the disjunctive "or" tends to show that at the termination of the life estate a choice is to be made between alternative takers, and therefore survivability until the termination of the life estate is a condition precedent to the vesting of the remainder interests. Appellants list over twenty cases in their briefs where the words "or their heirs," or similar words, were held to be words importing an alternative gift, and where the remainders involved were held to be contingent upon survivability. See, also, Estate of Blake, 157 Cal. 448, 108 P. 287.

Appellants also place reliance on the rule of construction to the effect that, other things being equal, a construction of a will or decree under which the property involved goes to those of the blood of the testator is to be preferred to a construction that will permit the property to go to strangers in blood. This rule of construction has been relied on in California. Estate of Wilson, 65 Cal.App. 680, 225 P. 283; Estate of Hartson, 218 Cal. 536, 24 P.2d 171; Estate of Clark, 64 Cal.App.2d 636, 149 P.2d 465.

Respondent likewise relies on several well-settled constructional preferences. The real question involved is whether the decree, internally, contains provisions which indicate that the constructional rules cited by appellants should not be applied, and that the rules cited by respondent should apply.

Respondent points out that the Restatement recognizes that § 252 merely states a rule of construction that is by no means absolute and controlling in all cases, and contends of course, the rule there stated is not applicable here. Respondent quotes subsection "c" of the discussion following § 252 as follows: "Sometimes a limitation of a remainder or an executory interest is worded 'to B or his heirs,' or 'to B or his representatives.' Any such limitation constitutes 'language of similar import' under the rule stated in this Section, but the strength of the constructional preference here stated is lessened by the fact that such language is also susceptible of being construed to describe the completeness of the disposition in favor of the first taker (B) rather than as limiting alternative interests." Respondent points out that at most the decree here could be interpreted as giving the remainders to "the children * * * or their legal heirs by right of representation" and does not provide that such remainders shall go to "B or his children," "B or his issue" or to "B or his descendants" (the language used in § 252) and contends that, at most, the language here used brings it within the weakest application of § 252. Respondent cites over 40 cases where it was held under the facts there involved that the words "or heirs" or similar language appearing in a will or decree did not compel an interpretation that the remainders there involved were contingent—all being held vested. The cases on both sides of this controversy are of but little help for the reason that none of them involves the exact language and the same context here involved.

One of the main arguments of respondent is that, properly interpreted, no alternative provision here appears in relation to the remainders, and that the alternative provision merely refers to possession of the property. To understand this contention paragraph "9" of the decree should be again quoted in part. It provides that the trust should continue until the death of the survivor of Frederic and Edith and then should be at an end. It is then provided that "thereupon, and at once, the said trustee shall deliver all the property so held by it in trust, then in its possession, unto the children, share and share alike, or their legal heirs by right of representation * * *." As to this portion of the quoted paragraph respondent urges it relates only to possession of the trust property and does not relate to the title to that property. It is pointed out that the words "grant and deliver" in paragraph "J" of the will became "deliver" in paragraph "9" of the decree. It is urged that this was done to avoid the then existing rule of the Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70, to the effect that a trust to convey was void. This, says respondent, amounted to an interpretation of the will by the decree and the decree must prevail. This interpretation is fortified by the next portion of the decree which respondent says relates to the title. That next portion of the decree following the above quoted portion reads "and subject to the trusts hereinbefore provided, the said children of the said Frederic R. King and the said Edith Boswell King are the owners and entitled to the possession of all the estate of said deceased, upon the termination of said trust."

Inasmuch as the then three living children of Frederic and Edith were referred to by name in both the will and the decree (paragraph "D" of the will—paragraph "2" of the decree), and, inasmuch as they were thereafter referred to in several places as "said children" or "above named children" in both the will and decree, respondent argues that the words "said children" in paragraph "9" refer to the three living children and do not refer to "children * * * or their legal heirs by right of representation" which appear in the earlier portions of paragraph "9". While the words "said children" may be ambiguous, the use of the words "are the owners," thus indicating that present interests were created, fortifies this construction. If only the last quoted portion of paragraph "9" were before us for interpretation, it would be the most obvious and reasonable interpretation. In that event the decree would obviously create vested remainders in the then three children of Frederic and Edith, with, at most, a possibility of the class opening up for after-borns. Under this interpretation

the probate court in 1909 made a clear distinction between those who were to receive possession of the trust property and those who were to receive title. This somewhat awkward arrangement was set forth in the decree, says respondent, to avoid the rule of the Estate of Fair, supra. Respondent also argues that even the will contained no alternative provision in relation to the title. Paragraph "J" of the will, it will be remembered, provided that the trustee should "grant and deliver" the trust property to the "children, (share and share alike, or their legal heirs by right of representation)" and then provided: "I hereby, subject to the trusts aforesaid, give, devise, and bequeath all said last named property to the persons last aforesaid in manner aforesaid." Respondent urges that "the persons last aforesaid" are the three living children of Frederic and Edith, and not the "children * * * or their legal heirs by right of representation." This is a strained construction of the will, but it cannot be doubted that the probate court used entirely different language in the decree, and if the two conflict that the decree must prevail. It likewise cannot be doubted that a possible and reasonable construction of paragraph "9" of the decree is that it made a distinction between possession and title and, as to the latter, referred only to the three living children and not to the "children * * * or their legal heirs by right of representation."

This interpretation is not the sole basis of respondent's claim that the remainders are here vested and not contingent. She sets forth a large number of constructional rules that support her contention that the remainders were vested in 1909. Thus she argues that the law favors the early vesting of remainder interests, and favors a construction which will create vested rather than contingent remainders, citing such cases as Estate of Ritzman, 186 Cal. 567, 199 P. 783, and Estate of Riemer, 69 Cal.App.2d 634, 159 P.2d 677. Respondent makes a most forceful argument to the effect that where language of "present gift" is used such use of the present tense indicates a purpose to create a presently vested interest. Both the will and the decree use the present tense. Paragraph "J" of the will contains the language, referring to the remainders, "I hereby give, devise and bequeath." Paragraph "9" of the decree is even more positive. It states that "subject to the trusts hereinbefore provided, the said children of the said Frederic R. King and the said Edith Boswell King are the owners" of the trust property. The words "are the owners" are most positive. In § 257 of 3 Restatement of the Law of Property the rule is stated as follows: "In a limitation purporting to create a remainder or an executory interest, which is ambiguous as to whether such interest is, or is not subject to a condition precedent of survival, language of present gift to the intended taker tends to establish the absence of a condition precedent of survival as to the interest of such taker."

In comment (a) thereto it is stated: "Language of present gift is inconsistent with a postponement of the determination of whether the intended taker is to receive the thing given, although it is consistent with the postponement of the receipt, by such taker, of the thing itself. Hence such language tends to prevent the finding of a condition precedent of survival."

In re De Vries' Estate, 17 Cal.App. 184, 119 P. 109; Miller v. Oliver, 54 Cal.App. 495, 202 P. 168, and Estate of Reimer, 69 Cal. App.2d 634, 159 P.2d 677, the California courts applied this rule of construction to the wills or decrees there involved.

Appellants cite Estate of Blake, 157 Cal. 448, 108 P. 287, as their strongest local authority for the rule that the presence of the alternative gift over (assuming such a gift over exists as to the remainders) makes survival a condition precedent to the vesting of the remainders, but it should be noted that the will there did not contain words of present gift but expressed futurity in creating the interest in question.

[12] Various other rules of construction are referred to by the parties. Enough has been said to indicate that there are rules of construction that would support a construction either way. Respondent has suggested an interpretation of paragraph "9" that, without the support of any rules of construction, reaches the conclusion that the remainders are vested. She supports this interpretation by several rules of con-

struction. The interpretation suggested is not only a possible one, but is a reasonable one. Appellants, by the use of several rules of construction, suggest an interpretation that is certainly a possible and perhaps a reasonable one. In addition, the will and decree contain internal evidence that indicates that the testatrix had no intent to exclude those not of her blood. The generous provisions for her daughter-in-law, far in excess of the provisions made for her own son, show this to be true. Moreover, in many of the provisions of the decree the probate court followed carefully and almost verbatim the words of the will, but when it came time to apply paragraphs "I", and "J" of the will, the court, in paragraph "9", for reasons not entirely clear, elected to change the language materially. Whether this was done because of a fear that otherwise the trust provisions might be void under the rule of Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70, we have no way of knowing, but the fact remains that in drafting the decree the court made a clear distinction between possession of and title to the trust property. Under these circumstances, it is our conclusion that when it has been determined that even if there is a gift to a class that the opening of that group to include after-borns does not present an obstacle to the vesting of the estate, when the differences between the language of the will and the decree are considered, when the intent of the testatrix to benefit her daughter-in-law, a stranger in blood, is taken into account, when the policy in favor of vested as distinguished from contingent remainders is weighed, and when the use of the present tense, particularly in the 1909 decree in creating the remainders is considered, the weight of the probabilities is that the testatrix and the probate court intended to create vested and not contingent remainders, and we so interpret the decree and the will.

This conclusion makes it necessary to discuss the other points raised by counsel.

The portions of the order appealed from are affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; SCHAUER, J., dissenting

78 Cal.App.2d 9

## STERN v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 13355.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

**1. Grand jury ⇐33**

Evidence showed that no unauthorized persons were present during the deliberations of grand jury. Pen.Code, §§ 906, 925, 925a.

**2. Indictment and Information ⇐12**

Evidence showed that all the testimony given before the grand jury was reported and transcribed in compliance with Penal Code. Pen.Code, § 925.

**3. Criminal law ⇐627(5)**

A transcript of the testimony received by grand jury and furnished to person indicted as required by Penal Code was not incomplete because it did not contain copies of the exhibits introduced before the grand jury, since all evidence is not "testimony" which is limited to the sort of evidence that is given by witnesses speaking under oath or affirmation. Pen.Code, § 925.

See Words and Phrases, Permanent Edition, for all other definitions of "Testimony".

**4. Indictment and Information ⇐87(3)**

The offense of conspiracy is a continuing one, and where indictment was returned on September 23, 1946, a little after 5 p. m. and alleged the crime of conspiracy with many overt acts all prior to September 23, 1946, it was not subject to criticism that it did not show an offense committed prior to the finding of the indictment. Pen.Code, § 959, subd. 5.

**5. Indictment and Information ⇐15(5)**

Where, after hearing several witnesses, one indictment was returned and then, after hearing additional witnesses, a second indictment was returned, it was not invalid because witnesses first heard were not recalled to repeat their testimony before second indictment was returned.

**6. Grand Jury ⇐36**
**Indictment and Information ⇐10**

A grand jury is an inquisitorial body and takes evidence to determine whether any crimes have been committed which warrant the return of one or more indictments, and any evidence taken during grand jury's investigations may be considered by it in determining whether a particular indictment should be found so long as at least 12 grand jurors who heard all of the evidence so considered concur in finding the indictment.

**7. Indictment and Information ⇐15(5)**

A grand jury may return a second indictment based upon the same evidence heard before the returning of the first indictment.

**8. Indictment and Information ⇐10**

Evidence showed that the indictment was read to the grand jury, who then voted to return it, so that there was a concurrence of at least 12 grand jurors as provided by the Penal Code. Pen.Code, § 940.

**9. Grand Jury ⇐41**

The presumption is that testimony admitted by trial judge in support of motion to quash proceedings taken in voting an indictment was properly admitted and that it did not contravene section of the Penal Code requiring that every member of the grand jury must keep secret in what manner he or any other grand juror may have voted on the matter before them. Pen. Code, § 926.

**10. Indictment and Information ⇐10**

Where there were numerous defendants as well as numerous counts, a separate poll of the grand jury as to each defendant on each count was not required, but a return of the indictment against all the defendants on one vote was proper, and the indictment was thereby found with the concurrence of at least 12 grand jurors in conformity with Penal Code. Pen.Code, § 940.

**11. Indictment and Information ⇐10**

The evidence contained in transcript of proceedings before grand jury which returned an indictment was sufficient to support it.

**12. Grand Jury ⇐34, 37**

The hearsay testimony of admissions made by some of the defendants included in indictment was admissible against the defendants making them, and the district attorney was not required to inform the grand jury that such evidence could not be considered in determining whether to return an indictment against other persons.

**13. Indictment and Information ⇐10**

Where it appears that sufficient competent evidence was introduced to support the indictment, it is not rendered void by the reception of some incompetent evidence.

**14. Indictment and Information ⇐10**

Where indictment was returned against several persons charged with abortion and another indictment charging conspiracy to perform abortions, evidence before grand jury was sufficient to show that the abortions performed were not necessary to save the lives of the women upon whom they were performed. Pen.Code, § 274.

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Original petition by Samuel M. Stern for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Alameda, to prevent the prosecution of petitioner under an indictment charging him and others with the performance of abortions in violation of the Penal Code and with a conspiracy to perform them.

Alternative writ discharged and petition denied.

Leslie C. Gillen, of San Francisco, for petitioner.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

The petitioner Stern seeks by writ of prohibition to prevent his prosecution under an indictment returned to the superior court in and for Alameda County by the grand jury of that county. The indictment contains twenty-seven counts and charges Stern and seventeen other defendants in count

one with a conspiracy to perform abortions in violation of section 274 Penal Code and in the other twenty-six counts with the performance of twenty-six specific abortions in violation of that code provision. The petitioner moved the trial court to quash the indictment as to him and that motion was denied.

The transcript of the testimony given before the grand jury contains a mass of evidence furnished by many witnesses that Stern engaged in the commission of abortions as a regular business first in Alameda County, then in Contra Costa County and later again in Alameda County, the operations continuing in Alameda County until the police armed with a search warrant entered his place of business in that county on August 23, 1946. The existence of a well organized conspiracy with at least several of his co-defendants and others to carry on this illegal business is supported by ample evidence. It appears that physicians, druggists, persons who had previously engaged in the performance of abortions and others were solicited by Stern to refer to him women who were pregnant and desired to be aborted and that he agreed with such persons to pay them a percentage of the amounts received by him for performing abortions upon the women so referred to him. It appears that pursuant to this understanding many pregnant women were in fact sent to Stern by these persons for the purpose of being aborted, that Stern did perform abortions upon them and that he paid to the persons referring them a percentage of his fee as promised. It further appears that other of his co-defendants were engaged with him in his business of performing abortions as employees and actively and knowingly assisted him therein. With this background outline of the general scheme of operation as shown by the transcript of the testimony heard by the grand jury we proceed to a consideration of the attacks directed against the indictment by this petitioner.

[1, 2] The petition alleges that unauthorized persons were present during the deliberations of the grand jury. Pen. Code, secs. 906, 925, 925a. We find nothing in the record before us to support this charge and several of the grand jurors who gave testimony on the hearing of the motion to quash the indictment testified specifically that no person other than the members of the grand jury was present during the grand jury's deliberations. The district attorney and some of his assistants were with the grand jury at times in the absence of the reporter. The grand jury is entitled to the legal advice of the district attorney (Pen. Code, sec. 925) and the law does not require the presence of a reporter while such advice is being given, the only requirement being that "the testimony that may be given" be reported (Pen. Code, sec. 925). The evidence given on the motion to quash is all to the effect that the grand jury did not engage in any of its deliberations in this case at any time while the district attorney or any of his assistants was present. The claim that all of the proceedings of the grand jury were not reported by the stenographic reporter is equally untenable. All of "the testimony * * * given" before the grand jury in this cause was reported and transcribed in full compliance with the requirement of Pen. Code, sec. 925.

[3] The related complaint that the transcript of the testimony furnished to the petitioner as required by the same code section was incomplete because it did not contain copies of the exhibits introduced before the grand jury finds no support in the statutory law. The reporter, as above noted, is required only to report the testimony given and sec. 925, Pen. Code, in requiring a transcription of the reporter's shorthand notes to be delivered to the defendant must be taken to refer only to the testimony given, since that is all that is required to be reported. All evidence is not testimony. Testimony is limited to that sort of evidence which is given by witnesses speaking under oath or affirmation (Mann v. Higgins, 83 Cal. 66, 69, 23 P. 206; 31 C.J.S., Evidence, § 3, p. 507), a distinction which is clearly made in Code of Civil Procedure section 1827: "There are four kinds of evidence: 1. The knowledge of the court; 2. The testimony of witnesses; 3. Writings; 4. Other material objects presented to the senses."

Exhibits are not testimony, but evidence of the kind mentioned in subdivisions 3 and 4 of the section just quoted. Those falling

under subdivision 4 are not even capable of transcription. Being material objects exhibits may be made available to the defendants, as we understand the exhibits in this case have been made available by the trial court. There is not the same purpose to be served in reporting and transcribing them as in the case of testimony which can only be accurately preserved in that fashion, and the legislature has with good reason not seen fit to require their inclusion in the transcript required to be furnished to the defendant.

[4] Count one of the indictment charges a conspiracy "from on or about the 1st day of January, 1940, to and including the 23rd day of September, 1946." The indictment was returned on September 23, 1946 at a little after 5 p.m. It is argued that as to count one the indictment does not show an offense committed prior to the finding of said indictment. Pen. Code, sec. 959, subd. 5. This point borders on the frivolous and we refuse to dignify it with extended discussion. The offense of conspiracy is a continuing one and the indictment alleges the crime of conspiracy with many overt acts all prior to September 23, 1946. This satisfies the code requirement. People v. Squires, 99 Cal. 327, 33 P. 1092.

[5-7] After hearing the testimony of thirteen witnesses the grand jury returned an indictment against petitioner Stern and several others. The grand jury then continued its investigation, heard the testimony of many additional witnesses and finally returned the indictment here under attack. Because the thirteen witnesses who had testified prior to the return of the first indictment were not recalled to repeat their testimony it is argued that their testimony became functus officio and the grand jury acted in excess of its jurisdiction in relying on that testimony in support of the second indictment. In making this argument counsel misconceives the functions of the grand jury. It is an investigatory and inquisitorial body and takes evidence to determine whether any crimes have been committed which warrant the return of one or more indictments. Any evidence taken in the course of its investigations may be considered by it in determining whether a particular indictment should be found so long as at least twelve grand jurors who heard all of the evidence so considered concur in finding the indictment. No case exactly in point has been called to our attention, but the analogous situation of the return of a second indictment without taking any additional evidence seems controlling. It is settled that a grand jury may return a second indictment based upon the same evidence heard before the returning of the first. People v. Follette, 74 Cal.App. 178, 189, 190, 240 P. 502; People v. Gilbert, 26 Cal. App.2d 1, 6, 78 P.2d 770; People v. Busick, 32 Cal.App.2d 315, 324, 89 P.2d 657.

[8] Section 940 of the Penal Code provides: "An indictment cannot be found without the concurrence of at least twelve grand jurors." The claim is made that the indictment was returned in violation of this requirement. In support of this contention it is argued that the evidence demonstrates that the grand jury had not sufficient time to consider a document of the length of this indictment and intelligently act on it. In this connection the reporter's notes show that after the examination of one witness on September 23, 1946, the reporter retired at 4:45 p. m. and returned at 5 p. m. at which time the foreman announced that the indictment had been voted. The district attorney and some of the grand jurors testified that the indictment was read to the grand jury, omitting some repetitious matter included in the same language in each count, after the reporter retired; that the district attorney then retired and the grand jury voted to return the indictment. The copy of the indictment made an exhibit in these proceedings consists of 87 typewritten pages containing from a maximum of 26 lines to a minimum of one line per page (the pages of less than 26 lines are due to the fact that each separate count commences on a new page). We may concede that the indictment could not have been read to the grand jury in fifteen minutes time. However the reporter testified that instead of fifteen minutes he was out of the jury room well over one hour and some of the grand jurors corroborated him in this. The trial judge heard the witnesses and denied the

motion to quash. If he concluded, as we must assume, that the reporter's notes were in error as to the time when he left the grand jury room, there was ample testimony to support that finding. We cannot say that the testimony that the grand jury heard the indictment read and then voted to return it is inherently impossible, which is what we are in effect asked to do by this argument.

[9] Some of the grand jurors were examined as witnesses in support of the motion to quash as to the proceedings taken in voting the indictment. Respondent argues that this testimony was forbidden by section 926 of the Penal Code which reads: "Every member of the grand jury must keep secret * * * in what manner he or any other grand juror may have voted on a matter before them * * *." We do not find it necessary to decide the question whether this prohibition forbids the character of testimony given by the grand jurors in this proceeding, but will assume that that testimony was properly admitted by the trial judge.

Summarized that testimony establishes that on September 19 the grand jury was separately polled as to each of the eighteen defendants and voted that each one should be indicted; that the foreman gave the list of eighteen names to the district attorney and informed him of the action of the grand jury; that the district attorney prepared the indictment and read it to the grand jury on September 23; that after reading the indictment the district attorney left the grand jury room; and that thereupon the grand jurors were polled in one poll as to all defendants and all counts on the question whether the indictment should be returned against the eighteen defendants named, and at least twelve of the grand jurors voted to return the indictment on such poll.

[10] Petitioner argues that the law requires a separate poll as to each defendant on each count. This would have required in this case 486 separate polls. The law makes no such requirement unless the court wishes to step into the legislative field. The code only requires "the concurrence of at least twelve". If twelve grand jurors after hearing all the evidence and the reading of the indictment were satisfied to vote that the indictment as a whole should be returned against the eighteen defendants the indictment was found by "the concurrence of at least twelve grand jurors" and it would have been a fruitless and tedious procedure to poll them 486 times to ratify a concurrence that they were satisfied to express on a single ballot.

Petitioner cites Eubanks v. State, 5 Okl. Cr. 325, 114 P. 748, which tends to support his argument that separate ballots should have been taken as he contends. We refuse to follow the judicial legislation indulged in by that court. We think the sounder view is expressed in those cases which hold that if the requisite number of grand jurors actually concur in finding the indictment the manner in which their concurrence is expressed is immaterial. Ex parte Harlan, C.C., 180 F. 119, 129, 130; Jacobs v. State, 35 Tex.Cr.R. 410, 34 S.W. 110; Whitted v. State, 188 Ark. 11, 63 S.W.2d 283.

[11] Finally relying upon the case of Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, 715, petitioner levels several attacks upon the sufficiency of the evidence to support the indictment. It is alleged in his petition for the writ of prohibition that there was no evidence to establish the crimes charged except the testimony of accomplices and persons whose testimony is required to be corroborated. This point was not stressed in the briefs or on oral argument but we may note that in the Greenberg case the court indicated that such testimony although not sufficient to support a conviction is sufficient to support an indictment. In that case the court said:

"In the case of In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103 Am.St.Rep. 117, 1 Ann.Cas. 840, a defendant petitioned for a writ of habeas corpus on the ground that the uncorroborated testimony of an accomplice which constituted the evidence presented to the grand jury, was insufficient to justify an indictment. The court properly refused the writ, holding, in accordance with the general rule, that it would not inquire into the sufficiency of the evidence."

Greenberg v. Superior Court, supra, 19 Cal. 2d 319, 322, 121 P.2d 713, 715. Cf. In re Schwitalla, 36 Cal.App. 511, 172 P. 617.

In any case the transcript contains the evidence of witnesses who appeared before the grand jury which sufficiently corroborates the testimony of the accomplices and women upon whom abortions were actually performed. It is sufficient to specify the testimony of a physician, who examined several women found in the place of business on August 23 when the officers executed the search warrant or who had recently been there, that his examinations indicated that these women had recently been pregnant and had apparently been aborted; the testimony of a number of women who had been physically examined by petitioner Stern that he had agreed to perform abortions upon them but that they had not returned to have such operations performed; and the testimony of a chiropractor who had been employed by Stern as a receptionist for a period of time and who, when he learned that Stern was engaged in the business of performing abortions, immediately quit his employment.

[12, 13] Complaint is made that the grand jury received hearsay testimony and other than the best evidence. The hearsay testimony was that of admissions made by other defendants and was admissible against the several defendants who had made such admissions. It is urged that in producing this testimony the district attorney should have informed the grand jury that it could not be considered in determining whether to return an indictment against any other person than the one making the admission. No authority is cited in support of this argument. In the analogous case of a hearing by a committing magistrate it has been held that the production before the committing magistrate of incompetent evidence is immaterial if there is sufficient competent evidence to justify the committing magistrate in holding the defendant to answer. In re Kawaguchi, 12 Cal.App. 498, 107 P. 727. Where it appears that sufficient competent evidence was introduced to support the indictment we are satisfied that the indictment is not rendered void by the reception of some incompetent evidence.

[14] This petitioner's main attack upon the sufficiency of the evidence is based on the claim that there is no evidence that any of the alleged abortions was not necessary to save the life of the women upon whom it was performed. Petitioner concedes that the question whether the burden of proving this negative is on the prosecution is still unsettled in California. See 1 Cal.Jur. 104, 105. Assuming that the burden of proving the negative is on the state the evidence before the grand jury was sufficient upon this point. It is true that no witness testified in so many words that the scores of abortions performed by petitioner were not necessary to save the lives of the women aborted. But the whole method of operation supports the strongest kind of inference that they were not. In addition to the evidence of the general method of operation outlined at the beginning of this opinion we cite the following evidence: Dozens of women testified to having abortions performed upon them by petitioner after a physical examination by petitioner for the purpose only of determining the fact and extent of the pregnancy. They were advised in case of later difficulty not to see their own physicians but to return to petitioner for treatment. As many as twenty or more abortions were at times performed by petitioner in a single day. Witnesses testified that petitioner had stated to them that there was nothing to worry about because he had ample protection in his operations for which he paid plenty. His place of business in Alameda County was closed by the police and he removed to Contra Costa County. His place in Contra Costa County was closed by the police and he returned to Alameda County. He offered a chiropractor one-third of his profits to let him put the chiropractor's name upon the door of his place of business. The first time he operated in Alameda County he used the name of Dr. Ray and had that name upon the door of his place of business. When he reopened in Alameda County he used the name of Dr. Stock and had that name upon his entrance door. Petitioner refused to operate upon women who were more than two and one-half or three months pregnant. He insisted on payment in cash in advance and would not accept

checks. He told a woman seeking an abortion that his price had gone up because his place had been closed and he had trouble. He admitted to the chiropractor, above mentioned, that he was engaged in performing illegal abortions. His practice was confined exclusively to abortions and he was not licensed to practice medicine or surgery.

The alternative writ heretofore issued is discharged and the petition for a writ of prohibition is denied.

NOURSE, P. J., and GOODELL, J., concur.




78 Cal.App.2d 25

## DAVIS et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 13357.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

**Indictment and Information ⇐10**

Evidence received by grand jury, which voted an indictment against numerous defendants for performance of abortions and conspiracy to perform abortions in violation of the Penal Code, sufficiently showed that particular defendants were connected with the alleged conspiracy.

Original petition by Lucille Davis and Dr. Maurice F. Stock for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Alameda, to prevent the prosecution of petitioners under an indictment.

Alternative writ discharged and petition denied.

Bernheim, Popper & Sugarman, of Richmond, for petitioners.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

The petitioners are joined as co-defendants in the indictment discussed in Stern v. Superior Court, Cal.App., 177 P.2d 308. Petitioner Stock is a licensed physician and petitioner Davis acted as his office nurse. As in the case of Anderson v. Superior Court, Cal.App., 177 P.2d 315, certain of the substantive counts have been quashed as to these defendants. In addition to the points disposed of in Stern v. Superior Court these petitioners argue that there is no legal evidence to connect them with the alleged conspiracy.

There is evidence that petitioner Davis referred many women to Stern for the purpose of having abortions performed and received a percentage of his fees from such abortions, that she participated in hiring an unlicensed woman to act as one of Stern's nurses and that she paid some of Stern's bills at his Richmond establishment in Contra Costa County. This evidence fully supports the indictment as to her.

There is evidence that petitioner Stock visited Stern's place of business in Richmond and asked to be permitted to go into the surgery and watch Stern work, but that Stern refused his request; that Stock made the arrangements to rent the place of business in Oakland to which Stern moved after the police closed his place of business in Richmond; that Stock procured and paid the fee on a business license in Stock's name for the Oakland address; and that Stock arranged with the owner of the Oakland building for Stern to move in, saying that Stern was his X-ray technician.

Stock had been using drugs to excess and went into a sanitarium about the time the Oakland place was opened and continued to be hospitalized until after August 23, 1946, the date on which Stern's place of business was finally closed. He appeared before the grand jury and denied all knowledge of Stern's illegal business. The grand jury manifestly was not bound by Stock's denials, if it chose to disbelieve them.

The evidence of Stock's presence in the Richmond establishment and his desire to see Stern operate is some evidence of his knowledge of the character of Stern's business; and his subsequent conduct in arrang-

ing for Stern to occupy a place in Oakland which he agreed to rent and for which he procured a business license in his own name, while it might be innocent if he believed Stern to be an X-ray technician, takes on a different color if he knew Stern to be a professional abortionist.

It is said in Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713, 715:

"It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in [Brady v. United States, 8 Cir., 24 F.2d 405] 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573) * * *."

It has long been settled that in the analogous case of an information the evidence before the committing magistrate is not subject to the same test as that before a trial jury in a criminal case and probable cause may be found for the holding to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. People v. Mitchell, 27 Cal.2d 678, 681, 166 P.2d 10; People v. Wisecarver, 67 Cal.App.2d 203, 209, 153 P.2d 778; 7 Cal.Jur. 982.

The supreme court in Greenberg v. Superior Court, supra, did not explain whether it thought that the same rule should apply in the case of an indictment as in the case of an information. It at least indicated that no severer rule should be applied when it used the language above quoted.

We are satisfied that the evidence against petitioner Stock if given before a committing magistrate would support an information. We must hold (quoting the language of the Greenberg case) that "there is some evidence to support the indictment."

The alternative writ heretofore issued is discharged and the petition for a writ of prohibition denied.

NOURSE, P. J., and GOODELL, J., concur.

78 Cal.App.2d 22

## ANDERSON v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 13359.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

Hearing Denied April 3, 1947.

**1. Conspiracy ⇐40**

A conspiracy between A and B to commit a specific crime or crimes will not make A liable as a conspirator with B and C if they enter into a separate conspiracy to commit a different crime or crimes, but one who joins a conspiracy after its formation is liable as a conspirator just as are those who originated it, and it is not necessary that each conspirator should have seen the others or have knowledge as to who all the members of the conspiracy are.

**2. Indictment and information ⇐10**

Evidence before grand jury returning an indictment for abortions and for conspiracy to perform them sufficiently showed that a particular defendant was a party to a general conspiracy.

**3. Conspiracy ⇐41**

One who joined a conspiracy was responsible for the substantive offenses later committed as a part of the conspiracy.

Original petition by Alta Anderson for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Alameda, to prevent the prosecution of petitioner on an indictment returned against her.

Alternative writ discharged and petition denied.

J. W. Ehrlich, of San Francisco, for petitioner.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

This is a companion case to Stern v. Superior Court, Cal.App., 177 P.2d 308. The evidence before the grand jury as to this

defendant who was jointly indicted with Stern and sixteen others, shows that several pregnant women who desired to be aborted visited the home and place of business of this petitioner in San Francisco, were given a physical examination to establish the fact of their pregnancy and were directed to go to the place of business of Stern in Alameda County. Upon some of these women Stern performed abortions and there is evidence that in the case of those so aborted he paid a portion of his fee to this petitioner. The trial court quashed the indictment against this petitioner as to counts 2, 4 and 5, apparently upon the theory that the abortions alleged in those counts were performed before there is any evidence to connect this petitioner with the conspiracy.

In addition to the points made and disposed of in Stern v. Superior Court, supra, this petitioner argues that if the evidence shows a conspiracy at all, it shows no more than a separate conspiracy between herself and Stern, and is not sufficient to show that she was a party to the general conspracy alleged in the indictment. She practically concedes that as to counts 6 and 15 of the indictment there is evidence to support those counts against her, since there is evidence that the two abortions alleged in those counts were performed upon women sent by her to Stern for the purpose of having abortions performed upon them. As to the conspiracy count and the other substantive offenses she challenges the sufficiency of the evidence.

[1] We are in full accord with the cases cited by petitioner to the effect that a conspiracy between A and B to commit a specific crime or crimes will not make A liable as a conspirator with B and C if B and C enter into a separate conspiracy to commit a different crime or crimes. However it is equally settled that "One who joins a conspiracy after its formation is liable as a conspirator just as are those who originated it" (11 Am.Jur. 548; 15 C.J.S., Conspiracy, § 36, p. 1060; Marino v. United States, 9 Cir., 91 F.2d 691, 696, 113 A.L.R. 975), "nor is it necessary that each conspirator should have seen the others, or have knowledge as to who all the members of the conspiracy are" (15 C.J.S., Conspiracy, § 40, p. 1063; 11 Am.Jur. 548).

This subject is so clearly discussed in Lefco v. United States, 3 Cir., 74 F.2d 66 at pages 68 and 69 as to warrant an extended quotation:

"There is nothing new in this defense of multiple conspiracies and nothing uncertain in the law arising from such a defense. Of course, to sustain a verdict on an indictment charging one particular conspiracy the evidence must establish the conspiracy charged. Evidence that establishes another conspiracy or several other conspiracies will not sustain the verdict. From this statement of law defendants, when in extremity, commonly resort to the contention that, not knowing all the conspirators or not knowing all the others were doing, they are responsible only for what they themselves were doing when caught, and as that usually is only a part of the conspiracy, they say, the part being less than the whole, it is different from the whole and in consequence is not the conspiracy alleged in the indictment and, for lack of proofs, they should be acquitted.

"Common design is the essence of conspiracy. The crime may be committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but ever leading to the same unlawful result. Allen v. United States, 7 Cir., 4 F.2d 688, 691; McDonnell v. United States, 1 Cir., 19 F.2d 801; Capriola v. United States, 7 Cir., 61 F.2d 5, 9; Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278; Pierce v. United States, 252 U.S. 239, 243, 40 S.Ct. 205, 64 L.Ed. 542. All conspirators need not be acquainted with one another, nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and cooperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before. Van Riper v. United States, 2 Cir., 13 F.2d 961; Coates v. United States, 9 Cir., 59 F.2d 173. Nor does the mere fact that conspirators individually or in groups perform different tasks to a common end split up a conspiracy into several different conspiracies. United

States v. McConnell, D.C., 285 F. 164; Wilson v. United States, 2 Cir., 190 F. 427.

"Whether the proofs establish the conspiracy alleged by an indictment or establish several conspiracies not alleged may, however, be a valid question and in such case it is a question of fact for the jury. United States v. McConnell, D.C., 285 F. 164."

[2] The inference is almost compelled, if the evidence is believed, that this petitioner knew that Stern was engaged in the commission of abortions not casually but as a regular business and that others, like herself, had conspired with him to further his operations. If the grand jury concluded that, with this knowledge, she saw fit to join with him and those others, even though unknown to her, in furthering the unlawful activities of the group we cannot say that the grand jury did not have substantial evidence upon which to find the indictment.

[3] If she did join the conspiracy she is responsible for the substantive offenses later committed as a part of the conspiracy. People v. Kauffman, 152 Cal. 331, 92 P. P. 861; People v. Welch, 89 Cal.App. 18, 264 P. 324; People v. Murphy, 53 Cal.App. 474, 200 P. 484.

The alternative writ heretofore issued is discharged and the petition for a writ of prohibition is denied.

NOURSE, P.J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.




78 Cal.App.2d 19

## ABBOTT v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 13356.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

Hearing Denied April 3, 1947.

**1. Witnesses ⇐201(2)**

Evidence tending to show that attorney was an alleged active member of conspiracy to violate law prohibiting abortions and that he was allegedly counseling a fellow member in an attempt to further the illegal purpose of the conspiracy was not privileged as to the attorney.

**2. Witnesses ⇐201(2)**

Communications between attorney and client having to do with client's contemplated criminal acts, or in aid or furtherance thereof, are not privileged.

**3. Witnesses ⇐217**

The privilege in respect of communications between attorney and client is the client's, not the attorney's, and if it results in the protection of the attorney, it does so only accidentally and as the result of the assertion of the client's right.

**4. Witnesses ⇐217**

Where client's privilege in respect of communication between him and attorney did not exist because it concerned client's criminal acts, the attorney could not assert the privilege for his own benefit.

Original petition by Carl Abbott for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Alameda, to prevent his prosecution under an indictment returned against him and others.

Alternative writ discharged and petition denied.

Lewis E. Lercara, of Oakland, for petitioner.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

This petitioner is one of the eighteen defendants joined in the indictment attacked in Stern v. Superior Court, Cal.App., 177 P.2d 308. He is an attorney at law and acted as his co-defendant Stern's attorney from September, 1944. On his motion to quash the indictment counts 2, 4 and 5 were ordered quashed as to him.

The evidence as to this defendant shows that he visited Stern's place of business in

Oakland and was present in his operating room immediately after an abortion had been performed and that he sent a pregnant woman to Stern for the purpose of having Stern perform an abortion upon her. It may be conceded, without deciding the question, that these facts, standing alone, would not be sufficient to support the indictment returned against him. The crux of his argument is that the evidence about to be discussed constituted a privileged communication between petitioner as attorney and Stern, his client, communicated through Mary Tracy, an employee of Stern.

According to this evidence about August 1, 1946, Stern directed Miss Tracy to go to petitioner's office. Miss Tracy had a friend named Medsker who had learned of Stern's illegal business and had reported that fact to members of the Oakland police department. Petitioner told Miss Tracy that he wanted to figure out a way to get Medsker out of town, "because, he said, he would go back to the City Hall and keep talking until he would get us all in trouble and ruin our protection." Petitioner then advised Miss Tracy to go to Medsker and tell Medsker that she was pregnant by him, that Stern had left town, and to suggest to Medsker that she and he leave the state together. It was further suggested that if she persuaded Medsker to go with her she could leave the train at Sacramento and petitioner would meet her there. Petitioner then said he would call a certain police officer and see if they could figure something out together. He attempted to call this officer on the telephone but was unable to reach him. He then asked Miss Tracy to inform Stern that he would see this officer in court the next morning and would then telephone to Stern.

[1, 2] This evidence, if believed, is sufficient to establish that petitioner was an active member of the conspiracy to violate the law prohibiting abortions and was counseling a fellow member of the conspiracy in an attempt to further its illegal purposes. Under the law as settled in every common law jurisdiction whose courts have considered the question this evidence was not within the attorney-client privilege. The continuous and unbroken stream of judicial reasoning and decision is to the effect that communications between attorney and client having to do with the client's contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of this privilege. 8 Wigmore on Evidence, 3d Ed., sec. 2298, p. 573 et seq.; 3 Wharton's Criminal Evidence, 11th Ed., sec. 1233, p. 2094; Underhill's Criminal Evidence, 4th Ed., sec. 237, p. 646; Jones on Evidence, 3d Ed., sec. 753, p. 1159; 70 C.J., Witnesses, sec. 560, p. 418; 28 R.C.L., Witnesses, sec. 158, p. 568; 125 A.L.R. 508 et seq.

[3, 4] Some of the cases hold that as a foundation for such evidence there must be a prima facie showing of the criminal activities of the client. See 125 A.L.R. 519. The evidence of Stern's criminal activities was detailed and voluminous. See Stern v. Superior Court, Cal.App., 177 P.2d 308. The privilege, where it exists, is the client's, not the attorney's and if it results in the protection of the attorney it does so only accidentally as a result of the assertion of the client's right. Here the client's privilege does not exist and the attorney is in no position to assert a privilege on his own behalf.

The argument that the uncorroborated testimony of an accomplice will not support an indictment and the complaint that hearsay evidence was admitted against this petitioner are sufficiently discussed in Stern v. Superior Court, supra, Cal.App., 177 P.2d 308.

The alternative writ is discharged and the petition for a writ of prohibition is denied.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

## THOMPSON v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 13358.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

Rehearing Denied March 8, 1947.

Hearing Denied April 3, 1947.

**Indictment and Information ⇐10**

Evidence before grand jury which returned an indictment against defendant and others for performance of illegal abortions and for conspiracy to perform abortions contrary to the Penal Code was sufficient to connect a particular defendant with the general conspiracy.

Original petition by James Douglas Thompson for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Alameda, to prevent the prosecution of petitioner under an indictment returned against him and others.

Alternative writ discharged and petition denied.

Nathan C. Coghlan, of San Francisco, for petitioner.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

This petitioner is joined as a defendant in the indictment under consideration in Stern v. Superior Court, Cal.App., 177 P. 2d 308. His wife is the owner of the building in Oakland in which Stern was engaged in business both before Stern removed to Richmond and after he returned to Oakland. Petitioner manages his wife's property and has an office in the ground floor of the same building. Stern occupied the second story. During Stern's first period of occupancy the second floor was rented to the co-defendant Dr. Ray and his name appeared on the entrance door. Stern vacated the premises and moved to Richmond after a visit from the Oakland police and this petitioner then rented the premises to Dr. Burl Whalen. Dr. Whalen testified that petitioner told him that he had cancelled Dr. Ray's lease because "things were pretty hot in San Francisco and he heard they were going to get hot in Oakland, and he better quit work and get out." On a later occasion Dr. Whalen told petitioner that from ten to twenty women a day were coming to his office, asking for Dr. Ray and seeking the performance of abortions and petitioner "told me I was crazy if I didn't take them in the operating room and examine them for hemorrhoids and take about $200 away from them * * * he said they had money in their pockets and, 'You might as well take it away from them.'"

Dr. Ray and Dr. Whalen had each been paying $400 per month rent. An unexecuted lease to Dr. Stock, in whose name Stern occupied the premises on his return from Richmond, for a five year term at $4000 per month was produced before the grand jury, which was admittedly prepared by petitioner and left in the premises for Stock. There is further evidence that petitioner frequently visited the premises while Stern was occupying them the second time and went into the surgery immediately after an abortion had been performed therein.

Enough has been detailed to indicate that the grand jury might reasonably conclude that petitioner with knowledge of Stern's illegal operations and purpose rented the premises to Stock for Stern's use at an exorbitant rental as a member, and in furtherance, of the general conspiracy to violate the law by the commission of illegal abortions. Petitioner testified that he knew nothing of Stern's illegal operations and believed in good faith that he was an X-ray technician employed by Stock. He explained the lease prepared by him for rental at $4000 per month by saying that Stock had agreed orally to purchase the building and equipment for $95,000 payable at the rate of $4000 per month and that he prepared the lease because he did not know how to prepare a contract of sale and intended to take Stock to his attorneys to prepare a contract and the proposed lease was to be used in that connection. The grand jury was entitled to weigh petitioner's testimony with the evidence against

him and to disbelieve his explanations if their discretion so dictated.

Complaint is made of the introduction of hearsay testimony. There is sufficient competent evidence to support the indictment and that is all that is required. Stern v. Superior Court, Cal.App., 177 P.2d 308.

The alternative writ is discharged and the petition for a writ of prohibition denied.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.




78 Cal.App.2d 30

## LOSER v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

**Civ. 13360.**

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1947.

Hearing Denied April 3, 1947.

**1. Conspiracy ⇐41**

A member of a conspiracy may effectively withdraw from it so as to exculpate himself from guilt for future criminal acts of his coconspirators.

**2. Conspiracy ⇐40**

One who has joined a criminal conspiracy can effectively withdraw therefrom only by some affirmative act bringing home the fact of his withdrawal to his confederates.

**3. Indictment and Information ⇐10**

Evidence before grand jury which returned an indictment of commission of abortions and conspiracy to commit them sufficiently showed that a particular defendant was connected with the commission of the substantive offenses.

**4. Criminal law ⇐112(3)**

Conspirators may be prosecuted in any county in which any overt act was done. Pen.Code, § 184.

**5. Criminal law ⇐112(3)**

An overt act done by one conspirator in Alameda county was sufficient to fix the venue in that county. Pen. Code, § 184.

**6. Indictment and Information ⇐86(1)**

An allegation that a specified county was the county in which the defendants conspired is not the allegation of an essential element of the offense. Pen. Code, § 184.

Original proceeding by Julius Loser for a writ of prohibition directed to Superior Court of the State of California in and for the county of Alameda, to prevent the prosecution of the petitioner under an indictment returned against him.

Alternative writ discharged and petition denied.

Francis McCarty, of San Francisco, for petitioner.

Ralph E. Hoyt, Dist. Atty., Arthur H. Sherry, Asst. Dist. Atty., and John S. Cooper Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Justice.

Petitioner herein is joined as a defendant in the same indictment considered in Stern v. Superior Court, Cal.App., 177 P.2d 308. Counts 2, 4 and 5 of the indictment were quashed as to him.

There is evidence that he was actively engaged with Stern in the commission of abortions, as a receptionist of women seeking abortions, while Stern was engaged in that illegal business in Contra Costa County; that he took to his co-defendant Ray in San Francisco his share of the proceeds from abortions; and that he went with his co-defendant Tracy to the Oakland office of their co-defendant Stuck to inform Stuck that Stern had opened a place for the performance of abortions in Richmond. This visit to Stuck is alleged as one of the overt acts done in furtherance of conspiracy.

It is argued that the only evidence on the subject shows that petitioner withdrew from the conspiracy about June 1, 1946.

Since petitioner's attack on the indictment hinges almost entirely on this evidence we quote it here verbatim:

"Q. When you first came down here to Oakland what did you and the other girl do? Were there two girls then? A. Yes sir.

"Q. Had Losier left? A. Yes sir.

"Q. When did he quit out there? A. Around the first of June.

"Q. Why did he quit? A. He had a fuss with the Doctor.

"Q. He had a fight with the Doctor? A. Yes sir.

"Q. What was that about? A. They just couldn't get along.

"Q. They couldn't get along? A. No sir."

Petitioner points to the fact that there is not a syllable of evidence in the transcript that after he quit about June 1 he was actively connected in any way with the conspiracy. All of the substantive offenses, except those quashed as to petitioner, occurred in Oakland between August 1 and August 23, 1946. As to all of these offenses petitioner argues that there is no evidence before the grand jury to connect him with their commission.

[1, 2] A member of a conspiracy may effectively withdraw from it so as to exculpate himself from guilt for the future criminal acts of his co-conspirators. 15 Am.Jur., Criminal Law, sec. 333, p. 22; 15 C.J.S., Conspiracy, § 78, subsec. a, p. 1110. However one who has joined a criminal conspiracy can only effectively withdraw therefrom by some affirmative act bringing home the fact of his withdrawal to his confederates. "Some affirmative act bringing home the withdrawal to the knowledge of his confederates is necessary, otherwise the conspiracy once established will be presumed to continue until the ends are accomplished or its abandonment is established. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; Coates v. United States, 9 Cir., 59 F.2d 173. See generally 5 Cal. Jur. p. 523." People v. Chait, 69 Cal.App. 2d 503, 514, 159 P.2d 445, 451; and cf. People v. King, 30 Cal.App.2d 185, 204, 85 P.2d 928; People v. Ortiz, 63 Cal.App. 662, 670, 219 P. 1024.

[3] There is no evidence of any communication of an intent to withdraw from the conspiracy to any fellow conspirator except Stern (if the evidence quoted above shows that) although petitioner was actively conspiring and cooperating with defendants Ray, Stuck and others according to the evidence. We cannot therefore say that there was no evidence before the grand jury to connect him with the commission of the substantive offenses, or to put it affirmatively that the evidence compels the conclusion that he had effectively withdrawn from the conspiracy prior to their commission.

As to the conspiracy count petitioner repeats the argument made in Anderson v. Superior Court, Cal.App., 177 P.2d 315, that if guilty of conspiracy at all he is guilty of a different conspiracy from that charged in the indictment. We have sufficiently disposed of that argument in the Anderson case.

[4-6] The indictment charges the formation of the conspiracy in Alameda County and petitioner insists that since the only evidence on the subject is to the effect that his part in the conspiracy was in Contra Costa County there is no evidence to support count 1 of the indictment, the conspiracy charge. There is nothing in this point. The conspirators may be prosecuted in any county in which any overt act was done. Pen.Code, sec. 184. The overt act done in Alameda County by petitioner in his visit to Dr. Stuck is sufficient to fix the venue in that county. The allegation that Alameda County is the county in which defendants conspired is not the allegation of an essential element of the offense. (See Hyde v. United States, 225 U.S. 347, 366, 367, 32 S.Ct. 793, 56 L.Ed. 1114, Ann. Cas.1914A, 614, in which the Supreme Court of the United States upheld an indictment charging a conspiracy in the District of Columbia, where the defendants were at all times in California, but an overt act was done in the District of Columbia; and Brown v. Elliott, 225 U.S. 392, 32 S.Ct. 812, 56 L.Ed. 1136, where the in-

dictment charged the formation of the conspiracy *at a place unknown* and the indictment was returned in a district where an overt act occurred.)

The alterative writ heretofore issued is discharged and the petition for a writ of prohibition denied.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.




78 Cal.App.2d 76

**THACKER v. AMERICAN FOUNDRY et al.**
**Civ. 15280.**

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1947.

**1. War ⇐4**

Under Stabilization Act, Executive Order, and regulations of Director of Economic Stabilization, general manager of newly created division of defendant foundry employed at salary of $500 per month was within regulation freezing salaries of $5,000 per annum and salaries of administrative personnel, and it was duty of employer and not general manager to file application seeking approval of terms of employment. Stabilization Act of 1942, §§ 1, 2, 5, 10, 11, 50 U.S.C.A.Appendix, §§ 961, 962, 965, 970, 971; Executive Order No. 9250, 50 U.S.C.A.Appendix, § 901 note.

**2. War ⇐4**

Under wage stabilization regulation requiring approval of Commissioner of Internal Revenue of salaries in new job classification, unless salary was not in excess of minimum for similar job classifications in same organization, or, if no such rates were available, then within the local area, employer failing to negative such exception to requirement of regulation could not maintain affirmative defense of illegality of employment contract because of failure to obtain approval of Commissioner of Internal Revenue. Stabilization Act of 1942, § 5, 50 U.S.C.A.Appendix, § 965; Executive Order No. 9250, 50 U.S.C.A.Appendix, § 901 note.

**3. Appeal and error ⇐1010(1)**

In action for breach of employment contract, record supported findings of express oral agreement under which employee was to manage new magnesium division in employer's foundry and that employee was to be paid $500 per month plus expenses and 20 per cent of net profits of division.

**4. Master and servant ⇐8(1)**

In absence of any evidence or findings as to duration of employment under oral agreement, contract of employment was terminable at any time at option of either party. Labor Code, § 2922.

**5. Master and servant ⇐6**

A provision of employment agreement that employee was to receive 20 per cent. of net profits of magnesium division of employer's business in addition to regular salary did not establish an employment coupled with an interest so as to justify presumption that contract would continue a reasonable time. Labor Code, § 2922.

**6. Master and servant ⇐8(1)**

Where there was no evidence that employee sought permanent employment as inducement to give up former employment, but evidence indicated that his former employment was terminating, employment contract was not supported by any consideration requiring continuance of employment for any particular period of time. Labor Code, § 2922.

**7. Master and servant ⇐7**

Where employment agreement fixed no time for duration thereof, and employee bringing action for breach of agreement failed to allege any consideration for contract requiring that it continue a reasonable time, right of either party to terminate contract at any time was not subject to modification. Labor Code, § 2922.

**8. Master and servant ⇐70(3)**

Under employment contract fixing no time for duration thereof and providing that employee was to receive 20 per cent of profits of magnesium division, right of

employee to percentage of net profits ceased as of date of termination of employment by employer.

9. Contracts ⇐324(1)
Damages ⇐118

Although a plaintiff may in one complaint join action upon express contract with one upon implied contract, he can recover on only one and, if there is a valid express contract, his recovery must be measured by its terms.

10. Contracts ⇐354

Where plaintiff joined action upon an express contract with one upon an implied contract, inconsistent and conflicting finding based on quantum meruit may be disregarded as surplusage where there is evidence to support court's findings on each count and the opposing party suffers no prejudice thereby.

11. Trial ⇐358

In action on two counts, one alleging breach of an express oral contract of employment and the other seeking recovery of reasonable value of services rendered, where evidence failed to support finding as to damages for breach of express contract, and court also made a conflicting finding with regard to reasonable value of services, employee, who established right to compensation under an express contract, could not recover on separate theory of implied contract.

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Appeal from Superior Court, Los Angeles County; Ranse R. Sischo, Judge pro tem.

Action by E. M. Thacker against the American Foundry and others to recover damages for breach of a contract of employment. Judgment for the plaintiff, and the defendants appeal.

Judgment reversed.

Julius V. Patrosso, of Los Angeles, for appellants.

Dechter, Hoyt, Pines & Walsh, Harry A. Pines, and Adele Walsh, all of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Defendants herein appeal from a judgment in plaintiff's favor in the sum of $4,800 in an action seeking damages for breach of a contract of employment.

The first question presented for decision is, assuming that the parties entered into a contract upon the terms alleged in the complaint and found by the trial court, was such contract illegal and void as violative of the salary Stabilization Act of 1942, in that the compensation therein provided to be paid plaintiff by the defendants was not approved by the Commissioner of Internal Revenue of the United States. The answer to this query is in the negative.

Plaintiff's complaint is in two counts, the first alleging an express oral contract of employment whereby, on May 10, 1943, plaintiff was employed to establish and act as general manager of a newly created "magnesium division" of the defendant American Foundry, a partnership composed of the individual defendants, for which service she was to receive a sum of not less than $500 per month, plus his expenses and 20% of the profits of said magnesium division. The second cause of action was upon a common count for the reasonable value of the services rendered defendants by plaintiff.

Defendants by their answer admit that plaintiff was employed to assist in the installation and operation of a magnesium division of their company at a salary of $500 per month, and his necessary expenses, but deny that he was to receive any additional compensation by way of a percentage of profits or otherwise, or that any sum is due him. As a special affirmative defense the defendants allege that the agreement sued upon is illegal and void as violative of the act of the Congress of the United States, known as the Stabilization Act of 1942, Public Law 729, 77th Congress, Second Session, 50 U.S.C.A. Appendix, §§ 961–971, and Executive Order No. 9250, promulgated by the President of the United States on October 3, 1942, 50 U.S.C.A.Appendix, § 901 note, pursuant thereto, in that no application was made to or obtained from the commissioner of Internal Revenue for authority to pay to plaintiff compensation as set forth in his complaint.

The trial court, on substantial evidence, found that the parties hereto did enter

into the oral agreement as alleged in the first cause of action of plaintiff's complaint and that plaintiff performed the services agreed by him to be performed until on or about August 15, 1944, when his employment agreement with defendants was repudiated and terminated by the latter. As a result of this severance of the contractual relationship the court found the plaintiff to have been damaged in a manner and amount hereinafter discussed. The court further found, in effect, that defendants had repeatedly failed to carry out their promise to reduce the oral contract to writing or to seek the approval of the salary stabilization unit of the Treasury Department of the United States of the terms and conditions of such contract.

It was stipulated at the trial that at all the times here concerned, the defendant American Foundry had in its employ more than 80 employees. The evidence shows, without contradiction, that immediately preceding his employment by defendants the plaintiff was employed by Basic Magnesium Co. at a salary of $500 per month; that no application for approval of the compensation found by the trial court to be due under his contract with defendants was ever made to, or secured from, the Commissioner of Internal Revenue of the United States, and that plaintiff was regularly paid a salary of $500 a month during the entire period of his employment by defendants.

The provisions of the Stabilization Act of 1942 which are pertinent to the issues here presented, are as follows:

Sec. 1. "In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. * * *" 50 U.S.C.A.Appendix, § 961.

Sec. 2. "The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. * * *" 50 U.S.C.A.Appendix, § 962.

Sec. 5. "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. * * *" 50 U.S.C.A.Appendix, § 965.

Sec. 10. "When used in this Act, the terms 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees." 50 U.S.C.A.Appendix, § 970.

Sec. 11. "Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment." 50 U.S.C.A.Appendix, § 971.

Pursuant to the authority conferred upon him by the foregoing statute, the President under date of October 3, 1942, issued Executive Order No. 9250, 7 Fed.Reg. 7871, by which there was established the office of Economic Stabilization and the Office of Director thereof. Pursuant to the authority conferred upon him by this Executive Order, the Director of Economic Stabilization, on October 27, 1942, issued his Regulations on Wages and Salaries, 7 Fed. Reg. 8748, by the provisions of which there was delegated to the Commissioner of Internal Revenue jurisdiction over all salaries in excess of $5,000 per annum, and salaries, regardless of amount, for persons employed in a bona fide administrative, executive or professional capacity. The Commissioner of Internal Revenue was also

thereby authorized to prescribe regulations, and to make such rules as might be necessary to carry out the provisions of the regulations issued by the Director of Economic Stabilization. Pursuant to the authority conferred by this last regulation, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on October 29, 1942, established within the Bureau of Internal Revenue a Salary Stabilization Unit, 7 Fed.Reg. 8820, and on December 2, 1942, T.D. 5186, 7 Fed.Reg. 10050, in consonance with the policy and purpose as stated in the Stabilization Act, Executive Order No. 9250, and the regulations promulgated by the Director of Economic Stabilization, all salaries in excess of $5,000 per annum were frozen at the rates in effect on October 3, 1942, and all salaries, regardless of amount, for persons employed in a bona fide administrative, executive or professional capacity were so frozen on October 27, 1942, and it was provided that no increase thereof could be made in excess of these rates, and that no salary for a position created after the "freeze date" might be established without first obtaining the approval of the Commissioner of Internal Revenue. It was further provided, as a part of such regulation of December 2, 1942, that: "An employer who has established a new job classification, or who has begun business, after October 3, 1942, must obtain approval of the Commissioner for the payment of salaries for such job classification or in such new business: *Provided, however, That if the salary rates in question are not in excess of those prevailing for similar job classifications within the local area, the approval of the Commissioner is not required.*"

On September 4, 1943, T.D. 5295, 8 Fed. Reg. 12429, at p. 12432, during the period plaintiff was employed by defendants under the contract in question, that portion of the regulation of December 2, 1942, immediately preceding and italicized, was superseded by amendment as follows: "*Provided, however, That if the salary rates in question are not in excess of the minimum of those prevailing for similar job classifications within his own organization or if no such rates are available, then within the local area on September 15, 1942, the approval of the Commissioner is not required.*" (Italics added.)

[1] It is readily apparent that the terms of plaintiff's employment bring him within the classifications over which jurisdiction is assumed under such regulation, both as earning in excess of $5,000 per annum and as general manager of the magnesium division, thus being in a bona fide executive capacity. It is equally evident that it was the duty of the employer, and not the employee, to file an application seeking the approval of the Commissioner of Internal Revenue of the terms of such employment. This, the evidence shows, defendants consistently failed and refused to do notwithstanding repeated demands on the part of plaintiff that such steps be taken.

Defendants are now in the position whereby, under their affirmative defense of illegality of the employment contract because of the failure to seek or obtain the authority of the Commissioner of Internal Revenue to pay the compensation therein provided, they ask the approval of the court permitting them to accept the benefits of plaintiff's services and, at the same time, retain a portion of the earnings due him therefor. They ask this even though the failure to seek or obtain such approval results from a breach by them of their legal duty to so apply. They assert the instant case is controlled by the well established principle that "performance of a contract cannot be compelled where it would involve a violation of law." 17 C.J.S., Contracts, § 467 page 964. In support of this position they point out the provisions of the act prohibiting the payment by the employer or the receipt by the employee of wages or salaries in contravention of the regulation as promulgated on penalty of fine or imprisonment.

[2] In pressing this affirmative defense defendants have overlooked an exception to the regulation which it is their duty to negative, by competent evidence, before such defense may become available to them. Concededly the position of general manager of the magnesium division to which plaintiff was appointed by defendants constituted "a new job classification." Also

the establishment for the first time in the history of defendant's foundry business of a division for the manufacture and sale of magnesium may reasonably be interpreted as the beginning of a new business within the purview of the regulation. The approval of the commissioner is not required under the provisions of the regulation to these classes of job if the salary rate provided for it is not in excess of the minimum of those prevailing for similar job classifications within defendant's own organization, or if no such rates are available, then those within the local area on September 15, 1942. The record is silent as to any such evidence and the exception has not been negatived. Under such conditions the trial judge was justified in believing the terms of plaintiff's employment were in consonance with the minimum of those holding similar positions, if any, in defendant's business organization or those within the local area on the prescribed date. Such being the case the approval of the commissioner was not required as a prerequisite to defendant's obligation to pay the amount found by the evidence to be due plaintiff as compensation for his services so rendered.

Defendants have cited the cases of Claude S. Bennett, Inc., v. Bollinger, 1945, 72 Ga. App. 531, 34 S.E.2d 563; Wernhardt v. Koenig, 1945, D.C.Pa., 60 F.Supp. 709, and Kells v. Boutross, 1945, 184 Misc. 206, 53 N.Y.S.2d 734, as authority for the illegality of the instant employment contract under the Stabilization Act of 1942, due to the failure to obtain the required authority to pay plaintiff the compensation therein provided. An examination of these cases, however, reveals that the employees there before the courts were neither occupying a position which had been established by the employer as a new job classification nor in a new business. As a consequence the above mentioned exception to the regulation did not apply to them as it here does to plaintiff. As was said in Vagim v. Brown, 1944, 63 Cal.App.2d 504, 510, 146 P.2d 923, 927: "It is the universal rule that where a contract can be performed legally it will not be presumed that the parties intended to perform it in an illegal manner, Fites v. Marsh, 171 Cal. 487, 153 P. 926, and where a contract can be performed in a legal manner, as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner. Teachout v. Bogy, 175 Cal. 481, 166 P. 319. This last principle stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or cooperate with the illegal performance. If the method provided for carrying into effect the principal purpose of an agreement has been executed and accepted by both parties, and the whole contract in itself is valid, it will not be permitted to fall because of any supposed invalidity attached to the means adopted. In re Yoell's Estate, 164 Cal. 540, 129 P. 999. Since nothing appears on the face of the instrument itself indicating its invalidity the burden was upon the defendant to establish his defense. George J. Birkel Co. v. Howze, 12 Cal.App. 645, 108 P. 145." In view of the fact, however, that a reversal of the judgment is indicated on subsequent grounds, defendants may take the opportunity in the event of a new trial, of offering evidence directed toward negativing the exception heretofore described.

[3] Although defendants strongly contend otherwise, the record of the case amply supports the findings of the trial judge to the extent that on or about May 10, 1943, the parties entered into an express oral agreement whereby they would undertake to add a new magnesium division to the iron foundry business then being conducted by defendant; that plaintiff would proceed toward procuring the necessary governmental authorization, would supervise the installation of the new business and would serve as its general manager after commencement of operations; that defendants agreed to pay plaintiff for his services under this agreement the sum of $500 per month, his necessary expenses and a further sum equivalent to 20% of the net profits of the magnesium division of defendants' business, when earned.

[4] Both plaintiff's complaint and the trial court's findings are silent as to any fixed time or term for the duration of such

agreement, nor is there any competent evidence in the case upon which a finding to such effect could be made. Under such a situation the contract of employment was terminable at any time at the option of either party, Labor Code, sec. 2922; Mile v. California Growers Wineries, 1941, 45 Cal.App.2d 674, 114 P.2d 651; Adkins v. Model Laundry Co., 1928, 92 Cal.App. 575, 268 P. 939; 17 C.J.S., Contracts, § 398, page 887, unless, as plaintiff contends is the case here, this rule is subject to the exceptions that, where the employment is coupled with an interest, or is entered into upon a consideration, it is presumed that it will continue a reasonable time. Plaintiff cites the cases of Brown v. National Electric Works, 1914, 168 Cal. 336, 143 P. 606; Gregg v. McDonald, 1925, 73 Cal.App. 748, 239 P. 373; Seifert v. Arnold Brothers, Inc., 1934, 138 Cal.App. 324, 31 P. 2d 1059; Boehm v. Spreckels, 1920, 183 Cal. 239, 191 P. 5; and several others in support of this theory. In the first place neither the pleadings nor the findings make mention of a failure to continue plaintiff's employment for a reasonable time nor that the term of approximately one year and three months during which plaintiff was so employed was not for a reasonable time. Neither is there pleading, finding nor proof to bring plaintiff within the protective folds of either of the exceptions upon which he relies.

[5] The contention by plaintiff that his employment was "coupled with an interest" is apparently predicated upon the fact that he was to receive as compensation for the services rendered by him a sum equivalent to 20% of the net profits of the magnesium division of defendants' business, when earned, in addition to a regularly paid salary of $500 per month. Such a contract cannot be held to transfer or assign to plaintiff a present and co-existing interest in the subject of the agency or power, but on the contrary clearly evidences the intention of the parties that plaintiff shall have but a percentage interest in the proceeds derived from the exercise of the power. This is insufficient to couple the agency or power with an interest. O'Connell v. Superior Court of City and County of San Francisco, 1935, 2 Cal.2d 418, 41 P.2d 334, 97 A.L.R. 918; Todd v. Superior Court of City and County of San Francisco, 1919, 181 Cal. 406, 184 P. 684, 7 A.L.R. 938.

[6, 7] As to the question whether plaintiff's contract of employment falls within the second named exception, in that it was "entered into upon a consideration," he apparently relies upon a claim that he abandoned other interests in order to serve defendants as being such a consideration as would require the latter to continue his employment for such reasonably additional period as to include all or substantially all of the profits ultimately accruing from the new division. Only one of the cases which he cites can be considered as authority for this proposition, that being Millsap v. National Funding Corporation of California, 1943, 57 Cal.App.2d 772, 135 P.2d 407, wherein the court said at page 776 of 57 Cal.App.2d. at page 409 of 135 P.2d: "* * * Where the prospective employee clearly states to his prospective employer, as in the case before us, that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms, it seems clear that the prospective employee (to paraphrase the language of section 1605, Civil Code) in giving up his present employment suffers a prejudice as an inducement to the promisor for his promise of permanent employment." In the instant case, however, plaintiff has failed to direct our attention to evidence showing any declaration on his part that he would not give up present employment to work for defendants unless the latter would agree to permanently employ him or any acquiescence by the employers to such terms. On the contrary there is evidence to the effect that his then position as an expediter for Basic Magnesium was terminating because of the completion of its plant and that he would have to look for a job. Under these circumstances no such prejudice has been suffered by plaintiff through his acceptance of employment by defendants as to afford a sufficient consideration to support a contract for the continuance of the employment over any particular period of time. In any event, since plaintiff has not alleged such consideration the right of

either party to terminate the contract at any time is not subject to modification on this ground. Speegle v. Board of Fire Underwriters of the Pacific, 1946, 29 Cal.2d 34, 172 P.2d 867, 870.

[8] The contract of employment between the parties, being terminable at any time at the option of either party, was terminated by defendants effective August 15, 1944. Such being the case the right of plaintiff to the stipulated percentage of net profits of the magnesium division ceased as of that date and he is entitled only to his agreed portion of such profits earned by defendants to the date of termination. The trial court, by its findings and judgment, however, has allowed plaintiff damage for breach of the express contract in a sum based upon 20% of the earned net profits of defendants' magnesium division for a period beyond August 15, 1944, and to April 30, 1945, the latter date being when such division ceased business. For the entire period between February 1, 1944, and April 30, 1945, the court found the defendants to have earned about $26,000 through this department of their foundry business and that plaintiff had been damaged to the extent of the value of his 20% interest therein in the sum of $4,800. The mathematical conflict in these figures remains unexplained. No finding appears to have been made as to the net earnings, if any, of this division to and including August 15, 1944.

[9-11] Following these findings of damage for breach of the express contract of employment the trial judge added the following finding: "On August 15, 1944, the defendants had become indebted to the plaintiff for services rendered by plaintiff to the defendants at their special instance and request in the sum of $12,000.00, which said sum is the reasonable value of said services so rendered and which said reasonable value the defendants promised and agreed to pay. Nothing has been paid thereon but the sum of $7,200.00; there remains due, owing and unpaid by the defendants to the plaintiff the sum of $4,800.00." It is immediately apparent that, while these findings arrive at the same sum, they are entirely conflicting and inconsistent. The latter finding is one for the reasonable value of plaintiff's services as rendered to defendants on an implied contract. While a plaintiff may, in one complaint, join an action upon an express contract with one upon an implied contract, he can recover on only one and not both. If there is a valid express contract his recovery must rest upon and be measured by its terms. The compensation agreed upon in the express contract may or may not be the reasonable value of the services to be performed but both parties are bound thereby and neither may, after the establishment of such a contract, recover a different or a larger sum just because such a sum would have been recoverable had the parties not theretofore agreed upon express terms. Provident Land Corp. v. Bartlett, 1946, 72 Cal.App.2d 672, 165 P.2d 469, 477; Fites Co. v. Harris Mfg. Co., 1928, 89 Cal. App. 427, 435, 264 P. 799, 803. It is true that the inconsistent and conflicting finding based on quantum meruit may be disregarded as surplusage where there is evidence to support the court's findings on each such count and the opposing party suffers no prejudice thereby, Niles v. Louis H. Rapoport & Sons, 53 Cal.App.2d 644, 1942, 652, 128 P.2d 50; Empire West Side Irr. Dist. v. Stratford Irr. Dist., 1937, 10 Cal.2d 376, 382, 74 P.2d 248; Baird v. Ocequeda, 1937, 8 Cal.2d 700, 703, 67 P.2d 1055; but here we find the evidence fails to support the finding as to damages for the breach of the express contract. As a consequence defendants are seriously prejudiced by the quantum meruit finding and plaintiff, having relied upon and established his right to compensation, if any, under an express contract, cannot at the same time recover on this separate theory of an implied contract.

The judgment is reversed.

SHINN, Acting P. J., and WOOD, J., concur.

78 Cal.App.2d 142

**Ex parte TAUBE.**

**Application of PEYSER.**

**Cr. 2453.**

**District Court of Appeal, First District, Division 2, California.**

**Feb. 18, 1947.**

**1. Criminal law ⇐1000**

Under statute, the judgment as pronounced must be certified to officer whose duty it is to execute it. Pen.Code, § 1213.

**2. Criminal law ⇐987, 996(2)**

Under statute, if original judgment fails to determine how terms of imprisonment shall run in relation to each other the court pronouncing judgment within time limits therein fixed may determine how the terms of imprisonment shall run with reference to the prior incompleted terms, and such determination may be made in absence of defendant. Pen.Code, § 669.

**3. Criminal law ⇐1000**

If judge, having omitted in his original judgment to provide how term of imprisonment imposed should run with relation to prior uncompleted terms, under authority of statute, later makes an order that term shall run consecutively, his subsequent order becomes a part of judgment and must be certified to officer whose duty it is to execute the judgment. Pen.Code, §§ 669, 1213.

**4. Criminal law ⇐1216(2)**

Where judgment imposing sentence of six months in county jail upon petitioner made no provision as to whether such sentence should run concurrently with or consecutively to three prior sentences, mere presence of rubber stamped word "consecutive" followed by the numbers of the prior proceedings against petitioner below the certificate to the commitment would be given no effect, and the four sentences would be construed to run concurrently. Pen.Code, §§ 669, 1213.

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Proceeding in the matter of the application of J. Maxwell Peyser for and on behalf of Helen Taube for a writ of habeas corpus to secure her release from further imprisonment in the county jail of the City and County of San Francisco.

Writ granted and petitioner ordered discharged.

J. Maxwell Peyser, of San Francisco, for petitioner.

Edmund G. Brown, Dist. Atty., City and County of San Francisco, and B. W. Hirschberg, Deputy Dist. Atty., both of San Francisco, for respondent.

DOOLING, Justice.

Petitioner seeks her release on habeas corpus from further imprisonment in the county jail of the City and County of San Francisco. Petitioner was convicted of two misdemeanors in the Municipal Court and on March 26, 1946, sentenced to two terms of six months in the county jail without direction as to whether the sentences should run consecutively or concurrently. They therefore must be construed to run concurrently. Pen.Code sec. 669. On May 29, 1946, she was convicted in the Superior Court of a violation of sec. 11500, Health and Safety Code, and sentenced to serve six months in the county jail. This judgment provided in express terms that the sentence should "run concurrently with the sentence heretofore imposed in the Municipal Court."

On June 5, 1946, petitioner was convicted of another misdemeanor in the Municipal Court and again given a six months sentence in the county jail. The judgment in this latter case, as certified in the commitment to the sheriff pursuant to Pen. Code, sec. 1213, makes no provision as to whether this sentence shall run concurrently with or consecutively to the three prior sentences. Below the certificate to this commitment is impressed with a rubber stamp the following words and figures:

"Consecutive No. 673375
673374
and Superior Court No.
38354."

The numbers quoted are those given to the three prior criminal proceedings in which sentences were imposed upon petitioner as above recited.

It is alleged in the petition and not denied that with good credit allowances petitioner has completed the service of all four sentences if they are to run concurrently.

The only question presented is the effect, if any, to be given to the rubber stamped words and figures appended to the fourth commitment. We are convinced that they should be given none.

[1] Under sec. 1213, Pen.Code, the judgment as pronounced must be certified to the officer whose duty it is to execute the judgment. See People v. Sourisseau, 62 Cal.App.2d 917, 928, 929, 145 P.2d 916. The judgment of June 5, 1946, as certified is silent on the manner in which the sentence therein imposed shall run in relation to the three earlier sentences.

[2] Under sec. 669, Pen.Code, if the original judgment "fails to determine how the terms of imprisonment shall run in relation to each other" the court within the time limits therein fixed may "determine how the terms of imprisonment * * * shall run with reference to the prior incompleted term or terms" and that this may be done in the absence of the defendant. We cannot assume on the record before us that any such action was taken or order made. The mere presence of the rubber stamped word "consecutive" followed by the numbers of the prior proceedings against petitioner below the certificate to the commitment imports no verity and proves nothing.

[3] By sec. 1213, Pen.Code, the legislature has expressly provided that the judgment of imprisonment shall be certified by the judge himself. It seems clear that the requirement of the judge's certificate was made out of a wise regard for the rights of the convicted person, so that the judge who had imposed the sentence could himself be certain that the clerk had correctly entered in his minutes the judgment actually rendered by the judge. If the judge, having omitted in his original judgment to provide how the term of imprisonment imposed should run with relation to prior uncompleted terms, under the authority of sec. 669, Pen.Code, later makes an order that the term shall run consecutively, his subsequent order becomes a part of the judgment and must be certified (pursuant to Pen.Code, sec. 1213) to the officer whose duty it is to execute the judgment. The liberty of no individual should depend upon a rubber stamp in the hands of a court clerk or other person where the record does not show that it reproduces an order or judgment of the court.

[4] We conclude that on the showing made the four sentences must be construed to run concurrently. In re Radovich, 51 Cal.App.2d 177, 142 P.2d 325.

The petitioner is ordered discharged from further custody pursuant to the four judgments referred to herein, and the bond exacted of her in this proceeding is exonerated.

NOURSE, P.J., and GOODELL, J., concur.




78 Cal.App.2d 272

**KELLY et ux. v. OCHS et al.**

**Civ. 3528.**

District Court of Appeal, Fourth District, California.

Feb. 26, 1947.

**1. Mines and minerals ⇐74**

Assignees of interest under oil lease did not lose their rights under lease for failure to "begin" to remedy defaults in payment of royalties and in diligent operation of oil wells within ten days after receiving notice of defaults, where workmen were engaged to put oil wells on production and royalty check was mailed within ten days after notice was received.

**2. Mines and minerals ⇐74**

Assignors of interest under oil lease to be successful in action to quiet their title against assignees' interest were required to prove a sufficient default by assignees under the lease and failure to remedy such default and good and sufficient notice to assignees as required by assignment.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Edward A. Kelly and Verna Irene Kelly, his wife, against M. Peter Ochs and others to quiet title in plaintiffs to certain realty against an interest under oil lease and an assignment of interest under that lease. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

Mack, Werdel & Bianco, of Bakersfield, for appellants.

Kaplan & Livingston, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment refusing to quiet plaintiffs' title to property in Kern County against an interest under an oil lease, dated January 14, 1936, and an assignment, dated September 17, 1940, of interest under that lease and made from plaintiffs to M. Peter Ochs and Lester Cutler.

The original lease is not before us but evidently one well had been drilled on the property down to an upper oil zone prior to the assignment which provided that the lessees deepen that well to a second zone, and, under certain conditions they were to drill three additional wells, paying the assignors an over-riding royalty.

The assignees deepened the first well and drilled another. They built a derrick for a third well but did not proceed with drilling operations because, as they claim, the outbreak of war together with federal regulations and shortages of materials prevented their proceeding with the work.

The two wells were not very productive and sanded up frequently. They were cleaned out at various times and put back on production.

There was no production from the wells during March, April, May and June, 1943. There was production from July, 1943, to January, 1944, both months inclusive. At the time of the trial one well was producing about eleven barrels of oil a day and the other about twenty-five barrels a day.

Under date of June 16, 1943, the assignors gave written notice to the assignees that they were in default in four particulars and that "you are hereby required to comply with the terms of said lease and assignment as provided therein and within the time therein limited, and remove said default under said Lease and Assignment or the undersigned will take further legal proceedings as set forth in said Lease and Assignment." It is admitted that this notice was received by the agent of the assignees on June 23, 1943.

No other notice of default or of cancellation of the assignees' interest was ever given. The complaint to quiet title was filed on July 12, 1943.

The notice of default contained four specifications: 1. That the assignees had failed to carry out their drilling obligations in that they had drilled only two wells on the property. 2. That they had failed to pay the assignors the royalty from oil produced from the first well. 3. That they had failed to pay them the royalty from the oil produced from the second well. 4. That they had failed to operate the two wells with reasonable diligence and in accordance with good oil field practices.

The portion of the forfeiture clause in the assignment which is material here reads as follows: "Upon the violation of the Assignee of any of the terms or conditions of this assignment and the failure to begin to remedy the same within ten (10) days after written notice from the Assignor so to do, at the option of the Assignor, this assignment shall forthwith cease and terminate, and all rights of the Assignee in and to said land be at an end."

As soon as the agent of the assignees received the notice of default he communicated with a man in Bakersfield who had done work for him before with the request that he put the wells on production or, if he could not do it himself, he secure some one else to do so. There was some delay in securing competent persons to do the work but it is undisputed that he did find and did engage two men; that they started to move their machinery onto the leased property on July 3, 1943, the tenth day after the notice of default was served; that there was a mechanical failure in transportation which prevented the machinery from reach-

ing the property until July 4; that actual work of cleaning out well number two was started July 5, 1943, and was completed about July 10, 1943; that it produced oil thereafter. Well number one was put on production at a later date. On July 2, 1943, the agent for the assignees mailed a check to the assignors for an amount which he then believed was due them as their royalty for the oil produced. The check was returned. No question was then raised as to the amount or form of the tender. Another royalty check was also refused.

[1] The forfeiture clause of the assignment is somewhat unusual in form. It only required the assignees "to *begin* to remedy" the default within ten days in order to cure it. The undisputed evidence clearly shows that the assignees began to remedy the default within the required ten days. The mailing of the royalty check was certainly a beginning. The successful search in good faith to find persons to put the wells on production was also a beginning. If it had not been for a mechanical failure the machinery and men to put at least one well on production would have been on the property on the tenth day. The good faith of the assignees is shown by their proceeding with the work as rapidly as possible, and that well number two was actually put on production about two days before this action was filed. Under these circumstances the trial court correctly held that the assignees had not lost their rights under the terms of the assignment because of their earlier default.

Plaintiffs raise one other question that requires brief consideration. The complaint joined M. Peter Ochs with Lester Cutler, the Kenneth Oil Producing Company and others as defendants. Only Lester Cutler and Kenneth Oil Producing Company appeared and answered. In the judgment the trial court held that M. Peter Ochs and Lester Cutler were the owners of the assignees' interest under the assignment. It is now urged that this was error.

There is nothing to show that Mr. Ochs was ever served with process or that his default was entered.

[2] Plaintiffs were endeavoring to quiet their title against the interest of the assignees under their assignment of the oil lease. To be successful it was necessary for them to prove a sufficient default and failure to remedy such default on the part of the assignees as well as a good and sufficient notice. Having failed to do this they cannot recover and are not injured by the form of the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




78 Cal.App.2d 93

**KENNEDY v. HAMILTON.**

**Civ. 15457.**

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1947.

**1. Appeal and error ⇐882(18)**

Plaintiff, having declined court's proposal that default judgment annulling marriage and decreeing plaintiff to be owner of designated property be vacated only as to the property issues, could not complain that order vacating judgment was too broad in that defendant made no showing of any right to be heard upon issue of validity of the marriage. Code Civ.Proc. § 473.

**2. Judgment ⇐138(3), 145(4)**

Wife's answer to action to annul marriage and recover property, alleging that money received from husband had been returned and not used in purchasing realty and that personal property involved was presented to wife as gift, stated a meritorious defense and vacation of default judgment upon application made ten days after rendition of judgment without personal service of summons was discretionary. Code Civ.Proc. § 473a.

**3. Judgment ⇐143(3)**

Affidavit and answer showing defendant was not personally served with summons and complaint, never received a copy there-

of, had no knowledge of pendency of action until service of writ of assistance after rendition of default judgment, and had a meritorious defense, warranted vacation of default and judgment on ground of mistake, inadvertence, surprise, and excusable neglect upon application made ten days after rendition of judgment. Code Civ.Proc. § 473.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Albert Ernest Kennedy against Vera Pauline Hamilton to annul a marriage and impress a trust on real and personal property. From an order vacating a default and judgment and permitting defendant to file answer and cross-complaint, plaintiff appeals.

Order affirmed.

Richard A. Haley, of Los Angeles, for appellant.

Francis W. Bunnett, of Los Angeles, and Benjamin Hansen, of South Gate, for respondent.

SHINN, Justice.

Appeal from an order vacating a default and judgment and permitting defendant to file an answer and cross-complaint in an action to annul a marriage and to have it declared that defendant held certain real and personal property in trust for plaintiff. The default judgment was rendered February 8, 1946, and a motion to vacate it was filed ten days later.

The complaint alleged that plaintiff and defendant entered into a ceremony of marriage on the 9th day of March, 1945; that defendant had previously contracted a marriage with one Leroy Hamilton which had not been dissolved; that her husband was still living, and the facts as to the former marriage were unknown to plaintiff at the time of his purported marriage; that plaintiff deposited with defendant $1500 and thereafter, while serving in the Merchant Marine, sent to defendant additional sums which brought the total to $6,000, and that he also sent her many articles of personal property, all of which sums of money and articles of property were to be held in trust by defendant for the use and benefit of plaintiff; that defendant used the money to purchase real property, title to which was taken in her own name; that plaintiff returned to the State of California and found defendant living with her said husband, Leroy Hamilton, and then discovered the facts concerning defendant's prior marriage. The prayer of the complaint was for annulment of the marriage and a decree declaring plaintiff to be the owner of the real and personal property described, and requiring defendant to transfer the same to him. Summons was issued and duly published and upon affidavit of publication and mailing of summons and complaint to defendant in care of an attorney at Las Vegas, Nevada, defendant's default was duly entered and the action was brought on for trial as a default. Judgment was given in accordance with the prayer of the complaint. The several items of personal property were valued in the complaint and in the judgment at prices which brought the total amount to approximately $2,000, and the judgment ordered the return thereof to plaintiff. A writ of assistance was issued upon the judgment and upon its being served defendant employed attorneys, who made a motion to vacate the default and judgment upon the grounds of mistake, inadvertence, surprise and excusable neglect, and that the summons had not been personally served upon defendant. The motion was supported by the affidavit of defendant, in which she averred that summons and complaint had not been personally served upon her; that she had never received a copy of the same by mail or otherwise and had no knowledge of the pendency of the action until the service of the writ of assistance. With the affidavit were presented defendant's verified answer and cross-complaint. By the answer defendant admitted her marriage to Hamilton and that the same had not been dissolved at the time of her purported marriage to plaintiff, and she denied all the material facts of the complaint with reference to the property. She admitted having received $1200 from plaintiff, but alleged that she had returned the same; denied that any part of the money had been used in the purchase of the real property and alleged that the property had

been purchased wholly with money received from her two sons, who were in the service. Corroborative affidavits were filed by the sons with reference to the funds used in the purchase of the property. Defendant's answer alleged further that the articles of personal property, with one exception, were presented to her as gifts. An affidavit of merits was filed with the notice of motion. It is conceded in the briefs that at the time of the hearing of the motion the court proposed to counsel that they agree that the judgment be vacated upon the issue of the property alone and that plaintiff's counsel declined to agree to such an order. Following this the order appealed from was made.

[1] It appeared without conflict from the affidavits that defendant had not been personally served with a copy of the summons and complaint. Section 473a of the Code of Civil Procedure reads: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." Appellant's attack upon the order is directed against the sufficiency of the showing of mistake, inadvertence, surprise or excusable neglect under section 473, and the charge is made generally that defendant's conduct in the matter has been such as to bar any right on her part to equitable relief at the hands of the court. As to the latter point, it may be granted that defendant made no showing of any right to be heard upon the issue of the validity of the marriage, but plaintiff makes no attack upon this portion of the order. Furthermore, as stated, plaintiff declined the court's proposal that the parties agree to an order that the judgment be vacated only as to the property issues and should not now be heard to complain that the order was in broader terms than it should have been.

[2] Defendant's application for relief was made promptly and she made a sufficient showing that she had a meritorious defense so far as the property issues were concerned. The order was a proper exercise of the court's discretion under section 473a. No reason has been advanced why it was not entirely just and proper for defendant to be granted an opportunity to prove, as she alleged, that the real property was not purchased with funds entrusted to her by plaintiff but wholly with funds supplied by her sons, and that this was done under an agreement that she would hold title for their use and benefit. Under the allegations of her answer defendant alleged a meritorious defense to the cause of action for the return of the personal property, both as to the question of title and the question of value.

[3] The contention that defendant made an insufficient showing under section 473 to justify the order is one that need not be decided, since the order was properly made under the authority of section 473a. However, we have examined the affidavits and the answer and find the same to be sufficient to sustain an order vacating the default and judgment under section 473.

The order is affirmed.

DESMOND, P. J., and WOOD, J., concur.




78 Cal.App.2d 121

**FISHER et al. v. LOSEY et al.**

**Civ. 15368.**

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1947.

Hearing Denied April 17, 1947.

**1. Brokers ⇐31**

Where trial court could have found that after plaintiff had procured owner to fix sale price of realty on basis of commission to plaintiff as the broker acting for another, plaintiff informed owner that plaintiff was purchaser and owner then agreed to sell for the price previously named, owner could not complain of a breach of fiduciary relationship though

plaintiff's general business was that of a broker.

**2. Principal and agent ⇐69(1)**

One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him.

**3. Brokers ⇐31**

A broker acts in a fiduciary capacity and owes an affirmative duty of disclosure to his principal.

**4. Appeal and error ⇐1011(1)**

Findings of trial court cannot be disturbed on appeal where the evidence was conflicting and there was evidence that supported the trial court's findings.

**5. Specific performance ⇐28(2)**

Contract for sale of realty at specified price subject to county taxes and providing for escrow agreement and other details contained all the essentials necessary to support action for specific performance by purchaser.

**6. Specific performance ⇐30**

That contract for purchase of realty recited the receipt of $500 by vendor from the purchaser whereas escrow instrument recited that deposit had been made by purchaser's wife, did not render the contract so uncertain as to be unenforceable in action by purchaser for specific performance.

**7. Trial ⇐403**

Where findings of fact and conclusions of law had been misplaced through no fault of the litigants, filing of them nunc pro tunc as of the time they were actually made was proper and judgment was not void or voidable merely because judgment roll showed that the findings of fact and conclusions of law were actually filed after the judgment.

**8. Evidence ⇐558(2)**

Where action concerned value of realty at time of contract for sale thereof, exclusion of question on cross-examination of expert witness concerning the value of the realty at the time of the trial was not an abuse of discretion.

**9. Specific performance ⇐129**

In action by purchaser for specific performance of realty contract allowance to purchaser of interest on amount deposited with escrow holder from date of deposit was not error, since a judgment for specific performance may include damages for delay.

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Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Clara Elizabeth Fisher and Howard B. Fisher against Glenn C. Losey and Hazel Losey and another for specific performance of contract for sale of realty. From a judgment for plaintiffs, the defendant Glenn C. Losey appeals.

Judgment affirmed.

Wm. J. Clark and Morris Lavine, both of Los Angeles, for appellant.

Barrick & Wright, of Pasadena, for respondents.

DRAPEAU, Justice pro tem.

One of the plaintiffs is a real estate broker. His wife is a party plaintiff because she is the purchaser named in an agreement of purchase and sale of real property which was enforced by judgment of trial court. Temple City is in Los Angeles County, a short distance east of the City of Los Angeles, and is growing very rapidly. Contemplating establishing a real estate office in Temple City, plaintiff looked over the business part of the area in which he wished to locate his office; centered on one particular spot, and then searched the records of Los Angeles County to ascertain who owned two lots which he wanted. Finding defendant's name listed as owner of the lots, he called the defendant on the telephone, and asked him if he would consider a sale.

In this conversation plaintiff told the defendant that he was a realty broker and had a client who would purchase the property. Defendant stated that he would sell the property but would have to ascertain what investment he had in it and would then advise plaintiff of the price. On the next day plaintiff again called the defendant; defendant said he would take $6,000

for the two lots. Plaintiff asked him if that would include a 5% commission; defendant said "Yes". Plaintiff said "then that would be a price of $5,700.00 net to you", and the defendant said, "Yes".

On the following Monday, September 29, 1945, plaintiff called at defendant's house. He introduced himself, reminded the defendant of the purchase price they had theretofore discussed, and offered defendant $5,500 for the two lots. This offer defendant refused; whereupon plaintiff told the defendant that he was the purchaser and would pay defendant $5,700 for the property. This offer defendant accepted. Then plaintiff filled in the blanks on a printed form of agreement of purchase and sale, read it to defendant, and plaintiff wife and defendant and his wife signed it. As part of the transaction a check for $500 was delivered to defendant to bind the bargain. In the agreement title was to be taken in the name of plaintiff wife.

The parties proceeded immediately to a bank, where escrow papers were prepared, evidencing substantially the agreement above recited, and were signed by the plaintiffs and defendant, Glenn C. Losey.

Within the next few days defendant proceeded to make a belated inquiry as to the value of the lots, convinced himself that they were worth $10,000 rather than $5,700, and notified the escrow holder that he refused to go further with the sale. Then followed the complaint in the Superior Court by plaintiffs to enforce the agreement of purchase and sale, and a judgment by the trial court for specific performance.

[1, 2] The first ground of appeal is that under the circumstances narrated, a fiduciary relationship existed between plaintiff and defendant. The vice of plaintiff's conduct lies in the fact that he inquired the price, and led defendant to believe that he was to get a commission of $300 from a fictitious purchaser, and thus secured for himself a net price at $5,700. Such conduct by a real estate broker is certainly not to be commended. However, it was the province of the trial court to draw the inference that there was subsequently a disclosure of the fact that the plaintiff was the real party in interest, and that the defendant then with full knowledge thereof agreed to the sale. The principle is stated in Rest. Agency, p. 877:

"a. Facts to be disclosed. One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him. Before dealing with the principal on his own account, however, an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material within the meaning of the rule stated in this Section if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account (see sec. 389), but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal. This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, and all other matters which a disinterested and skillful agent advising the principal would think reasonably relevant."

[3] It is elementary that any broker acts in a fiduciary capacity and owes an affirmative duty of disclosure to his principal. Haswell v. Costellenos, 126 Cal.App. 427, 14 P.2d 846; Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885 (involving a real estate broker); Jolton v. Minster Graf & Co., 53 Cal.App.2d 516, 128 P.2d 101; Baird v. Madsen, 57 Cal.App.2d 465, 134 P.2d 885.

[4] This then leaves the question whether there was any misrepresentation by the plaintiff as to the transaction. Appellant contends this was so in reference to the purchase price of $5,700. Again we find a substantial conflict in the testimony,

which it was the province of the trial court to resolve. Witnesses, including the defendant, testified that the market value of the lots was $10,000. One of plaintiff's witnesses testified that they were worth $5,500; another, $6,000. Therefore, this court may not disturb the findings of the trial court in this respect.

Appellant urges as a second ground of reversal that the contract of purchase and sale is uncertain, and therefore unenforceable.

The agreement is as follows:

"Received from Howard B. Fisher $500.00 (Check) to apply on purchase price of $5,700.00 for TWO lots No. 569 and 570, Block ———, Tract 6561 in the County of Los Angeles, State of California, also known as On southside of Las Tunas Street, between Sunset and Temple Aves, Temple City, Calif.

"Subject to County taxes for fiscal year 1944-1945; bonds and assessments with unpaid balance not to exceed $NONE; covenants, conditions, restrictions, reservations, rights, rights-of-way and easements of record, if any; mortgage or trust deed of record with unpaid balance of $None;

"Seller agrees that this property will be delivered free and clear of all bonds, assessments, or Mattoon expense.

"Buyer will deposit an additional $5200.00 and his necessary instruments in escrow with the Bank of America—South Pasadena Branch within 5 days. Each party to pay his customary escrow charges.

"The seller is to furnish at his expense in said escrow a Deed, and a Policy of Title Insurance showing title condition as provided for above. In the event same is not furnished within a reasonable time, then buyer shall have the right to cancel this agreement and his deposit is to be returned.

"If buyer fails to deposit the money and his instruments and complete the purchase as provided herein, then the amounts paid shall be forfeited, to the seller.

"Interest, taxes, rents and fire insurance are to be prorated to date deed is recorded.

"The sale of said property is made subject to owner's approval and deposit is to be refunded if owner does not approve said sale NOW.

"There are no oral agreements not contained herein.

"I agree to sell said property on above terms ——

"Glenn C. Losey
(Seller)
"Mrs. Hazel Losey

"I agree to purchase said property on above terms.

"Clara Elizabeth Fisher
(Buyer)"

[5] Without specific enumeration thereof, this contract contains all of the essentials necessary for specific performance.

[6] It is urged that the contract and escrow agreement must be regarded as one instrument, that the contract recites the receipt of $500 by defendant from plaintiff, whereas the escrow instructions recite that the deposit of the sum was made by Mrs. Fisher. This does not render the contract uncertain.

[7] Appellant urges that the judgment is void or voidable upon its face and from an inspection of the judgment roll because the judgment was filed with the clerk, February 1, 1946, entered February 4, 1946, but the findings were not filed with the clerk until February 27, 1946, after the judgment. Upon the findings appears the following notation by the trial judge: "The foregoing Findings of Fact and Conclusions of Law having been signed on the First day of February, 1946 but through inadvertency having been misplaced, it is therefore ordered, adjudged and decreed that the foregoing Findings of Fact and Conclusions of Law be filed nunc pro tunc by the Clerk as of the First day of February, 1946. Collier, Judge of the Superior Court."

Filing of the findings, nunc pro tunc, was certainly in the interest of justice. That they were misplaced was in no sense the fault of the litigants, and it was proper to so file the findings.

[8] Complaint is made of a ruling by the trial court sustaining objection to a question on cross-examination of an expert witness as to value. This question was as to

the opinion of the expert as to value "at the present time". No authority is cited to support the proposition; and there was no abuse by the trial court of its discretion in curtailing the cross-examination of this witness.

It is urged that the findings are not sustained by the evidence, and a number of specific matters pointed out to support this contention. However, a fair and careful review of the record convinces us that the evidence supports the findings, and considering the function of the trial court to resolve conflicting testimony, the findings and judgment are correct.

[9] Finally it is argued that the judgment is erroneous in awarding interest on the sum of $5,700 from October 4, 1944, the date of its deposit with the escrow holder. A judgment for specific performance may include damages for delay in performance of the contract. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425; Coleman v. Dawson, 110 Cal.App. 201, 294 P. 13.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.




**HARTFORD ACCIDENT & INDEMNITY CO. v. CITY OF TULARE et al.***

**Civ. 3518.**

District Court of Appeal, Fourth District, California.

Feb. 20, 1947.

As Corrected Feb. 25, 1947.

Hearing Granted April 24, 1947.

**1. Courts ⇐91(1)**

District Court of Appeal must follow decisions of the Supreme Court which have been neither criticized nor overruled, without regard to their antiquity.

**2. Insurance ⇐181**

The liability of surety on city treasurer's bond terminated with expiration of term of office for which treasurer was appointed or at the latest on date specified in the bond, and hence surety could not recover premium on bond for a period subsequent to such expired date when treasurer obtained a bond from another surety. St.1923, pp. 1510, 1518, §§ 6, 33.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by the Hartford Accident & Indemnity Company against the City of Tulare and another for declaratory relief and to recover an annual premium on an indemnity bond together with attorney's fees. From an adverse judgment, plaintiff appeals.

Modified and affirmed.

Maddox and Abercrombie, of Visalia, for appellant.

I. H. Ham, City Atty., of Tulare, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of defendants in an action brought for declaratory relief, and to recover an annual premium on an indemnity bond, together with attorneys' fees.

The city of Tulare is a municipal corporation organized and existing under a municipal charter. St.1923, p. 1508, St.1933, p. 3043, and St.1935, p. 2640. The charter was amended twice but none of the amendments affect the questions before us.

The charter provides for certain elective officers of the city among whom are an auditor and a treasurer. Section 6 provides that those officers, before entering on the duties of their respective offices "shall each give and execute to the city a bond with a responsible surety company in such penal sum as the City Council may by ordinance direct, * * *."

Section 33 of the charter contains provisions concerning the city treasurer and specifies that "before assuming the duties of his office he shall file with the City Clerk a surety company bond in the penal sum of Fifty Thousand Dollars ($50,000.00) * * *."

* Subsequent opinion 186 P.2d 121.

Section 5 of the charter provides that "the term of office of each of said elective officers shall be Four (4) years, and until his successor is elected and qualified."

Section 8 provides that the bond of the treasurer shall be approved by the council and filed with the city clerk.

Section 9 provides that a vacancy in an elective office shall be filled by appointment by the city council, "such appointee to hold office until the next general municipal election," without any provision that the appointee shall hold office until the election and qualification of his successor.

Section 72 provides that "All general laws of the State applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter or with ordinances or resolutions hereafter enacted, shall be applicable to the city."

Section 879 of the Political Code, now re-enacted as section 1302 of the Government Code, provides as follows: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified."

Section 959 of the Political Code, now re-enacted in section 1504 of the Government Code, provides as follows:

"Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk."

On June 1, 1942, Andrew J. Menown, then city treasurer of the city of Tulare, died, and on the next day the city council appointed Frances M. Besse city treasurer. She qualified by taking the oath of office and furnishing a bond in the sum of $50,000, with plaintiff as surety, which bond was approved by the city council and filed with the city clerk.

The penal clause of the bond read as follows:

"Whereas, the above bounden was heretofore elected or appointed City Treasurer in and for the City of Tulare, State of California, and is required to furnish bond.

"Now, therefore, if the said Principal shall for the period commencing June 2nd, A.D. 1942 and ending April 18th A.D. 1943 well, truly and faithfully perform all official duties now required of him by any law of the State of California, then the above obligation shall be null and void; otherwise to remain in full force and effect."

The next general municipal election after the appointment of Frances M. Besse was held on April 13, 1943, in which she was elected to succeed herself. Plaintiff tendered a new bond in the penal sum of $50,000 which was rejected by the city council and was never filed.

On May 18, 1943, the city council of Tulare adopted its ordinance No. 513 fixing the bond of the city treasurer at $10,000. Frances M. Besse obtained a bond in that penal sum from another surety company. It was approved by the city council on August 19, 1943, and filed with the city clerk.

Counsel for plaintiff argue as follows: That the city council had no authority to fix the bond of the city treasurer at a sum less than $50,000; that when sections 33 and 6 of the charter are construed together the only power of the council in this regard is to fix the bond at a sum not less than $50,000 so ordinance No. 513 was void as being contrary to the express terms of the charter; that the approval of the bond in the penal sum of $10,000 was beyond the power of the council, so Frances M. Besse never qualified as city treasurer after her election on April 13, 1943; that while, under the provisions of the charter, the term of office of Frances M. Besse under her appointment expired on April 13, 1943, and as there was no provision in the charter prohibiting an appointee holding office until the qualification of an elected successor, the provisions of sections 879 and 959 of the Political Code were adopted into the charter by section 72, so that Frances M. Besse, having failed to qualify for the term of office for which she was elected, continued to hold office under her appointment and plaintiff continued to be obligated under its bond and was entitled to collect its annual premium. As an alternative it is argued that if it be held that the city council

did not exceed its authority in passing ordinance No. 513 and fixing the bond at $10,000, still Frances M. Besse did not qualify after her election on April 13, until August 19, 1943, so that plaintiff continued to be her surety until the latter date and was entitled to its premium for the short term.

[1] Were it not for decisions of the Supreme Court of this State the arguments we have summarized would seem sufficiently sound to require the most careful examination. However, a District Court of Appeal must follow decisions of the Supreme Court which have been neither criticized nor overruled, without regard to their antiquity. In this connection it should be observed that the statutes in effect when the controversies arose in the cases we will consider, concerning the term of office of a county treasurer and his qualification after election or appointment, do not differ materially from the construction urged by plaintiff of the law governing our decision here. Stats. 1850, p. 115.

Our attention is first directed to People v. Aikenhead, 5 Cal. 106. In that case the trial court held that the sureties on the bond of the county treasurer of Santa Clara County were not liable for defalcations occurring after the expiration of the term for which he had been appointed. The following facts are stated:

"On the 4th day of October, 1852, the Court of Sessions of Santa Clara County appointed William Aikenhead, County Treasurer, in place of one Clayton, resigned. On the following day, Aikenhead gave bond, with the defendants as sureties, to continue until his successor was qualified. On the 2d of November, of the same year, Aikenhead was duly elected Treasurer of said County, and received his certificate of election, but never qualified or gave bond, and continued to exercise his official duties. On the 7th of September, 1853, one Appleton was elected as his successor, but failed to qualify within the time prescribed by law." The complaint alleged the defalcations occurred after October 1, 1853.

The Supreme Court affirmed this judgment releasing the bondsmen from liability, giving the following reasons for its conclusions:

"The appointment of Aikenhead as Treasurer was to continue until his successor was qualified, and until this took place, ordinarily, his sureties would be bound. But Aikenhead was elected for a new term and ought to have given a new bond. It devolved upon another officer of the law to see to this, and the sureties upon the bond may well have rested in security under the impression that the obligations of the law had been fulfilled. If another than Aikenhead had been elected and failed to qualify, so as to have continued the latter in office, the defendants would have been chargeable with notice, and indeed their continued liability would have been but an incident of their contract.

"The State has no right to visit upon the defendants the effects of the laches of her own officer, whose duty it was to see that a new bond was given."

We can find no distinguishing feature between the facts of the Aikenhead case and those of the case before us.

People v. Aikenhead was cited with approval and followed in Brown v. Lattimore, 17 Cal. 93, where the Supreme Court held the sureties on the bond of a county treasurer not liable for a defalcation occurring after the term for which he had been elected had expired, although after his election and before his term had ended the legislature had extended the term of office. The law in effect at the time of his election provided that the term of office of a county treasurer should be two years and until his successor had been elected and qualified.

People v. Aikenhead, supra, and Brown v. Lattimore, supra, were cited with approval and followed in Hubert v. Mendheim, 64 Cal. 213, 30 P. 633.

Defendants also rely on King County v. Ferry, 5 Wash. 536, 32 P. 538, 19 L.R.A. 500, 34 Am.St.Rep. 880, which follows the rule of the Aikenhead case.

We find nothing in the cases of Placer County v. Dickerson, 45 Cal. 12, and Fresno Enterprise Co. v. Allen, 67 Cal. 505, 8 P. 59, contrary to the holdings in the cases already cited.

The notes to American Surety Co. of New York v. Independent School District No. 18 of Lake Park, Minn., 8 Cir., 53 F.

2d 178, found in 81 A.L.R. 1, et seq., show the conflict of authority in various jurisdictions on the questions here presented. We need give them no further attention other than to quote the comment of the author on Page 17, as follows:

"In accordance with the rule laid down in the preceding division of the annotation, it is generally held that, where the officer is re-elected or re-appointed as his own successor, the sureties are not liable for acts or defaults occurring during the second term."

[2] Under the foregoing authorities we must conclude that the liability of plaintiff on its bond ended with the expiration of the term of office for which Frances M. Besse was appointed, or at the latest, on April 18, 1943, as specified in the bond. This makes it necessary to consider the validity of ordinance No. 513 and the other questions argued by plaintiff. As plaintiff's liability ended April 18, 1943, at the latest, it is not entitled to recover.

Plaintiff points to inconsistencies in the findings of fact and conclusions of law. We can correct them here.

It is ordered:

That the following be stricken from finding of fact number 4:

"* * * and save and except that as an incident to the obligations of said Bond No. 1984385 the plaintiff continued to be responsible for any acts of said Frances M. Besse up to the time of her completed qualification on August 19, 1943, or thereabouts, by giving a bond of the Maryland Casualty Company under said Ordinance No. 513 of the City of Tulare, but not thereafter."

That the following be stricken from conclusion of law No. 1:

"* * * with the exception that, as an incident to the obligations thereof, the plaintiff continued to be responsible for any acts of said Frances M. Besse, up to the time of her completed qualification under the Ordinance of the City of Tulare by reason of giving a Bond of the Maryland Casualty Company hereinbefore referred to, on August 19, 1943, or thereabouts, and that the liability of the plaintiff for any acts of the defendant, Frances M. Besse ceased upon such qualification, and no liability has existed since the date of executing said Bond and its acceptance by said City of Tulare as obligee."

It is further ordered:

That paragraph numbered I be stricken from the judgment and in lieu thereof the following be susbstituted as paragraph I of the judgment:

That the plaintiff is not liable on its bond for any act or omission of Frances M. Besse as City Treasurer of the City of Tulare occurring after April 18, 1943.

As thus modified the judgment is affirmed, no party to recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.




78 Cal.App.2d 133

**BARNARD v. JAMISON et al.**

**Civ. 3195.**

District Court of Appeal, Fourth District, California.

**Feb. 17, 1947.**

Rehearing Denied March 13, 1947.

Hearing Denied April 17, 1947.

**1. Mines and minerals ⇐73, 74**
**Tenancy in common ⇐3**

Where owners leased realty to oil company for drilling oil with a one eighth royalty to be paid to the owners, and thereafter owners executed two grant deeds, one conveying a one-half of 1 per cent. and other 2 per cent. of the oil, gas and other hydrocarbon substances in realty to third persons, oil company was owner of a profit a prendre of 87½ per cent. of the hydrocarbons and all parties became tenants in common.

**2. Mines and minerals ⇐74**

Where owners of realty under lease to oil company for drilling oil with a one eighth royalty to be paid to owners, executed two grant deeds, one conveying a one-half of one per cent. and other 2 per cent. of oil, gas and other hydrocarbons to third persons, and thereafter lease was canceled, and parties, reserving a one eighth

royalty to themselves, leased realty to two other oil companies, and oil companies paid a bonus or delayed rental, grantees of oil and gas interests were entitled to approximately 4 per cent. and 16 per cent. of the bonus money rather than merely one-half of 1 per cent. and 2 per cent.

3. Mines and minerals ⇐79(1)

The words "royalty" and "rental" in an oil and gas lease are used interchangeably to convey the meaning of compensation which the lessee paid the lessor for that species of occupation which the contract between them allowed.

See Words and Phrases, Permanent Edition, for all other definitions of "Rental" and "Royalty".

4. Appeal and error ⇐1135

Where deeds of grant of interests of oil and gas clearly defined rights of parties, and there was nothing in record on appeal from judgments in actions to declare rights of parties under deeds to indicate that at time of execution of deeds parties had any other intention than that expressed in deeds, and judgment carried out that intention, judgment could not be disturbed on appeal.

Appeals from Superior Court, Tulare County, Frank Lamberson, Judge.

Actions by Paul J. Barnard and by Harold A. Barnard and Jeanette R. Barnard against Max B. Jamison and Millie L. Jamison for a declaration of the rights of the parties under conveyances of oil interests in realty, and two oil leases on the realty. From judgments for the plaintiffs, the defendants appeal.

Judgments affirmed.

Zeutzius & Steffes, of Los Angeles, for appellants Jamison.

Maddox and Abercrombie, of Visalia, for respondents.

MARKS, Justice.

Two cases were brought by plaintiffs to recover money had and received by defendants, and to declare the rights of the parties under two conveyances of oil interests in real properties, and two oil leases now on the properties. The cases are consolidated on appeal. Plaintiffs recovered judgments and defendants have appealed.

The facts are not in dispute. Only questions of law were decided by the trial court and are argued here.

Max B. Jamison and Millie L. Jamison, his wife, were the owners of parcels of land in Fresno County which, prior to May 26, 1941, were under lease to the Richfield Oil Corporation for drilling for and producing oil, with a ⅛ royalty to be paid to the land owners.

While the Richfield Oil Corporation lease was in full force and effect, Mr. and Mrs. Jamison, on May 26, 1941, executed two grant deeds, the one conveying a ½ of 1%, and the other 2% of the oil, gas and other hydrocarbon substances in the leased property to Paul J. Barnard and to Harold A. and Jeanette R. Barnard respectively. Except as to the interests conveyed and the names of the grantees the deeds are identical.

[1] Afterwards Mr. and Mrs. Jamison conveyed fractions of the landowners' royalty to their children. For the purpose of this opinion we will accept as correct the admissions of counsel, if we correctly understand them, that after the delivery of the two deeds we have mentioned, and during the life of the Richfield lease, the Jamisons were the owners of 10% and the Barnards the owners of 2½% of the hydrocarbons in the leased property, and the Richfield Oil Corporation the owner of a profit a prendre of 87½% of those substances. That they were tenants in common of those respective interests cannot be doubted under the established law of California. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Company of California v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corporation v. Walden, 4 Cal.2d 637, 52 P.2d 237; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Schiffman v. Richfield Oil Co., of California, 8 Cal.2d 211, 64 P.2d 1081; La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546; Dutton v. Interstate Investment Corp., 19 Cal.2d 65, 119 P.2d 138; Tanner v. Title Ins. &

Trust Co., 20 Cal.2d 814, 129 P.2d 383. There are also numerous decisions by district courts of appeal following the rule of Callahan v. Martin, supra, but that rule is so well established that we need not cite them. They are cited in Shepard's California Citations under the Callahan case.

After the execution of the two deeds the Richfield Oil Corporation released the leased property and its lease was canceled. Thereafter, in 1943, Max B. Jamison and his wife and children, together with Harold A. Barnard and his wife and Paul J. Barnard, as lessors, executed two leases to two portions of the property formerly leased to the Richfield Oil Corporation. The respective lessees were the General Petroleum Corporation of California and the Chanslor-Canfield Midway Oil Company. The leases reserved a ⅛ royalty to the lessors and were for a period of 20 years, and so long thereafter as hydrocarbons might be produced therefrom, so the lessees each acquired a profit a prendre in the leased property and became tenants in common with the lessors.

The lessees paid $7,169.87 as a bonus, or, as counsel chose to call it, "a delayed rental", at the time of the execution of the leases. Mr. Jamison paid Paul J. Barnard $35.85 or ½ of 1% of this money, and Harold A. Barnard and his wife $143.40 or 2% of it, and retained the balance for himself and his family. Paul J. Barnard claimed there was due him an additional $250.93, and Harold A. Barnard and his wife claimed that there was an additional $1003.78 due them. The trial court gave judgment to the respective plaintiffs for those amounts and construed the rights of all the parties in future oil royalties under the existing leases as giving the Barnards 2½% of the total production to be taken out of the 12½%, or ⅛ landowners oil royalty, and the Jamisons the balance. In other words, if an oil well were brought in with a net production of 100 barrels a day, the Barnards would receive 2½ barrels and the Jamisons 10 barrels or the equivalent in money. During the trial Mr. Jamison, an attorney at law who represented defendants in the superior court, conceded that this would be a correct division of the royalties after oil was produced, but sought to differentiate between the division of royalty oil and the money paid by the lessees for delayed rentals or bonus as we believe it is generally known.

Counsel now representing defendants, if we understand their position correctly, seek to withdraw from this position and maintain that the Jamisons are entitled to 97½% of the bonus money and the same per cent of the oil royalty and the Barnards the balance. Taking the same assumption we used before, of a well producing a net 100 barrels of oil, the ⅛ royalty would be 12½ barrels and under the present contentions of the Jamisons they would receive 12.1875 barrels and the Barnards .3125 barrels or the equivalent in money.

This argument must be based on the following reasoning: When the deeds were made to the Barnards the Richfield Oil Corporation owned as a profit à prendre 87½% of the oil rights leaving 12½% to the landowners. The deeds conveyed 2½% of the oil to the Barnards leaving the balance of the royalty to the Jamisons. When the Richfield Oil Corporation released its 87½% interest, that entire interest passed to the Jamisons as owners of the fee and none of it to the Barnards. From that point they proceed to reason that when the two new leases were executed the lessors conveyed away 87½% of their oil rights so that the remaining interests of both groups were reduced proportionately to the percentages we have already indicated.

We find the clear answer to this argument in the deeds of conveyance to the Barnards. As the material portions of these deeds are identical we will quote from but one as follows:

"* * * Max B. Jamison, a married man and Millie L. Jamison, his wife, do hereby grant, sell, assign, set over and convey unto Harold A. Barnard and Jeanette R. Barnard, as Joint Tenants, Two Per cent (2%) of all oil, gas, other hydrocarbon substances and other minerals in and under and that may be produced, saved and sold or removed from those certain lands situate in the County of Fresno, State of California, described as follows: (Description.) * * *

"It is expressly provided that the interest hereby conveyed is chargeable with its proportionate share of all deductions for taxes and other costs permitted to be withheld by the Lessee under said Oil and Gas Lease and under any other Oil and Gas Lease in which said premises, or any portion thereof, may hereafter be included.

"It is also expressly provided that Grantee herein at all times and under any such Oil and Gas Lease shall be entitled to receive and shall be paid said full Two Percent (2%) of all the oil, gas and other hydrocarbon substances hereby conveyed to Grantee, and Grantee's Proportionate share of all cash and oil bonuses, rentals for delayed drilling, and other considerations paid by any such Lessee."

[2] This is a clear grant of 2% of all the hydrocarbons in the described property with that interest only chargeable with taxes and other deductions provided for in the leases. The only deductions permitted in the two leases, other than taxes, are oil and gas used in lessees' operations and a percentage of casing head gasoline if any be produced. The provision that the grantees shall be entitled to receive the full 2% of all hydrocarbons produced is clear and explicit and is not subject to interpretation. The final clause to the effect that the grantees shall be entitled to receive their proportionate share of all cash, oil bonuses and rentals for delayed drilling, and any other considerations paid by any lessee, is also clear when construed with the rest of the deed, for the only proportionate share of the grantees, set forth in the deed, is the full 2% of all hydrocarbons "in and under and that may be produced, saved and sold or removed" from the leased land. "The interest created by an assignment depends upon the intention of the parties (citing cases) and while that intention is determined primarily from the terms of the instrument, the language of the assignment must be construed in the light of the facts and circumstances of the particular case." Austin v. Hallmark Oil Co., 21 Cal.2d 718, at page 730, 134 P.2d 777 at page 784. Here it is admitted that when the deeds were executed during the life of the Richfield Oil Corporation lease the 2½% oil interest conveyed to the Barnards was carved entirely from the Jamison interests which were reduced by that amount. We can see no good reason why there could be any other intention imputed to the parties in executing future leases when the deeds expressly provide that the grantees should receive the same percentages under any other oil and gas leases which might thereafter be executed. Further, the delayed rental or bonus was paid to postpone the drilling obligations of the lessee and in lieu of the ⅛ royalty to be paid when oil was discovered in paying quantities. This furnishes an additional reason for concluding that the Barnards should receive the same percentage of the money paid by the lessees that they would have received had the drilling operations proceeded successfully and produced oil in paying quantities.

[3] The conclusion that the Barnards are entitled to receive the same proportion of the money paid by the lessees as a bonus or "rentals for delayed drilling" is further fortified by the holding that "the words 'royalty' and 'rent,' it has been held, 'are used interchangeably to convey the same meaning'; i. e., 'the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows' (Nelson v. Republic Iron & Steel Co., 8 Cir., 1917, 240 F. 285, 291, 293, 153 C.C.A. 211; Elsinore Oil Co. v. Signal Oil & Gas Co., 3 Cal.App.2d 570, 573, 1935, 40 P.2d 523)." Denio v. City of Huntington Beach, 22 Cal.2d 580, at page 596, 140 P.2d 392, at page 400, 149 A.L.R. 320.

Counsel for the Jamisons cite the case of Hochsprung v. Stevenson, 82 Mont. 222, 266 P. 406, and argue that it supports their position and is decisive of the question presented by this appeal. This action was one to quiet title to real property. The appellant claimed 4½% interest in all of the oil, gas and other minerals in or under the leased premises under one conveyance, and another 9/25 interest under another conveyance. The court upheld the appellant's claim to the 4½% interest which was admittedly valid under an assignment but denied its right to the 9/25 interest because the purported assignment "does not contain any operative words of conveyance" and

was therefore ineffective. Thus the difference between the two cases is apparent and the Montana case is not controlling here as the words of conveyance in the deeds to the Barnards could not be plainer.

[4] As the contracts between the parties clearly define their rights and as there is nothing in the record to indicate that at the time of the execution of the deeds they had any other intention than that expressed in the writings and as the judgment carries out that intention and puts it into effect we cannot disturb it here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




78 Cal.App.2d 168

## BLACHE v. BLACHE.

Civ. 13294.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1947.

Rehearing Denied March 21, 1947.

Hearing Denied April 17, 1947.

**1. Marriage ⇐54**

In dividing gains made by joint efforts of man and woman living together under voidable marriage, entered into in good faith, rule is same as when valid marriage is dissolved.

**2. Husband and wife ⇐298¾**

Community property of husband and wife granted separate maintenance on any other ground than adultery, incurable insanity or extreme cruelty, must be equally divided between spouses. Civ.Code, §§ 137, 146.

**3. Appeal and error ⇐1097(1)**

On appeal from order directing appellant to pay amount of money judgment against her, District Court of Appeal cannot reconstruct or reinterpret its decision in main case on appeal from such judgment, nor even reallocate costs.

**4. Appeal and error ⇐1195(3)**

On retrial, for which District Court of Appeal remanded case to determine whether half or any portion of property, treated as community property in such court's order affirming portions of superior court's judgment adjudicating husband's ownership of half of spouses' property and vacating transfers of his interest therein to woman married by him without securing divorce from wife, were transferee's separate property, superior court had no power to order transferee to pay wife amount of costs and attorney's fees awarded her, but could order husband to pay such costs and fees from his property.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Anna J. Blache against her husband Maurice J. Blache, also known as Jean J. M. Blache, and Jeanne C. Pedebidou, also known as Jeanne Blache, for separate maintenance, a share of the spouses' community property, attorneys' fees, and cancellation of defendant husband's transfers of property to codefendant. From an order directing defendant Pedebidou to pay a deputy county clerk an amount awarded plaintiff by the judgment in lieu of her rights in the community property for application against defendant husband's indebtedness to plaintiff and her attorneys, defendant Pedebidou appeals.

Reversed.

Edward J. Lynch, of San Francisco, for appellant Jeanne C. Pedebidou, also known as Jeanne Blache.

David Livingston and Louis F. DiResta, both of San Francisco, for respondent Anna J. Blache.

WARD, Justice.

This is an appeal by Jeanne C. Pedebidou, also known as Jeanne Blache, from an order directing her to pay $7,989.13 to Ray L. Mulcrevy, Deputy County Clerk, to be applied against the indebtedness of Maurice J. Blache to respondent Anna Blache and her attorneys.

The parties will be referred to as Anna, Maurice and Jeanne. As stated in this court's earlier opinion, "They are the components of a marital triangle constructed by Maurice when he married Jeanne under the mistaken impression that he had secured a divorce from Anna." Blache v. Blache, 69 Cal.App.2d 616, 618, 160 P.2d 136, 138. More than 20 years after the marriage ceremony of Maurice and Jeanne, Anna brought an action for separate maintenance, for a share of property which she claimed was the community property of herself and Maurice and for attorneys' fees. Jeanne was joined as a party defendant because Maurice had transferred property to her. The trial court refused to grant Anna separate maintenance but rendered a judgment in her favor for $7,989.13 in lieu of her rights in any community property, set aside the transfers and allowed her attorneys' fees of $6,500. Anna and Jeanne, but not Maurice, appealed the judgment to this court.

By its order, as modified, this court ruled: "The judgment insofar as it refers to attorney fees and all provisions of said judgment protective of those fees are affirmed; the portions of the judgment adjudicating Maurice's ownership of one-half of the real and personal property, and vacating and setting aside certain transfers of his interests in such properties to Jeanne, insofar as such transfers affect his one-half interest, and the provisions of the judgment granting an injunction against Maurice until the rights of the parties can be determined, are also affirmed; in other respects the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed." Blache v. Blache, supra, 69 Cal.App.2d at page 633, 160 P.2d at page 145.

[1] Since Maurice did not appeal from the trial court's judgment, this court held that his maximum possible interest in the property was one-half. "In dividing gains made by the joint efforts of a man and woman living together under a voidable marriage, where the parties enter into the relationship in good faith the rule is the same as when a valid marriage is dissolved. Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844." Blache v. Blache, supra, 69 Cal.App.2d at page 624, 160 P.2d at page 140. The effect of the order of this court on the prior appeal was to determine that Jeanne owned absolutely, as her sole and separate property, one-half of the property involved. Whether Jeanne was entitled to more than one-half of the property was a matter left to be determined on retrial. "Whether the property described in the complaint was the separate property of Jeanne is a question of fact which may be tested again on a retrial." Blache v. Blache, supra, 69 Cal. App.2d at page 631, 160 P.2d at page 144.

The transfers were held to have been correctly set aside to protect that half of the property which, if on retrial is found not to be the separate property of Jeanne, may be treated as if it were the community property of Maurice and Anna. Blache v. Blache, supra, 69 Cal.App.2d at page 624, 160 P.2d 136. Of course, if on the retrial the one-half of the property involved, or any portion thereof, is found to be the separate property of Jeanne, then Anna can have no legal claim thereto.

[2] If it be determined on retrial that any of the property may be treated as the community property of Maurice and Anna, and if maintenance be given Anna on any other ground than that of adultery, incurable insanity or extreme cruelty, said property must be equally divided between Maurice and Anna, since Civil Code, section 137 makes Civil Code, section 146 applicable for separate maintenance. Blache v. Blache, 69 Cal.App.2d at pages 625-631, 160 P.2d 136.

[3] The foregoing is not a reconstruction or reinterpretation of the decision in the main case. That may not be done; we may not even reallocate the costs.

The Reporter of Decisions' summary of this court's opinion is correct. "Action for separate maintenance. Judgment denying maintenance, and awarding money in lieu of plaintiff's share in community property, and also attorney's fees, reversed save as

to attorney's fees." Blache v. Blache, supra, 69 Cal.App.2d at page 618, 160 P.2d at page 136.

[4] By its order this court sought to protect the rights of attorneys to their fees. The lower court in the present proceeding ordered Jeanne to pay $7,989.13 toward Maurice's indebtedness for Anna's costs and attorney fees. The lower court may order Maurice to pay Anna's costs and attorney fees, but payment must be made from Maurice's property. Until on retrial it is determined whether all the property is Jeanne's separate property or not, no order such as the present order on appeal may be made directing Jeanne to pay Anna's costs and attorney fees.

In view of the foregoing, it is unnecessary to consider contentions raised in the briefs, or to consider the validity of the order appealed from insofar as it relates to the amount of Maurice's indebtedness to Anna and the interest thereon. Serious doubts appear as to the propriety of adding interest when such interest was not noted in the judgment upon which this order was based. Any order enforcing Anna's rights against Maurice must conform to the provisions of the judgment.

The order appealed from is reversed; appellant to recover costs on this appeal.

PETERS, P. J., and SCHOTTKY, J., pro tem., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.




78 Cal.App.2d 63

**LE BLANC et al. v. BROWNE et al.**

**Civ. 15175.**

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1947.

Hearing Denied April 3, 1947.

**1. Appeal and error ⇐996, 1001(1)**
**Negligence ⇐136(26)**

Contributory negligence is ordinarily for jury, and jury's implied finding upon that issue will not be disturbed upon appeal if any substantial evidence or reasonable inferences support it.

**2. Automobiles ⇐160(4)**

A motorist who made a sharp left-hand turn so as to cross "button" on left side of street, and struck pedestrian in marked crosswalk, was negligent as matter of law. Vehicle Code, §§ 525, 540(b), 560(a).

**3. Automobiles ⇐147, 201(1)**

Violation of traffic statute is prima facie evidence of negligence as a matter of law, but recovery may be had only if the violation is proximate cause of injury. Vehicle Code, §§ 525, 540(b), 560(a).

**4. Automobiles ⇐244(6)**

Motorist's testimony that pedestrian had not quite reached center of street, but was very close to it, when automobile struck her, was so highly improbable as to form no basis for conclusion by jury that point of impact was elsewhere than as claimed by pedestrian.

**5. Trial ⇐143**

A conflict in evidence, making a jury question, is not created where undisputed facts render the conflicting testimony inherently improbable.

**6. Automobiles ⇐206**

A pedestrian in marked crosswalk was bound to exercise ordinary care for her own safety, but was under no duty, after reaching further side of street, to anticipate that automobile would approach from left, ignoring center of intersection so widely as to strike her. Vehicle Code, § 525.

**7. Automobiles ⇐206**

A pedestrian in marked crosswalk could assume that motorist would not use left side of street. Vehicle Code, § 525.

**8. Automobiles ⇐216**

A pedestrian is not required to look in every direction during every instant of his progress, but to look at least in those directions from which danger may be reasonably apprehended, as often and as carefully as a person of ordinary prudence under like circumstances.

**9. Automobiles ⇐244(50)**

In action for injuries to pedestrian struck by automobile in marked crosswalk, evidence did not sustain implied finding of contributory negligence and hence did not sustain verdict for defendant, in view of defendant's admission indicating that he was on left side of street. Vehicle Code, §§ 525, 540(b), 560(a); Code Civ.Proc. § 2055.

**10. Damages ⇐168(1)**

Where plaintiff denied previous trouble with right eye, evidence that plaintiff had been paid $2,250 for settlement of $18,000 damage action against doctor for injuries to her right eye several years before was admissible for limited purpose of showing injury to plaintiff and condition of her eyesight.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Alice A. Le Blanc, also known as Alice A. White, and another, against Robert A. Browne and others for injuries suffered when struck by automobile. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded.

Charles A. Thomasset, of Los Angeles, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Plaintiffs, Alice A. LeBlanc and Harry LeBlanc, also known as Alice A. White and Harry White and so referred to at the trial and in this opinion, appeal from a judgment entered subsequent to the rendition of a jury verdict in favor of defendant in an action by which plaintiffs sought damages for personal injuries sustained by plaintiff Alice A. White on March 2, 1942, when a Mercury automobile, driven by defendant, collided with her in a pedestrian crosswalk located on South Vermont Avenue just immediately south of West Thirty-Fifth Street in the city of Los Angeles. Defendant, as a defense to plaintiffs' action, set up contributory negligence on the part of Mrs. White as the proximate cause of her injuries, alleging that "said plaintiff, immediately prior to and at the time of this accident was walking across Vermont Avenue proceeding in a southeasterly direction at the southeast corner of Vermont Avenue and 35th Street, and was doing so in a reckless, negligent and careless manner and without regard for other traffic upon 35th Street and Vermont Avenue, and without due regard, or any regard or care for her own safety and the safety of others."

South Vermont Avenue extends in a northerly-southerly direction and is approximately eighty feet wide from curb to curb. On it are located four street car rails, two for north-bound and two for south-bound street cars. West Thirty-Fifth Street approaches South Vermont Avenue at a slight angle from the southeast but does not cross it, terminating on the easterly boundary of South Vermont Avenue. It is approximately thirty-four feet wide from curb to curb. Several feet south of the corner formed by Thirty-Fifth Street is located a pedestrian crosswalk, fifteen feet wide, running across South Vermont Avenue and marked by two white lines parallel to each other. Twelve inches north of the northerly line of the pedestrian crosswalk and approximately eighteen inches to the east of the most easterly street car track is painted a white "button" and nine feet directly north of this "button" is another white painted "button." These so-called "buttons," which we have placed in quotation marks, are merely discs painted on the pavement and are to be distinguished from two metal buttons which appear in photographic exhibits at a considerable distance north of the crosswalk and which rise several inches above the level surface of the pavement. These metal buttons are of no importance in this case being located in the passenger loading zone north of the crosswalk where the accident occurred. Both corners formed by Thirty-Fifth Street at its junction with Vermont Avenue are improved with buildings and the immediate vicinity is a business one.

The accident occurred at approximately 5:30 p. m. and in daylight. Mr. Browne had been driving his automobile in a westerly direction on Thirty-Fifth Street

and was completing a left-hand turn onto Vermont Avenue when he collided with Mrs. White, the only person at that time in the pedestrian lane.

Testimony as to the actual impact was given by Mrs. White, Mr. Browne and Mrs. Nellie B. Feltman, a dis-interested witness.

Browne, questioned under section 2055, Code of Civil Procedure, stated there was no traffic "in the immediate vicinity" when he made the turn after he had made a boulevard stop at Vermont Avenue and north of the center line of Thirty-Fifth Street; that no cars were ahead of him; that he then proceeded to make a "rather sharp" left-hand turn, demonstrating on the diagram then before the jury and the trial court how he made the curve with respect to the painted "buttons," heretofore described, saying "I think that the right part of my car * * * went over one of those buttons here." With respect to the position of the "buttons" on the highway, Browne stated that although he was not sure he was "under the impression" that they "were in the center of the street, right between the two car tracks." Counsel for plaintiffs then stated he would stipulate that the location of the "buttons" could be changed as the testimony was "brought into evidence, if there is any occasion for a change. My position at this time is there will be no change in the location of the buttons." Parenthetically, it may be stated here that the position of the painted "buttons" was not changed by any other evidence; in fact, an examination of defendant's Exhibit C, a photograph taken during the trial and looking south on Vermont Avenue at the intersection of Thirty-Fifth Street, furnishes proof that the "buttons" were located at the points heretofore mentioned. Concerning them the following colloquy took place:

"Q. By Mr. Thomasset: Now, with reference to the buttons as you have placed them, what was your line of travel? A. [By Mr. Browne] Well, as I remember, there was part of the car, I believe, went over the buttons, one of these buttons, about like this. Now, I was more towards the center of the street than I would be here. In other words, I would have to go at almost a right angle if I went around those buttons this way, which I think would be rather impracticable.

"Q. I think it would be impracticable, too.

"The Court: That will go out and the jury will disregard it.

"Q. By Mr. Thomasset: It is exactly what you did. Then it is your testimony at this time that the button which you have placed and indicated with a B-4 was a button which you straddled as you proceeded to the south, is that it? Is that your testimony? A. That is right."

When questioned as to Mrs. White's position when he collided with her, the witness stated that she had not reached the center of the street but was "very close to it," indicating on the diagram the position of Mrs. White as being "between the two westernmost rails on Vermont"; that she "had passed the second rail," the rails having been numbered by counsel as 1, 2, 3, and 4, from west to east. The questioning then continued:

"Q. * * * Isn't it a fact—assuming now for the time being, which I am not conceding, this is the location of the button, is it not a fact that all of your car was to the east of that button at the time of the collision, with the possible exception of your right front wheel? A. Yes, it is possible. * * *

"Q. How far was she [Mrs. White] from the point of collision when you saw her the first time? A. Well, just a few feet, I would say about six or seven or eight.

"Q. Well, she only took one or two steps after you first saw her, didn't she? A. That is about all she could take, yes. * * *

"Q. After you first saw her up until the time of the collision? A. That is right."

He testified that when he first saw her, he applied the brakes and skidded "some 6 or 7 feet." It appears from the record that police officers arrived subsequent to the accident and took measurements. Plaintiffs' counsel questioned the witness:

"Q. And isn't it a fact that when Officer D. E. Leffler and Officer R. W. Lauritzen

got there your right front wheel was * * * 29 feet west of the east curb of Vermont. * * * A. I didn't measure it; I don't know.

"Q. I mean the right front wheel was only 29 feet. They measured it in your presence, didn't they? A. I don't know they did, no; they might have.

"Q. You didn't see them make measurements there, did you? A. I didn't notice them, no.

"Q. Would you say that was wrong, if they did measure and found that your right front wheel, this being that one, was just 29 feet west of the east curb. * * * And isn't it a fact that your right wheel was just—right rear wheel was just 26 feet west of the east curb? A. It might have been."

The witness then stated that when the officers arrived his car was "still in the skid marks" and that he thought the "right front part" of his car was still in the crosswalk; that it took him "only a few seconds * * * more like three or four" from the time he left the corner until he struck Mrs. White; that he traveled "about 40 feet, approximately" from the time he left the corner until he struck Mrs. White. He was confronted by questions and answers made in his deposition as follows:

"Q. Now, at the time of the collision how fast were you going? A. Well, it is hard to say. I just started up and hadn't gone more than, I would say, about 20 feet * * *

"Q. And how long would you say that it took you to go from the place where you were stopped waiting to make your turn left on Vermont to the point of impact? A. Only about 15 feet * * *

"Q. How long after you stopped until you started was it that you had this impact? A. It wasn't very long. Just about one or two seconds, I would say."

Examined by his own counsel, Browne stated that he applied his brakes as soon as he saw plaintiff; that he didn't remember whether he turned his car "any further to the left or not," but that it was being turned to the left at the time; that after colliding with Mrs. White his car traveled "about three or four feet" before it came to a stop; that the "right front part of the car" came in contact with Mrs. White.

Plaintiff Alice White testified as follows: That at the time of the accident she was 46 years of age and weighed 235 pounds; that she is five feet three inches tall; that she was wearing glasses at the time; that she had been at the intersection of Thirty-Fifth Street and Vermont "quite frequently"; that at the time of the accident she was in the pedestrian crosswalk on Vermont Avenue traveling from west to east; that before she started to cross the street she looked for cars and there were none coming; that at the time of the collision she was in the "center of the crosswalk" between "the third and fourth rails" but "closer to the fourth rail," as numbered by counsel from west to east; that she continued to look to the left until she "got about to the center"; that when she got to about the center she then looked to her right [south] for cars; that she did not see the car that hit her; that she was struck on her left side; that after the impact she lay at an angle with her head "on the third rail" and her feet extended northerly; that she was thrown out of the crosswalk "about 12 feet" south; that the first one to get to her after the collision was Browne, who stated "he was very sorry it happened and that he had made a very short cut"; that later a Mrs. Feltman and a number of police officers came to her; that she was unable to get up or walk and left "by ambulance and stretcher." On cross-examination Mrs. White stated that while she did not see the automobile at the time it collided with her she saw it while lying on the pavement, saying "I don't know whether it was on the west side or east side, but I know I could see the car in front of me. * * * When I was struck, as I say, I was right in there between the two tracks with my head on the third rail lying at an angle." The witness was then asked:

"Now, as you walked across the street there, Mrs. White, did you see any cars that stopped over here on the east side of Vermont? * * * A. No, I did not.

"Q. Did you look for any? A. I didn't have any occasion to look over there, I was taking care of—I took care of my left,

then I was taking care of my right; I had no indication [occasion?] to look to see what was coming down on 36th [35th] Street because that street doesn't cut through there.

"Q. * * * So from the time you started across from the left, you at no time looked over on 35th Place to see if there were any cars coming out there? A. Well, there was no traffic in sight; I didn't see any traffic in sight.

"Q. Well, you say you had no occasion to look. What I want to know is whether you did look over there? A. I don't recall that I did. * * * I started to look at my right when I got to the center of the track, I looked to my right. * * *"

Questioning by defendant's counsel then continued:

"Mrs. White, my question was that you only took one or two steps from the time that you got to the center of the street until the time the accident took place? A. Well, all I know is that I didn't see the car.

"Q. Well, I appreciate that, Mrs. White, but what I want to know is if it is not a fair statement that you only took one or two steps from the time you got to the center of Vermont until the accident took place. A. Well, I—what I usually do when I cross the car tracks, I always walk on the track—

"Q. No, I don't want to know what you usually do, I want to know what you did on this occasion. A. I was watching the track to see I didn't get my heel caught in the rail.

"Q. Then you were looking down? A. After I got through taking care of my left, yes, I was watching the car rail to see I didn't get my heel caught in the track.

"Q. I see. Then from the time you got to this first rail you started looking down at the car tracks to see you didn't get your heel caught in it? A. Yes, I was looking at the rail to see I didn't get my heel caught, then I looked up to see to my right.

"Q. You were looking at that when the accident occurred? A. It might have been possible that I was looking at the—

"Q. At the rail? A. Yes."

On redirect examination Mrs. White testified that she knew that her head lay on the third street car rail after the impact because an officer told her he would have to move her head "and let traffic have the rail, and told me not to be alarmed"; that she saw the street cars go by on her right, headed north;

"Q. And speaking from yourself now, not from the standpoint of east or west or north or south, but from your own self, as you were lying in the street, was that car [defendant's] as you were looking at it to your right or to your left? A. Well, I could see the front of it. I don't know whether or not it was directly to my right, I could see it this way—it would be my right, yes.

"Q. You could see it this way, is that right? A. That is right, yes.

"Q. That was to your right? A. To my right."

The testimony of the only other witness to the accident, Mrs. Nellie B. Feltman, who was seriously ill and confined in a hospital at the time of the trial, was given by way of deposition. She testified as follows: That she did not know Mrs. White prior to the accident; that she saw her at the time she was hit; that she (Mrs. Feltman) was on the west side of Vermont "straight in front of the pedestrian walk that Mrs. White was in"; that she didn't see Mrs. White when she started to cross Vermont but saw her walking in the pedestrian crosswalk, "she had her back to me"; that Mrs. White was always in the pedestrian crosswalk; that Mrs. White was the only one in the pedestrian crosswalk; that at the time she was hit she had reached the third rail and was "right in the center" of the pedestrian crosswalk; that after striking Mrs. White the car went about 10 to 12 feet before it stopped; that the car was going about 15 miles per hour; that Browne "wasn't going fast. He had just made * * * a left-hand turn." On cross-examination this witness was asked:

"And did you actually see this accident at the time it happened? A. At the time it happened; the minute it happened. I was the first one to go over to her, and I picked up her packages and held them until the

officer came. Absolutely the woman was right out in the middle of the pedestrian crosswalk.

"Q. Were you on the same side of Vermont that Mrs. White started to cross from? A. Yes, I was. There is a bakery there.

"Q. And you were not crossing the street in any direction? A. No. I just stood still. I was looking for the car, and there was nobody in the zone but her.

"Q. Do the signals go? A. No, just the stop signals.

"Q. Were there any stop and go signals for traffic going the same way Mrs. White was? A. Yes. Well, you know, it's just a stop and then start, and if traffic is all right it could go; this car.

"Q. Did you say that there are red and green lights there at that point? A. No.

"Q. There are not? A. I don't think so. No, just white lines.

"Q. There is a boulevard stop? A. Yes, on 35th Street. He was making that turn south.

"Q. How was the condition of traffic that day? A. The traffic wasn't congested at all. It was about five o'clock. * * *

"Q. Were there a lot of cars in the street there? A. No.

"Q. How many cars were there going the same way that the lady was crossing the street? A. There wasn't any.

"Q. How many going the other way, the way the car involved in the accident was going? A. Everything was just clear. Clearer than this hospital."

Appellants predicate their appeal upon two major contentions—(1) that defendant's negligence was the proximate cause of the accident, and (2) that the verdict is unsupported by the evidence, there being no substantial evidence of contributory negligence on the part of plaintiff.

[1] It is a settled principle that contributory negligence is ordinarily a question of fact for the jury to determine and that the implied finding of the jury upon that issue will not be disturbed upon appeal if there is any substantial evidence or reasonable inferences to support it. In this connection respondent argues that the "factual situation presented at the trial of this case manifested ample testimony to support a finding that the appellant did not exercise ordinary care for her own safety at the time of the happening of the accident."

The question for our consideration, therefore, is whether the jury's implied finding of contributory negligence on the part of plaintiff has any evidentiary support.

[2-5] As we review the record before us, it is clear that defendant was guilty of negligence, for the violation of a statute prescribing traffic rules is prima facie evidence of negligence as a matter of law. 19 Cal.Jur. 632, sec. 65; 13 Cal.L.Rev. 428; Samuelson v. Siefer, 62 Cal.App.2d 320, 324, 144 P.2d 879; Harris v. Johnson, 1916, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560. This principle, however, is subject to the limitation that recovery may be had only if the violation is the proximate cause of the injury. 19 Cal.Jur. 636. The testimony is uncontradicted by any credible evidence that Mrs. White was struck in a marked pedestrian crosswalk between the third and fourth street car tracks on the easterly half of Vermont by defendant who admittedly made a "sharp" turn and "cut" the "button," thereby violating section 540(b) of the Vehicle Code, and who was driving his car on the wrong side of the street in violation of section 525, Vehicle Code. He also failed to yield the right of way to a pedestrian in a marked crosswalk as required by section 560(a) of the Vehicle Code. Defendant's testimony that Mrs. White had not quite reached the center of Vermont but was "very close to it" when he struck her is so highly improbable and unworthy of belief as to form no basis for a conclusion by the jury that the point of impact was elsewhere than claimed by appellants, namely, in the easterly half of Vermont Avenue. We cannot overlook the defendant's testimony to the effect that he "cut" the "buttons," namely, the white discs which were not located at the center of the intersection but were definitely on the east side of Vermont Avenue approximately eighteen inches east of the most easterly street car track. In addition, we have in mind also the physical facts sur-

rounding the accident, including Mrs. White's position and the position of the defendant's car after the impact and also including defendant's own photographic Exhibit C, which conclusively established that the painted "buttons" were as heretofore described and entirely on the easterly half of Vermont Avenue. A conflict is not created where the undisputed facts render the testimony inherently improbable.

[6-8] Mrs. White was bound to exercise ordinary care and prudence for her own safety, but that imposed upon her no duty, once she had reached the easterly portion of Vermont, to anticipate the approach of an automobile coming from her left in a path which, by ignoring the center of the intersection, cut that point by so wide a space as to strike her down. She had the right to assume that a driver of an automobile intending to proceed in a southerly direction on Vermont Avenue would not use the easterly side of the street. Vehicles are required under the law to travel on the right-hand side of the street (sec. 525, Vehicle Code.) As a careful and prudent person she was under no obligation, in the absence of a situation which might warn her of impending danger, to look to her left after she had passed into the easterly portion of Vermont, or, to put it in other words, to anticipate an automobile approaching on the wrong side of the street (Harris v. Johnson, supra, 174 Cal. 55, 58, 59, 161 P. 1155, L.R.A.1917C, 477, Ann. Cas.1918E, 560; Hyams v. Simoncelli, 1940, 41 Cal.App.2d 126, 132, 106 P.2d 68; Wright v. Foreman, 1927, 86 Cal.App. 595, 602, 261 P. 481; Lewis v. Tanner, 1920, 49 Cal.App. 271, 273, 193 P. 287); any requirement to exercise such extraordinary precaution would place an intolerable burden and hardship on a pedestrian. Harris v. Johnson, supra, presents a street crossing case that has points in common with the case at bar. The evidence was without conflict and showed that defendant, while driving his automobile in a westerly direction, passed on the left hand side of the street a standing street car injuring plaintiff who, having alighted from another street car and having passed in front of the stationary street car, was proceeding to cross the street in a southerly direction. The Supreme Court in that case said, 174 Cal. at page 58, 161 P. at page 1156, L.R.A. 1917C, 477, Ann.Cas.1918E, 560: "'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' 29 Cyc. 516; Medlin v. Spazier, 23 Cal.App. 242, 137 Pac. 1078. Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. The plaintiff had the right to assume that the defendant's automobile, or any other vehicle coming westerly on Seventh Street, would confine its travel to the right-hand side of the street, as provided in the ordinance aforesaid, unless and until, in the reasonably careful use of her faculties, she had reasonable cause to believe otherwise. There was evidence to show that before attempting to cross the street she looked in both directions, and used ordinary care to ascertain whether or not any vehicle was approaching, and that she did not see the defendant's automobile coming, notwithstanding such caution. * * * The evidence was sufficient to exonerate her from the charge of contributory negligence." See, also, Averdieck v. Barris, 1923, 63 Cal.App. 495, 497, 218 P. 786. In the instant case there is nothing in the record to indicate any situation which might have warned Mrs. White of danger. There was no traffic in the immediate vicinity; it was daylight; Mrs. White was the only pedestrian in the crosswalk at the time; there is no evidence that Browne gave any warning to call attention to the fact that he was making a left-hand turn and "cutting" the button nor is it claimed by him that any such warning was given. His own testimony indicates that he did not see Mrs. White until she was a few feet in front of him and if he had been as alert as he should have been he could have seen that Mrs. White was unaware of his approach or of any impending danger. Imprudence and want of care, therefore, cannot be predicated upon the fact that Mrs. White

did not assume that there would be a violation of law on the part of defendant or any other driver of a vehicle. While it is true that Mrs. White testified that at the time of the accident it "might have been possible" that she was looking down at the street car tracks to prevent her heel from being caught nevertheless she also stated that *"after I got through taking care of my left * * * I was watching the car rail to see I didn't get my heel caught * * * then I looked up to see to my right."* (Italics ours.) There is no evidence upon which a legitimate inference could be based that if Mrs. White had looked toward Thirty-Fifth Street she would have seen defendant and his automobile. The record is silent as to where Mrs. White was at the time defendant made his boulevard stop on Thirty-Fifth Street and, as heretofore stated, defendant saw Mrs. White for the *first* time when she was only "five or six feet—seven or eight probably" away from him. The law does not require of a pedestrian that he must look in every direction during every instant of his progress. It does require, however, that he must look at least in those directions from which danger may be reasonably apprehended, as often and as carefully as would a person of ordinary prudence under like circumstances. Gett v. Pacific Gas & Electric Co., 1923, 192 Cal. 621, 627, 628, 221 P. 376. For the jury to base an inference of contributory negligence on the fact that Mrs. White failed to look toward Thirty-Fifth Street, without any showing that the situation was such as to put her on her guard, would be to base an inference on mere conjecture or speculation.

[9] We believe that under the circumstances of this case the evidence and the reasonable inferences to be drawn therefrom are insufficient to sustain the jury's implied finding that Mrs. White was contributively negligent.

The circumstances of the accident, as developed by the evidence, distinguish this case from all the cases relied upon by defendant in support of the familiar rule that the question of contributory negligence is usually one of fact. The unusual facts of the present case take it out of the general rule and render the question one of law.

[10] A further contention urged by appellants for reversal is that prejudicial error occurred when Mrs. White was questioned by respondent's attorney concerning an $18,000 damage action filed by her in 1935 or 1936 against a certain doctor for injuries to her right eye and the fact that she had been paid $2,250 "for settlement of the case." It appears from the record that the questioning objected to by appellants followed testimony by Mrs. White to the effect that she had had no trouble with her right eye prior to this accident and that her right eye had not been injured. Subsequently she stated that the injury was to the tear duct and that she had received a permanent black eye as a result thereof. The court admitted the testimony but instructed the jury to disregard it "except in so far as it goes to the injury of this plaintiff and the condition of her eyesight," that being stated as the sole purpose for offering the evidence. We believe that the evidence was admissible for the limited purpose for which it was offered.

The judgment is reversed and the cause remanded to the superior court for a new trial on the sole question of the amount of damages sustained by the appellants.

SHINN and WOOD, JJ., concur.

Hearing denied; SHENK, J., dissenting.

## PEOPLE v. McGEE. *

Cr. 4045.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1947.

Rehearing Denied Feb. 17, 1947.

Hearing Granted March 6, 1947.

1. Indictment and Information ⇐122(2) Homicide ⇐308(3)

Where evidence taken at preliminary examination warranted a charge for murder, permitting prosecutor to file information charging murder and action of court in giving instructions relating to murder were not error, notwithstanding, following preliminary examination, defendant was bound over for manslaughter. Pen.Code, §§ 809, 1008.

2. Homicide ⇐250

Evidence supported conviction of manslaughter.

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Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Henry Alexander McGee was convicted of manslaughter, and he appeals.

Attempted appeal from order denying motion in arrest of judgment dismissed. Judgment and order denying motion for new trial affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., of San Francisco, for respondent.

DORAN, Justice.

Defendant, accused by information of murder, was found guilty, by a jury, of manslaughter. The appeal is from the judgment, on order denying defendant's motion for arrest of judgment and from the order denying a motion for a new trial.

It appears from the record that the crime was committed on July 16, 1945, in a social club in San Pedro, California; appellant and the deceased were members of the club. On arrival at the club with a friend, Chas. F. Linck, appellant first visited the bar and had a drink, then went into the card room which adjoined the bar. The deceased, together with five others, was playing poker. Appellant's friend joined the game and later withdrew, whereupon, appellant undertook to take part but was informed in substance and incidentally, in no uncertain terms, to get out of the game; the deceased joined in the protest. Appellant finally left the game and together with Linck went into the bar and from there left the building. In a few minutes, both returned and entered the card room. An argument over $40 ensued, following which appellant and Linck again left the card room. The exit from the building was from the bar room, and as appellant was leaving the deceased was also in the bar room. It was at this point that appellant, about to leave through the doorway, turned and shot the deceased. The cause of death was "internal hemorrhage due to gunshot wound in the abdomen."

Following the preliminary examination, defendant was bound over for manslaughter. The District Attorney, however, filed an information charging murder. It is contended on appeal that such action was without authority hence various motions seeking to limit the trial to the offense of manslaughter should have been granted. It is also contended that the instructions including the offense of murder constituted error.

[1] The above-mentioned contentions are without merit. Sections 809 and 1008 of the Penal Code provide that the District Attorney may amend the information within certain limits. An information can not be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination". The trial court's rulings on the above-mentioned motions were correct. It follows that the instructions relating to the offense of murder were proper.

It is also contended that the court erred with regard to certain rulings on the admissibility of evidence. It appears that an effort was made by defendant at the trial to prove that deceased died from improper treatment and not from the gunshot wound. Without going into detail, it is sufficient to note that appellant's contentions in this regard are also without merit. The trial court's rulings were proper.

* Subsequent opinion 187 P.2d 706.

[2] The evidence abundantly supports the jury's verdict; the jury was adequately and properly instructed in every respect and there are no prejudicial errors in the record.

The attempted appeal from the order denying the motion in arrest of judgment is dismissed. The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P.J., and WHITE, J., concur.




78 Cal.App.2d 245

**HANNA v. KERN COUNTY.**

**Civ. 3197.**

District Court of Appeal, Fourth District, California.

Feb. 21, 1947.

**1. Trial ⇐395(1)**

Finding that center line of main channel of river, which was made north boundary of land conveyed to defendant's predecessor in title by deed from owner of land on both sides of river, was in same location as on date of such deed, authorized judgment for defendant in action by owner of land on north side of river to quiet title to approximately 30 acres allegedly shifted from north to south side of river by natural action of accretion and alluvion.

**2. Appeal and error ⇐1012(2)**

Trial court's finding supported by a fair and reasonable amount of evidence will not be disturbed even though, in appellate court's opinion, such finding is against the preponderance of the evidence.

**3. Trial ⇐395(1)**

In action to abate alleged nuisance consisting in maintenance of dikes by defendant along opposite bank of river in such manner as to divert waters thereof upon plaintiff's land, finding that free flow of water had not been obstructed or diverted by dikes or embankments constructed or maintained by defendant authorized judgment for defendant.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Blanche M. Hanna against the County of Kern, a body politic, to quiet title to realty, fix the boundary between plaintiff's and defendant's lands, and abate an alleged nuisance. From a judgment and amended judgment in favor of defendant and an order amending findings of fact and conclusions of law, plaintiff appeals.

Judgment and order affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Norbert Baumgarten, Co. Counsel, and Oran W. Palmer, both of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff, in her first cause of action, seeks to quiet title to property in the northwest quarter of section 36, township 28 S. R. 28 E., M. D. B. & M., lying north of the main channel of the Kern River as the same existed February 18, 1876. Her claim is based upon the supposition that plaintiff, appellant herein, and defendant, the respondent, have a common source of title which has tied them both down to a fixed line in the Kern River as it flowed on February 18, 1876, and that since said date the river, by the natural action of accretion and alluvion has somewhere shifted and has deposited some 30 or more acres of soil from its north to its south side, which acreage she now claims.

The second cause of action is to fix the boundary between the lands of plaintiff and the lands of defendant in this section.

The third cause of action is to abate a claimed nuisance consisting of maintenance of dykes and levees by the defendant along the south bank of the Kern River in such manner as to divert the waters thereof upon the plaintiff's land.

The answer of defendant denies the material allegations of the first cause of action and alleges that the defendant is the sole owner and entitled to the exclusive

possession of the property which lies south of the main channel of the Kern River as the same now exists or has existed at any time since the 18th day of February, 1876. It also alleges the affirmative defense that the defendant has been in open, notorious and adverse possession of the lands which lie south of the river now or at any time since that date. The second affirmative defense of the Statute of Limitations is likewise alleged.

As to the second cause of action the defendant denies the material allegations thereof and alleges the affirmative defenses of laches, adverse possession and the Statute of Limitations.

As to the third cause of action, defendant denies generally the allegations thereof and alleges as an affirmative defense that it maintains the dykes under the exercise of its police power in the protection of morals, health and safety. The affirmative defense of laches, adverse possession and the statute of limitations is also pleaded as an affirmative defense to the entire complaint. It is likewise alleged that plaintiff failed to file a claim with the Board of Supervisors in compliance with the provisions of the Political Code.

The Kern River runs westerly from the Sierra Nevada mountains through a canyon into the foothills and finally the floor of the San Joaquin Valley. Like all such California rivers, it drains into the valley. It has seasonal flood periods. As the river leaves the mountainous area it is bounded on the south by high bluffs and upon the north by rolling foothills which gradually decrease in height as it progresses into the valley. The bluffs and foothills finally merge into a hilly country in the vicinity of Bakersfield. The river in its progress through these bluffs and foothills follows a meandering course, sometimes through narrow canyons and sometimes through small valleys, some of which are several square miles in area. As it runs westerly through section 36, the property here involved, the river passes into one of these small valleys, through which its channel is of a meandering nature. The claimed meandering of the river through this section is the heart of the present controversy.

Plaintiff and defendant are at present adjoining landowners in section 36. Plaintiff's property is to the north of defendant's. Both claim title from a common source. An abstract containing the chain of title of both plaintiff and defendant was received in evidence in lieu of the production of the original instruments.

In defendant's chain of title the language used in the several deeds describing the north boundary of its claimed property is as follows: The deed of February 18, 1876: "Section 36 south of middle channel of Kern River as it now flows"; August 21, 1876: "Section 36 south of middle channel of Kern River as it now flows"; June 13, 1877: "Southern part of half of section 36, which lies south of the middle line of the main channel of Kern River as it now flows and for two years heretofore has flowed through said section"; July 14, 1879: "Southern part of half of section 36 which lies south of the middle line of the main channel of the Kern River as it now flows and for two years heretofore has flowed through said section"; June 9, 1879: "South half of section 36 which lies south of the middle line of the main channel of Kern River." The deed of March 27, 1886, contains a metes and bounds description and describes it as running from a point on the east line of section 36 "in a northerly and westerly direction along center of said river to a point."

On November 7, 1921, the Board of Supervisors of Kern County, by resolution, agreed to the purchase of the south half of section 36 for public park purposes, and in that resolution described the land as follows: "338 acres of land lying in the south half of section 36". A deed to the County, dated November 22, 1922, described the land by metes and bounds, beginning at the southeast corner of section 36 and running north along the east line of that section 47.67 chains to a point in the center of Kern River, thence in a northerly and westerly direction along the center of said river to a point 33.60 chains south of the center of the north line of said section, thence in a westerly and southerly direc-

tion along the center of said river to a point 23 chains east of said center of the west line of said section, thence in a southerly and westerly direction along the center of said river to a point 55.20 chains south of the northwest corner of said section, thence south and east to the place of beginning, containing 338 acres more or less. The language "that lies north of the center line of the main channel as the same existed on February 18, 1876," did not appear in plaintiff's chain of title until used in a deed dated February 26, 1935, 14 years after defendant had acquired and gone into possession of the Kern County Park. On that date a deed was executed describing a portion of fractional section 36 "lying north of the main channel of Kern River, as the same existed on February 18, 1876." A similar description was contained in a deed dated February 28, 1935; and likewise in a deed dated April 6, 1935; December 23, 1936; December 6, 1937; and in a deed dated April 5, 1939, to Blanche M. Hanna, plaintiff herein.

After the county entered into possession of the property in 1922, it constructed a park for the benefit of the public, and there was expended thereon a sum of nearly $200,000. It built dykes along the south bank of the river, filled in certain sloughs and swails behind the dykes and planted the area to trees and shrubbery. It excavated a portion of the land and constructed an artificial lake. It is claimed by plaintiff that the banks and dykes so built force the river to flow in a semi-circular direction along the north bank of the river, and that her property is being damaged thereby.

It is her contention that the river channel changed its course since 1876 and now flows farther north; that as a result thereof, approximately 30 to 40 acres of her land lies south of the river and that the county has constructed its park mainly on her property.

In support of this claim there was received in evidence a map of a government survey made in 1855 which, it is claimed, showed the river as it flowed through the land here involved. This map, compiled from the field notes of that date, *1855*, does support plaintiff's claim. However, that was as of the date of 1855, 21 years prior to the deed executed in 1876, upon which grant the defendant claims its title. Another map, the result of a mineral survey of sec. 36, made in June, 1901, and filed in the General Land Office, was received in evidence. It purports to show the north and south banks of the river as of the year 1901. It does not show where the main channel of the river ran as compared to those banks. Although the survey as thus indicated also supports plaintiff's claim, that survey is not in entire agreement with the survey of 1855. A map prepared from a survey made by the County Surveyor of Kern County in 1943, was also received in evidence.

An engineer, a witness for the plaintiff, made a study of the river for her and a composite study of the survey above mentioned and he computed the area of the land to the north and south of the river in 1855 and in 1943 and found that there was a difference of 80.25 acres and claimed therefore that the river had so changed its course that now approximately 40 acres of land appearing to the south of the channel, as shown in the 1943 survey, appears to the north of the channel as shown in the 1855 survey.

The county surveyor of Kern County, from the same records, computed the difference and he approximated that difference to be 31 acres.

A Mr. Gribble, superintendent of the Kern River Levee District who was familiar with the property located on exhibit 13, an aerial photographic map of section 36 taken just before the trial of this action, located the main channel of the river and fixed it in the vicinity of an object, referred to in the testimony as the "old mill," from which point he said the channel ran westerly in 1919 or 1920, which date was before the county purchased the park property.

A Mr. White, Civil Engineer in charge of excavating for the artificial lake, said he found redwood and cedar logs buried in the ground in the approximate location of the main channel as shown on the map of 1855, which was in the approximate location of the channel described by

Mr. Gribble. This would put the location of the main channel described by the plaintiff's witnesses several feet south of the course of the present main channel as shown on the aerial map.

Several local citizens, oldtimers in the community, testified that the land in the area of the present parksite, was marshy and full of sloughs. In 1942, the County Assessor of Kern County, apparently after the survey of 1942, changed the acreage previously assessed to plaintiff on the tax rolls of the county by reducing it 31 acres. Plaintiff contends that she had no knowledge of the shortage until such change was made on the assessment roll.

The Hannas testified that in April, 1941, they had a survey made of their property; that they were assessed for 204 acres and believed that they owned that number of acres; and that they then discovered they were short about 30 acres. They also testified as to the changes in the river channel since they purchased it and the claimed change in it due to the erection of levees and embankments by defendant.

Charts and diagrams of rainfall and flow of water in California streams over the period involved were also received in evidence.

The trial court found first, that the center line of the main channel of the Kern River flowing through section 36 "is in the same location now as it was on February 18, 1876, and that said center line of the main channel of said river has not meandered nor changed its course through said section since February 18, 1876" and "That defendant is the sole owner of and entitled to the exclusive possession of all the real property which lies south of the center line of the main channel of the Kern River as the same flowed on February 18, 1876, and as the same flows on this date"; second, "that defendant has been in open, notorious and exclusive possession of all said real property, adverse to the plaintiff, and to her predecessors in interest, for more than five years * * *"; third, "That insofar as * * * the plaintiff claims any of said property, said claim is barred by the provisions of section 318 of the Code of Civil Procedure," and that "the plaintiff is also guilty of laches and unreasonable delay in asserting said claim * * *"; fourth, "That the defendant has not constructed nor is it now maintaining nor does it threaten to maintain or construct along the southerly boundaries of said Kern River immediately opposite or at any other point in said section 36 * * * any embankments or dykes which obstruct the free flow of the water of said river or in any way cause the water of said river to be diverted from its natural course"; fifth, that the plaintiff's third cause of action is barred by the provisions of sec. 338 of the Code of Civil Procedure. It then concluded that plaintiff was not entitled to any relief on any of the causes of action in her amended complaint, and judgment was entered accordingly.

We therefore conclude that if there was sufficient substantial evidence to support the trial court's finding that the center line of the main channel of the river has been and is now in the same location as it was on February 18, 1876, then there is no necessity of determining the other claims of title by adverse possession, laches, or the bar of the statute of limitations, as alleged and found by the trial court.

The Superintendent of the Kern River Park testified that he was employed there in 1936; that "outside of where we straightened it (the river) up it runs practically the same as it did only there is more water in the south side than there was in 1936"; that an island has been formed on the north side of the river; that he had been "pulling trees out of the south side and pushing the dirt up against the bank, making a grade slope for beaches"; that he opened up a channel there for the water to go through and made a beach where people could go and swim; that he raised the original dykes "a little"; that nothing has been built "out into the river"; that the dykes were built to protect the park "in high water."

A Mr. Curran, resident of Bakersfield for 61 years, testified that in 1883 he was

employed by a canal company and he was employed every day to watch the water measuring board at Kern Island and patrol the river on horse; that he patroled on the north bank near the present site of the park.

He was asked: "Q. Will you state to the court whether or not the main channel of the Kern River was changed during that period of time?" He answered: "Well, it doesn't seem to me it has changed.

"Q. And that is particularly in reference to where the park now is? A. Yes, along the north side I cannot discover any change in the river, of any consequence.

"Q. Now, where the park is situated, will you describe to the court just what the situation was at the park with reference to canals or sloughs? A. Well, there were some sloughs in there, but of course I couldn't tell just the location then, only I knew the general character of the river running up to where I crossed it, and I went up to see if there was any more water coming down and I didn't notice any, during the whole time I was there when the wier was built.

"Q. And up to the present time you have not noticed any material change? A. No, I have not noticed any material change up to the present time."

On cross-examination, he testified:

"Q. And you didn't have in mind any fixed observation of fixing the channels or exact places where the river might be flowing by? A. No.

"Q. And you are speaking generally now when you say that the river looks the same as it did then? A. Yes.

"Q. And your examination never was such that you made any close examination of any particular area? A. No, except I rode along that dam to the other side and went up, and then I would cross the river, and came down on the bluffs, and come on home if there was not any change."

A Mr. Smoot, a rancher raising cattle on the river, testified that 40 years ago he first went into that area; that where the county park is now "it was just dry land," i. e., "there was not anything there only just some places there was backwater along the old Kern County Park there"; that the river is "substantially in the same place as it was."

Mr. Thornton, County Surveyor for 24 years, testified that he was particularly familiar with the park from 1921 to 1934; that he knew where the channel of the river was in 1921 and at the present time; that there has been no change in the main channel of the river between those dates; that he studied plaintiff's exhibit 12, the mining claim survey of 1901, and that he checked it and at one point thereon the river seemed to be 1100 feet wide and that he went out on the ground and made a survey of the cross-section indicated at that point; that by taking the area indicated, the flow of the river would be "entirely out of line with the record," that is, that the flow would be "2 or 3 times more than would be required to flood the city of Bakersfield," and that the actual flow of the river as taken from the records would be about 200 rather than 1100 feet. He then testified that he drew a transparent map (Exhibit D) based on the field notes made by W. R. MacMurdo, County Surveyor in 1880 (photostatic copies of these field notes are in evidence), in reference to the location of the Kern River as of that date and as it crossed section 36; that the notes referred to the "right bank on the north side of the river" and to the "left bank on the south side of it" and are tied into another section northwest of sections 24, 29 and 28; that he measured from these points out from various banks of the river and that he could actually locate those points on the map; that he placed this tracing (Exhibit D) upon the aerial photograph (Exhibit H) showing the present location of the banks and channel of the river as it crossed section 36; that it "roughly coincides with the top of the bluffs as they appear in the photograph." (Our comparison of the two exhibits would result in the same conclusion), that Mr. MacMurdo does not "name the channel" on his notes but does name the "right and left bank." He then examined plaintiff's Exhibit 9, showing the present main channel of the Kern River, and compared it with the flow of the river according to the map

of 1880, and testified that the two "maps compared very favorably," i. e., they compared substantially. After examining the chart in evidence indicating rainfall in inches in that area from 1874 to 1888 and also the comparative runoff or relative flow of the Kern River from 1871 to 1920, he testified that he remembered high water in 1914 and the floods of 1916, of 1941 and 1943, and that during all of those periods the course of the river through the park property made no appreciable change; that he did not think that the embankment built by the County changed the course of the river as it relates to the Hanna property.

Defendant then presented the editor of the local newspaper as a witness, who produced old copies of the news accounts of January 4, 1868, depicting a great flood of the Kern River as of that date.

Mr. Latta, history teacher in Bakersfield High School testified that he has been compiling, since 1906, the history of the valley by searching records, interviewing pioneers and writing treatises on Kern County; that he is familiar with the "behavior" of the Kern River; that in the 1867–68 flood a great area slid from the mountain on the south, and an artificial dam was created and the water backed up many hundreds of feet deep; that when it reached the top of the artificial dam it cut through rapidly and brought down a tremendous amount of water about 100,000 second feet and flooded all of the area in question; that the history of that flood is that it changed the channel of the Kern River at Bakersfield; that there has been no such flood in that river since; that the course now taken is practically as it was after the flood of 1868.

[1, 2] The crucial point that was presented for the trial court to decide was the course of the center of the main channel of the river as of February 18, 1876. A summary of plaintiff's evidence indicates that there was sufficient substantial evidence supporting her contention that the center of the main channel of the river was south of its present location as it crossed section 36 in the year 1855 and also south of its present location in subsequent years. Had the trial court determined that issue in plaintiff's favor we would have been compelled to uphold such finding. However, there is sufficient substantial evidence supporting the finding of the trial court that the center of the present main channel of the river runs in the same location as it did in the year 1876. Under such circumstances, we are confronted with the familiar rule that wherever there is a fair and reasonable amount of evidence to support the finding of the trial court, it will not be disturbed by the appellate court, even though, in its opinion, it may be against the preponderance of the evidence. In re Wilson's Estate, 117 Cal. 262, 49 P. 172, 711.

[3] The evidence respecting the claimed damage to the Hanna property, i. e., that the free flow of the water has been obstructed by the erection and maintenance of embankments and dykes by the county, is in substantial conflict. That question must abide the same rule in reference to the finding on the previous issue. In view of this determination it becomes unnecessary to review or discuss the merits of the other findings made on the question of adverse possession, statute of limitations, and laches.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

78 Cal.App.2d 171

**PEOPLE v. BALT et al.**

**Cr. 4055.**

District Court of Appeal, Second District, Division 3, California.

Feb. 19, 1947.

**1. Infants ⇐68**

Under the Welfare and Institutions Code providing that a court "may" refer to the Youth Authority any person convicted of public offense, etc., the word "may" is permissive, and whether 20-year-old youth convicted of robbery of the first degree should be referred to the Youth Authority rested in the discretion of the trial judge, and refusal to so refer the defendant was not abuse of discretion under the record. Welfare and Institutions Code, §§ 15, 1731.5.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

**2. Criminal law ⇐1023(12)**

The general rule is that a party who has a right to appeal from a judgment or order is not ordinarily allowed to move to set it aside and then appeal from an order denying his motion.

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Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding by the State against Jester H. Balt and others wherein Loel McMullen was convicted of robbery of the first degree, and from an order denying his motion to vacate and set aside the judgment and sentence entered against him committing him to the state prison at San Quentin, he appeals.

Order affirmed.

William G. Kenney and Francis Jones, both of Los Angeles, for appellant.

Robert W. Kenney, Atty. Gen., and Laughlin E. Waters, Deputy Atty. Gen., of Los Angeles, for respondent.

WOOD, Justice.

Defendant McMullen appeals from an order denying his motion to vacate and set aside the judgment and sentence entered against him committing him to the state prison at San Quentin.

Appellant contends that the court should have referred him to the California Youth Authority.

The three defendants were charged with robbery, a felony, in seven counts. Defendant McMullen, the appellant herein, pleaded guilty as charged in count one—taking from the person of one Peter Wade the sum of $7 while armed with a .22 automatic pistol. He was granted leave to file an application for probation. Thereafter, at a hearing on March 12, 1946, the court found the crime to be robbery of the first degree as to count one; denied appellant's application for probation; refused to refer appellant (who was then 20 years of age) to the California Youth Authority; and sentenced him to the state prison at San Quentin for the term prescribed by law. The other counts were dismissed as to appellant.

On April 23, 1946, a motion to set aside the judgment and sentence was made and denied, but the court recommended that appellant be transferred immediately from the state prison to the State Institution for Men at Chino.

It is not disputed that appellant was eligible for referral to the Youth Authority, but the People contend that the matter of referral was discretionary with the trial court.

[1] Section 1731.5 of the Welfare and Institutions Code, as amended in 1945, provides: "After certification to the Governor as provided in this article and until January 1, 1948, a court *may* refer to the Authority any person convicted of a public offense who comes within all of the following description: * * * If the Authority believes that any person referred to it as provided in this section can be materially benefited by * * * the Authority * * * it shall so certify to the court. The court shall thereupon commit said person to the Authority." (Italics added.) Section 15 of the Welfare and Institutions Code states that "shall" is mandatory and "may" is permissive. There can be no doubt that the term

"may," as it is used in section 1731.5, was meant to be permissive. The legislature further manifested an intention to make it so when, in amending the section in 1945, it deleted the words "shall commit," as formerly used in the first part of that section, and substituted the words "may refer." Prior to the 1945 amendment, the section provided: "After certification to the Governor * * * a court *shall commit* to the Authority any person convicted of a public offense * * *." (Italics added.) The court was not required to refer him to the Youth Authority, but the matter was within the discretion of the trial judge.

Appellant also contends that the court's failure to refer him to the Youth Authority constituted an abuse of discretion. The record indicates, from the report of the probation officer, the argument of appellant's counsel, and the remarks of the judge during the hearing on the motion to set aside the judgment, that persons assigned to investigate appellant had formed favorable opinions of him. That the trial judge took those opinions, and others, into consideration in denying the motion is evident from his remark: "If I were to follow my own personal inclination, I would grant you your motion but sitting here as the court I have to weigh all the factors and this court cannot conscientiously change its original judgment." The court expressed the opinion that the appellant should be sent to Chino instead of San Quentin, but stated that it did not have the authority to commit him to Chino in the first instance. There was no abuse of discretion.

[2] Although the question is not raised by the People, nor referred to in the record, a question arises herein as to whether the order denying appellant's motion is an appealable order. The general rule is that "Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion." People v. Carkeek, 35 Cal.App.2d 499, 503, 96 P.2d 132, 134. There are exceptions to the general rule, and it has been held that an order denying a motion to vacate a judgment of conviction is appealable where the question raised by the motion to vacate the judgment cannot be presented by the record on an appeal from the judgment. People v. Miller, 140 Cal.App.2d 241, 35 P.2d 229. It has also been held that an order denying such a motion is appealable where the judgment is void on the face of the record. People v. Flohr, 30 Cal.App. 2d 576, 86 P.2d 862. In the case just cited, it was said at page 579 of 30 Cal.App.2d, at page 863 of 86 P.2d: "[T]hat where a judgment is not void or illegally entered, but is merely erroneous, an order denying a motion to vacate the same is not reviewable when the same points might have been presented upon an appeal from the judgment." If the remedy available to a defendant is an appeal from the judgment of conviction, an appeal from an order denying his motion to set aside the judgment would be equivalent to allowing two appeals from the judgment. People v. Simms, 41 Cal.App.2d 466, 469, 107 P.2d 86. Appellant herein filed his notice of motion to set aside the judgment after the time for appeal from the judgment had expired. An appeal from the order denying his motion, in effect, extends the time for appealing. It appears that the order is not appealable; however, as indicated above, there are exceptional circumstances under which an appeal may be taken from an order denying a motion to vacate a judgment, and, since the question of appealability was not raised by the People, we have considered the appeal and do not determine whether the instant case comes within the exceptions.

The order is affirmed.

DESMOND, P. J., and SHINN, J., concur.

78 Cal.App.2d 127

## FITZGERALD v. HERZER.

Civ. 15573.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1947.

**1. Bankruptcy ⇐424**

A complaint seeking to recover for injuries sustained by plaintiff when struck by automobile driven by defendant which alleged that defendant drove his automobile "at a fast, furious, reckless and dangerous rate of speed, and in a grossly careless, reckless and unlawful manner, and at an illegal rate of speed" stated a cause of action for a "willful and malicious injury" excepted from operation of a discharge in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful and Malicious Injury".

**2. Bankruptcy ⇐421(1), 436(2)**

In ascertaining whether judgment sought to be renewed was cancelled by discharge in bankruptcy, the court would go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and when necessary, extrinsic evidence would be received for purpose of determining character of the debt. Bankr.Act, § 17, 11 U.S.C.A. § 35.

**3. Bankruptcy ⇐421(1)**

Notwithstanding the change in form of a debt from that of an unliquidated claim by merger into a judgment of a court of record, it still remained the same debt as that on which the action was brought, for purpose of determining whether debt was cancelled by subsequent discharge in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

**4. Bankruptcy ⇐424**

Willful disregard of what one knows to be his duty, an act that is against good morals and wrongful in itself and that necessarily causes injury and is done intentionally, is a "willful and malicious act" excepted from operation of a discharge in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful and Malicious Act".

**5. Bankruptcy ⇐424**

To avoid discharge in bankruptcy of judgment in personal injury action on ground that it was for a "willful and malicious injury" excepted from operation of discharge in bankruptcy, the complaint was not required to charge that the acts were "willful and malicious" in language of Bankruptcy Act provided equivalent terminology was used. Bankr.Act, § 17, 11 U.S.C.A. § 35.

**6. Judgment ⇐112**

By permitting his default to be entered, defendant confessed truth of all material allegations in the complaint in action arising out of automobile accident, including allegations of wantonness, recklessness and gross carelessness.

**7. Judgment ⇐652**

A judgment by default is as conclusive as to issues tendered by complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer, and such a judgment is res judicata as to all issues amply pleaded in the complaint, and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint.

**8. Bankruptcy ⇐424**

Where complaint in automobile accident case against bankrupt charged that bankrupt's acts were grossly careless, reckless, negligent and wanton, and a default judgment was entered therein, the default judgment conclusively established that claim against bankrupt was for "willful and malicious injury" excepted from operation of a discharge in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful and Malicious Injury".

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Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Hazel Fitzgerald against Fred Herzer to renew a judgment in a personal injury action. From a judgment for defendant, the plaintiff appeals.

Reversed.

Porter C. Blackburn and Shelby L. Chambers, both of Los Angeles, for appellant.

No appearance for respondent.

WILSON, Justice.

The question presented by this appeal is whether defendant's discharge in bankruptcy released him from a judgment in a personal injury action in which plaintiff's injuries were the result of his grossly careless and reckless conduct.

Plaintiff commenced an action against defendant to recover damages for injuries that she received when struck by an automobile driven by him. The complaint alleged that he drove his automobile "at a fast, furious, reckless and dangerous rate of speed, in a grossly careless, reckless and unlawful manner, and at an illegal rate of speed;" that he drove "negligently, carelessly and recklessly," and that plaintiff's injuries were "due to the wanton, gross carelessness, recklessness and negligence of said defendant."

Defendant suffered his default to be entered and a judgment was rendered against him on May 17, 1944, for the sum of $7,500 and costs. The judgment recited that he had been regularly served with process, had failed to answer, was not in the military service of the United States, and that his default had been entered.

On December 12, 1944, defendant filed his petition in bankruptcy and schedules in the District Court of the United States. In the schedule of creditors whose claims were unsecured he listed the judgment, together with plaintiff's name as the holder of the claim, and she was notified in the manner required by law. On or about April 12, 1945, defendant received his discharge in bankruptcy.

Thereafter plaintiff brought this action on the judgment seeking a new judgment for the amount thereof, with interest. The complaint alleged the rendition of the judgment in the former action and that it was on a cause of action for damages suffered by her for personal injuries "proximately caused by defendant through his willful, wanton and grossly careless conduct, under circumstances manifesting an utter disregard of the rights of plaintiff by defendant."

On motion of defendant the latter allegation was stricken from the complaint. He then answered pleading his discharge in bankruptcy.

At the trial the complaint and the judgment in the former action were offered by plaintiff and received in evidence. The facts relating to defendant's bankruptcy as above set forth were stipulated to be true.

For the purpose of showing that the judgment was not discharged in bankruptcy plaintiff offered to prove the allegations in the complaint in the former action with reference to defendant's "wanton, gross carelessness, recklessness and negligence;" that defendant was driving at approximately 80 miles an hour; that he was drunk at the time of the accident. The offer of proof was refused by the court. Findings were filed to the effect that defendant had been discharged in bankruptcy of plaintiff's claim. Judgment was rendered in favor of defendant from which plaintiff has appealed.

[1, 2] 1. The effect of defendant's discharge in bankruptcy. Section 17 of the Bankruptcy Act, 11 U.S.C.A. § 35, provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities * * * for willful and malicious injuries to the person or property of another * * *". The cause of action stated in the complaint in the first action was of the type excepted in the statute from the operation of the discharge, and if the allegations in the original complaint are true defendant's liability was not discharged. Woehrle v. Canclini, 158 Cal. 107, 108, 109 P. 888; Marlenee v. Warkentin, 71 Cal. App.2d 177, 180, 162 P.2d 321; Van Epps v. Aufdemkamp, 138 Cal.App. 622, 623, 32 P.2d 1116. Whether a judgment is cancelled by a discharge in bankruptcy depends on the nature and character of the liability for which it was recovered. There-

fore, in ascertaining whether the judgment upon which the instant action is based was discharged the court will go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and when necessary extrinsic evidence will be received for the purpose of determining the character of the debt. Carit v. Williams, 74 Cal. 183, 185, 15 P. 751; In re Hammond, 2 Cir., 98 F.2d 703, 704, certiorari denied 305 U.S. 646, 59 S.Ct. 149, 83 L.Ed. 418; Greenfield v. Tuccillo, 2 Cir., 129 F.2d 854, 856; Swig v. Tremont Trust Co., 1 Cir., 8 F.2d 943, 946; In re Pulver, 146 Wash. 597, 264 P. 406, 408; Guernsey-Newton Co. v. Napier, 151 Wash. 318, 275 P. 724, 725; Halligan v. Dowell, 179 Iowa 172, 161 N.W. 177, 178; Bever v. Swecker, 138 Iowa 721, 116 N.W. 704, 706; Campbell v. Norgart, N.D., 14 N.W.2d 260, 261.

[3] Notwithstanding the change in the form of a debt from that of an unliquidated claim by merger into a judgment of a court of record, it still remains the same debt as that on which the action was brought. Boynton v. Ball, 121 U.S. 457, 466, 7 S.Ct. 981, 30 L.Ed. 985, 986; Woehrle v. Canclini, supra; Carit v. Williams, supra; Wilson v. Walters, 19 Cal. 2d 111, 121, 119 P.2d 340.

[4] Willful disregard of what one knows to be his duty, an act that is against good morals and wrongful in itself and that necessarily causes injury and is done intentionally, is a willful and malicious act within the exception in the bankruptcy statute. Van Epps v. Aufdemkamp, supra, 138 Cal.App. at page 623, 32 P.2d at page 1116, quoting from Tinker v. Colwell, 193 U.S. 473, 487, 24 S.Ct. 505, 48 L.Ed. 754, 760. The term "wanton" expresses a reckless disregard of consequences. Tharp v. Breitowich, 323 Ill.App. 261, 55 N.E.2d 392, 393, certiorari denied 323 U.S. 801, 65 S. Ct. 561, 89 L.Ed. 639.

[5] The acts of defendant were charged in the original complaint to have been grossly careless, reckless, negligent and wanton. To avoid a discharge in bankruptcy it was not necessary that the words "willful and malicious" be used. The terminology in the complaint is the equivalent of "willful and malicious" as used in the Bankruptcy Act. In re Greene, 7 Cir., 87 F.2d 951, 953, 109 A.L.R. 1188; Van Epps v. Aufdemkamp, supra; Tinker v. Colwell, supra.

It follows that defendant was not released from liability on the judgment by his discharge in bankruptcy.

[6-8] 2. The effect of the default judgment. Since the judgment in the former action had become final, the court erred, not in rejecting plaintiff's offer of proof, for such proof was unessential, but in rendering judgment in favor of defendant on the evidence before the court, consisting of the complaint in the original action, the default of defendant, and the judgment for plaintiff. The evidence tendered by the offer of proof would have established nothing more than defendant had admitted by his failure to answer in the first action. By permitting his default to be entered he confessed the truth of all the material allegations in the complaint (Wilshire Mortgage Corp. v. O. A. Graybeal Co., 41 Cal.App.2d 1, 5, 105 P.2d 996; Strong v. Shatto, 201 Cal. 555, 558, 258 P. 71; Brown v. Brown, 170 Cal. 1, 5, 147 P. 1168) including the allegations of wantonness, recklessness and gross carelessness. Van Epps v. Aufdemkamp, supra, 138 Cal.App. at page 624, 32 P.2d at page 1116. A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. Maddux v. County Bank, 129 Cal. 665, 667, 62 P. 264, 79 Am. St.Rep. 143; Morenhout v. Higuera, 32 Cal. 289, 295. Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint. Horton v. Horton, 18 Cal.2d 579, 585, 116 P.2d 605; Harvey v. Griffiths, 133 Cal.App. 17, 22, 23 P.2d 532. Since the only defense presented in the instant action was the discharge in bankruptcy, futile insofar as plaintiff's claim is concerned, judgment should have been rendered in favor of plaintiff on the evidence introduced.

Judgment reversed with instructions (1) to vacate the order striking out portions of the complaint; (2) to make findings of fact and conclusions of law in accord with this opinion; (3) to enter judgment for plaintiff as prayed.

MOORE, P. J., and McCOMB, J., concur.




78 Cal.App.2d 145

**HURON COLLEGE et al. v. YETTER et al.**

**Civ. 15611.**

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1947.

**1. Judgment ⇐443(1)**

Equitable relief from the effect of a judgment may only be obtained upon allegations and proof of extrinsic and collateral fraud.

**2. Executors and administrators ⇐516(2)**

Equitable relief cannot be granted against judgments of the probate court approving annual current accounts of executor when the fraud alleged could have been relieved by the probate court itself and injured party had legal notice of probate proceedings in time to make his objections to such proceedings and was not prevented from so doing by some fraud on part of other parties.

**3. Executors and administrators ⇐516(6)**

Where plaintiffs, in suit to set aside judgments of probate court approving executor's annual current accounts, were advised of probate of will, under which they were beneficiaries, had knowledge of pendency of probate proceedings and failed to allege that statutory notices of hearing to approve accounts were not given and failed to allege a request for special notice, it was presumed that plaintiffs received proper notice of the various applications for settlement of such accounts. Probate Code, §§ 1200, 1202.

**4. Executors and administrators ⇐471, 513(1)**

The notice required by Probate Code of executor's application for settlement of an annual current account is constructive notice to everyone of pendency of proceedings, and when a hearing has been had and an order entered pursuant thereto, such order is conclusive upon all parties in interest and absence of a personal notice in such proceeding is not a deprivation of constitutional rights of any one in interest. Probate Code, § 1200.

**5. Executors and administrators ⇐516(6)**

In suit by beneficiaries under will to set aside judgments of probate court settling executor's annual current accounts, failure of plaintiffs to allege that they themselves were without fault, failure to excuse their neglect to investigate conduct of estate by executor, failure to plead with particularity the facts constituting the alleged extrinsic fraud and failure to assert that plaintiffs were prevented by fraud from making objections available to them in proceedings had in probate court were fatal to complaint.

**6. Judgment ⇐460(4)**

In an action for equitable relief based upon extrinsic fraud in obtaining judgment, facts constituting fraud must be pleaded with particularity and specifically.

**7. Judgment ⇐460(6)**

One seeking the aid of equity for relief from a judgment must not only allege matters wherein judgment is unjust or was fraudulently obtained, but must also allege that he has a meritorious defense to the action or proceeding wherein judgment was obtained, so as to warrant court in determining that if facts so alleged be proven, a different result would ensue.

**8. Wills ⇐746**

Complaint alleging that, at time of testator's death, an orange grove belonging to testator and a grove belonging to individual defendants were being jointly operated as a partnership venture and that executor failed to procure a partnership accounting,

but which complaint failed to allege facts authorizing conclusion that, were an accounting had, there would be a balance in favor of or against plaintiffs as beneficiaries under the will, was bad.

**9. Executors and administrators ⇐516(6)**

Complaint to set aside judgments of probate court approving executor's annual current accounts, in so far as complaint charged an improper sale of realty without reciting facts authorizing inference that property was sold under its market value or that as a result of sale estate suffered, or that sale was in fact consummated or approved by probate court, was bad.

**10. Executors and administrators ⇐380(2)**

Where probate court has jurisdiction over realty of an estate because no order of confirmation of sale has been made, a court of equity which has no supervisory jurisdiction over that tribunal cannot set aside the sale.

**11. Courts ⇐481**

Equity has no power to sit in judgment on actions of probate court to determine whether it has committed error either in law or in fact while exercising its authority.

**12. Judgment ⇐486(1)**

Even though a judgment or decree, rendered by a court in a cause wherein it has jurisdiction of the subject matter and the parties, contains error committed in the exercise of jurisdiction, such judgment is not void but merely erroneous.

**13. Executors and administrators ⇐513(13)**

Where beneficiaries of will charged executor with negligence in failing to require an accounting from testator's partners, but neglected to allege that such conduct of executor was without sanction of probate court, approval by probate court of executor's annual current accounts over many years negatived charge of mismanagement, negligence or fraud on part of executor.

**14. Executors and administrators ⇐513(9)**

The decree of the probate court settling an executor's account, when it becomes final, is conclusive upon all parties interested in the estate.

**15. Executors and administrators ⇐516(6)**

Where complaint to set aside decrees of probate court approving executor's annual current accounts failed to state facts sufficient to warrant a court of equity in overthrowing rule upholding the sanctity of final judgments, orders and decrees, objection to introduction of any evidence by plaintiffs was properly sustained upon ground of want of facts sufficient to constitute a cause of action.

**16. Appeal and error ⇐105**

An order sustaining defendants' objection to the introduction by plaintiff of any evidence is not appealable.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Huron College and others against Judd H. Yetter, executor of the estate of Elizabeth G. Kimmel, deceased, Anna Graham Bartlett, and Elizabeth Bartlett Yetter to set aside various orders approving executor's annual current accounts and to require individual defendants to account as surviving partners of decedent and for other relief. From a judgment for defendants and from an order sustaining defendants' objection to the introduction of any evidence by plaintiffs, plaintiffs appeal.

Judgment affirmed and appeal from order dismissed.

Marshall & Farnham, of Long Beach, for appellants.

Stanton & Stanton, of Los Angeles, for respondents.

WHITE, Justice.

Elizabeth G. Kimmel died January 25, 1931, leaving a will which was duly admitted to probate. In such will, plaintiffs and others were named beneficiaries and defendant Judd H. Yetter was appointed executor. He qualified as such executor February 27, 1931.

Defendant Anna Graham Bartlett is a sister of the testatrix, while defendant Elizabeth Bartlett Yetter is the daughter of defendant Anna Graham Bartlett and is the wife of the aforesaid executor.

Twelve orders of the probate court approving annual accounts were made in the matter of the estate of Elizabeth G. Kimmel, deceased, during the period from May 17, 1932 to November 15, 1943, both inclusive.

Plaintiffs instituted this action in equity by which a judgment is sought setting aside the orders approving the foregoing accounts, requiring the individual defendants to account as surviving partners of the decedent, and for damages in a sum equivalent to "47% of eight thousand ($8,000.00) dollars".

Plaintiffs' complaint embraced three causes of action, the first of which alleged that the principal asset of the estate consisted of an orange grove of approximately 10 acres immediately adjacent to an orange and lemon grove of similar acreage owned by the defendants Anna Graham Bartlett and Elizabeth Bartlett Yetter at the time of the death of said Elizabeth G. Kimmel. At the time of the death of the testatrix, the two groves were being operated by defendant Judd H. Yetter conjunctively as a partnership arrangement. That defendant executor failed to procure an accounting from the survivors of said partnership; that defendant Judd H. Yetter, in collusion with his codefendants Anna Graham Bartlett and Elizabeth Bartlett Yetter, continued to operate the Kimmel grove in conjunction with the Bartlett grove without authorization of law or order of the court, borrowed money for said operation, illegally used the credit of said Kimmel estate and incurred excessive obligations against said estate in favor of said defendants in such amounts as to practically absorb the equities of plaintiffs in said estate. That defendant Judd H. Yetter commingled funds of said estate with his own and the funds of said defendants Elizabeth Graham Bartlett and Elizabeth Bartlett Yetter, and appropriated funds of said estate to his own use without authority of law or approval of the court.

It was further alleged in the complaint that the aforesaid 12 annual accounts were approved by the court, that no appeal was seasonably taken therefrom, and that such orders are now final. It is then set forth that said annual accounts did not contain the true status of the estate and that, in the interest of equity and justice, the orders approving said accounts should be vacated and set aside. That the plaintiffs were nonresidents of the state of California, were not given any notice whatever of the filing of said accounts, nor of the contents thereof, and "had no opportunity or reason to doubt the good faith of said executor until in August, 1944, when the respondents through their attorney sought to purchase the interests of appellants for an amount considerably under the appraised value of said estate".

The second cause of action has been abandoned.

By their third cause of action, plaintiffs adopted certain of the allegations pleaded in their first cause of action, and further alleged that defendant executor, in collusion with his codefendants, and "with intent to defraud and cheat these plaintiffs, wrongfully and illegally, and in defiance of the orders of the court, so managed and manipulated the said Kimmel grove since the death of the said Elizabeth G. Kimmel as to wipe out the entire equity of these plaintiffs in said grove, and with the intent to eventually acquire the same at their own figure", by failing to terminate and close the proceedings, by incurring excessive obligations against said orange grove property, by failing to keep plaintiffs "informed as to the true status of affairs", and by false statements as to obligations allegedly existing against said estate.

General and special demurrers were separately interposed by each defendant. These were overruled and a joint answer filed specifically denying the allegations of fraud, deception, collusion and mismanagement of the estate as charged in the complaint. By their answer, defendants also pleaded as an affirmative defense that any and all claims on the part of the plaintiffs were barred under the terms and provisions of section 337, subdivision 2; section 338, subdivision 4; section 339, subdivision 1; and section 343 of the Code of Civil Procedure.

When the cause was called for trial, plaintiffs dismissed and abandoned the sec-

ond cause of action contained in their complaint, leaving for trial the first and third counts. When the first witness was produced and sworn, defendants objected to the introduction of any testimony on the ground that the complaint did not, in either of the counts therein contained, state facts sufficient to constitute a cause of action, and that in any event, the claims were barred under the applicable statutes of limitations as pleaded. The court sustained the objection and ordered judgment for the defendants for their costs. From such judgment, as well as from the order sustaining defendants' objection to the introduction of any evidence, plaintiffs prosecute this appeal. Does the complaint state a cause of action is the sole question presented.

[1, 2] We are persuaded that the query must be answered in the negative. A veritable forest of authorities indicate that equitable relief from the effect of a judgment or decree may only be obtained upon allegations and proof of extrinsic and collateral fraud. As stated in Caldwell v. Taylor, 218 Cal. 471, 477, 23 P.2d 758, 760, 88 A.L.R. 1194 (quoting in part from United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93, "'In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud *practiced directly upon the party seeking relief* against the judgment or decree, that party has been prevented from presenting *all* of his case to the court.' (Italics ours.) This definition has become the well-recognized and standard definition of extrinsic fraud. * * * It * * * must not be the fraud which is in effect the issue in controversy." So in a case such as the one now before us, equitable relief cannot be granted when the fraud alleged could have been relieved by the probate court itself, and the injured party had legal notice of the probate proceedings in time to make his objections to such proceedings, and was not prevented from so doing by some fraud on the part of the other parties. Caldwell v. Taylor, supra, 218 Cal. at page 477, 23 P.2d 758, 88 A.L.R. 1194.

[3, 4] In the instant case it cannot be inferred from the allegations of the complaint that respondents or any of them, by act or omission, prevented appellants from presenting their contentions to the court on any of the 12 hearings had upon the orders settling current accounts. The complaint reveals that at all times appellants knew that they were beneficiaries under the will. Manifestly, they were advised of the probate of the will and had knowledge of the pendency of the probate proceedings. The law provides for the filing of annual accounts. There is no allegation in the complaint herein that the notices required by section 1200 of the Probate Code were not given, nor is there any allegation that throughout the 12 years covered by these accounts current the appellants made any request for special notice as provided for in section 1202 of the Probate Code. In the absence of any allegation to the contrary, it will be presumed that proper notice was given to the parties. Furthermore, in Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 756, 37 P.2d 69, it was held that the notice required by the section of the Probate Code is constructive notice to everyone of the pendency of the proceedings, and when a hearing has been had, and an order entered pursuant thereto, such order is conclusive upon all parties in interest. In the same case the court also said (1 Cal.2d at page 756, 37 P.2d at page 72): "Absence of a personal notice in such proceeding does not deprive any person in interest of any of his constitutional rights". See also Estate of Leonis, 138 Cal. 194, 200, 71 P. 171; Estate of Bump, 152 Cal. 274, 276, 92 P. 643; Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; Lilienkamp v. Superior Crt., 14 Cal.2d 293, 298, 93 P.2d 1008.

[5, 6] In their complaint appellants fail to allege that they themselves were without fault or to excuse their neglect to investigate the conduct of the estate by the executor. An examination of the complaint herein shows no compliance with the established rule that in an action for equitable relief based upon extrinsic fraud in obtaining an order, decree or judgment, the facts constituting the fraud must be pleaded with particularity and specifically. Eisenmayer v. Thompson, 186 Cal. 538, 541, 199

P. 798. Moreover, there is not a single allegation in the complaint specifically asserting that the appellants were prevented by fraud from making any objections available to them in proceedings had in the probate court.

[7-11] Before a party may invoke the aid of equity for relief from a judgment he must not only allege matters wherein the judgment is unjust or was fraudulently obtained, but he must also allege that he has a meritorious defense to the action or proceeding wherein the judgment, decree or order was obtained. In other words, facts must be alleged, not merely as ultimate facts, but such facts must be alleged as would warrant the court in determining that if the facts so alleged be proven a different result would ensue. In the case at bar, the pleader in the first count sets forth no facts from which the conclusion could be drawn that were an accounting had there would be a balance in favor of or against the appellants, while in the third count no facts are recited from which the inference could be drawn that the property of the estate was sold under its market value, or that as a result of the sale the estate suffered. True, certain conclusions are set forth, but there is no allegation that the sale was in fact consummated or was at any time approved by the probate court. There is no averment as to what action was had in the probate court with reference to such sale. For aught that appears in the complaint, the real property in question may yet be an asset of the estate. It is not alleged in the complaint that the probate court does not now have jurisdiction over the real property in question, or that any application has been made to such court in reference thereto. If the probate court still retains jurisdiction because no order of confirmation of sale was made, then a court of equity has no supervisory jurisdiction over that tribunal, nor does equity possess the power to sit in judgment on the actions of the probate court to determine whether it has committed error either in law or in fact while exercising its authority. Even though a judgment or decree rendered by a court in a cause wherein it has jurisdiction of the subject matter and the parties contains error committed in the exercise of jurisdiction, such judgment is not void but merely erroneous. Hogan v. Horsfall, 91 Cal.App. 37, 42, 266 P. 1002.

[12, 13] In the first count of their complaint, appellants alleged that the executor was negligent in failing to require an accounting from the individual respondents, that appellants are without knowledge as to whether such an accounting would have burdened or benefited the estate. Assuming that the executor, determining in the exercise of his judgment that the estate would be benefited by the action which he took, was negligent, the approval by the probate court of the annual accounts over the long period of years negatives the charge of mismanagement, negligence or fraud on the part of the executor, when, as here, there is no allegation that such conduct of the executor was without the sanction of the probate court and was not passed upon when the various accounts current were approved. As heretofore pointed out, the decree of the probate court settling an account, when it becomes final, is conclusive upon all parties interested in the estate. Carr v. Bank of America, 11 Cal.2d 366, 374, 79 P.2d 1096, 116 A.L.R. 1282; Ringwalt v. Bank of America, etc. Ass'n, 3 Cal.2d 680, 685, 45 P.2d 967.

[14] In view of the conclusion at which we have arrived that from the allegations contained in the complaint it appears that the required notices were given to all persons interested in the estate, that nothing incumbent upon respondent executor was left undone, that no fraud was practiced directly upon appellants by which they were prevented from presenting their objections or exceptions to all proceedings in the probate court, we deem it unnecessary to discuss other points raised on this appeal. The allegations of the complaint in both the first and third causes of action, when scrutinized in the light of the rules we have herein enunciated, fail to bring the complaint within the doctrine which equity says warrants it in overthrowing the rule which upholds and maintains the sanctity of final judgments, orders and decrees. The objection to the introduction of any evidence was therefore properly sustained upon the ground of want of facts sufficient to constitute a cause of action.

[15] The attempted appeal from the order sustaining defendants' objection to the introduction of any evidence is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.




78 Cal.App.2d 265

**In re JONES ESTATE.**

**JONES v. JONES.**

**Civ. 3543.**

District Court of Appeal, Fourth District, California.

Feb. 24, 1947.

**1. Executors and administrators ⇐194(1)**

The probate judge has discretion to grant or deny petition to set aside exempt personalty to a surviving spouse. Probate Code, § 660.

**2. Executors and administrators ⇐194(4)**

Where soldier's widow who was named beneficiary in his policies was receiving monthly payments from the government and was also surviving co-owner of government bonds and funeral expenses and some of expenses of last illness had not been paid, probate court's order denying widow's petition to set aside to her small amount of exempt personalty belonging to soldier's estate was not an abuse of discretion. Probate Code, § 660.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding in the matter of the estate of James Robert Jones, also known as James R. Jones, deceased, wherein Bedur Miriam Jones, his widow, filed a petition to require Edith J. Jones, as executrix of the estate of James Robert Jones, deceased, to set aside to the widow exempt property belonging to the estate. From an order denying the petition, the widow appeals.

Affirmed.

Vernon P. Spencer, of Inglewood, for appellant.

Frederick W. Welsh, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal by the widow of deceased from an order denying her petition to set aside to her certain exempt property belonging to the estate of her husband. The estate was small and the property the widow sought to have set aside to her is not of considerable value.

Appellant argues that since section 1465 of the Code of Civil Procedure was held to be mandatory and to require that the probate judge set aside exempt personal property to the widow (Estate of Ehler, 115 Cal. App. 403, 1 P.2d 546; Estate of Millington, 63 Cal.App. 498, 218 P. 1022) we should place the same construction on its successor, section 660 of the Probate Code.

[1] The question has been passed upon by both the Supreme Court and the District Court of Appeal where it has been held that the change made by the legislature in the language of the earlier section clearly showed an intention to vest a discretion in the probate judge to either grant or deny a petition to set aside exempt personal property to a surviving spouse. Estate of Mattingly, 19 Cal.App.2d 550, 65 P.2d 1338; Estate of Kachigian, 20 Cal.2d 787, 128 P.2d 865.

The reasons for this conclusion are thus set forth in Estate of Mattingly, supra [19 Cal.App.2d 550, 65 P.2d 1339]:

"It is provided in section 660 of the probate Code that the court 'may in its discretion set apart to the surviving spouse * * * all or any part of the property of the decedent exempt from execution.' * * * The Legislature in adopting the Probate Code added after the word 'may' the words, 'in its discretion' and after the word 'all' the words 'or any part of.' The Legislature doubtless intended to give a

definite meaning to these added words. It is expressly provided that the court shall exercise its discretion in acting upon petitions of this character. The language of the section is free from ambiguity and needs no interpretation. The order appealed from was made in the exercise of the court's discretion."

Appellant further argues that if it be held that the Probate Court is vested with such a discretion there was an abuse of that discretion in making the order before us.

[2] The arguments made by appellant are far from convincing. Deceased was a soldier and died while in the service. His widow was named as beneficiary in his insurance policies and has received payment of the death benefit in one issued by an insurance company and is receiving regular monthly payments from the Government. She is also the surviving co-owner of the Series E United States War Savings Bonds accumulated by the couple. Conrad v. Conrad, 66 Cal.App.2d 280, 152 P.2d 221. The funeral expenses and some of the expenses of the last illness of deceased have not been paid which is also true of the expenses of administration of his estate. We can see no abuse of discretion on the part of the trial judge in retaining in the estate the small amount of exempt personal property in question here. This is especially true as it is probable that the allowance made to the widow will exhaust the major portion of the assets of the estate leaving little or nothing for distribution after the funeral expenses, the expenses of the last illness and the expenses of administration are paid.

The order is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.

## PEOPLE v. DUNN.

Cr. 4751.

Supreme Court of California, In Bank.

Feb. 11, 1947.

Rehearing Denied March 10, 1947.

**1. Homicide ⇐253(3)**

Evidence was sufficient to establish premeditation or malice aforethought warranting conviction of first degree murder.

**2. Criminal law ⇐822(17)**

In murder prosecution, instructions, as a whole, were not objectionable on ground that they failed to advise the jury of the distinction between first degree murder, second degree murder, and manslaughter and failed to conform to the law.

**3. Homicide ⇐338(1)**

Alleged fact that instructions in murder prosecution were subject to objection that they failed to advise jury of distinction between first degree murder, second degree murder, and manslaughter, was not prejudicial error, where the evidence established premeditation or malice aforethought.

**4. Criminal law ⇐438**

In murder prosecution, admission of photograph showing condition of face and chest of deceased as result of defendant's attack on her, was proper, over objection that the only purpose of the photograph was to prejudice the jury because there was no question as to deceased's identity, since prosecution was not required, merely because identification was unquestioned, to withhold cumulative and corroborative evidence otherwise admissible. Code Civ. Proc. § 1954.

**5. Criminal law ⇐662(6)**

In murder prosecution, reading of testimony of prosecution's absent witness at defendant's former trial, was not in violation of statute providing that a defendant is entitled to be confronted with witness against him, in presence of the court, where cross-examination of the witness was also read. Pen.Code, § 686.

**6. Criminal law ⇐543(2)**

In murder prosecution wherein testimony of absent witness at prior trial was read to the jury, question whether due diligence was shown by prosecution in attempting to secure absent witness' appearance, was addressed to the trial judge's sound discretion.

**7. Criminal law ⇐543(2)**

In murder prosecution, permitting prosecution to read testimony of absent witness at prior trial was discretionary, where several attempts had been made to serve a subpoena on the witness to insure her presence at the trial, and it was discovered that she had left the state.

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Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Ernest N. Dunn was convicted of first degree murder, and he appeals.

Affirmed.

John W. Ross, Jr., of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., James O Reavis, Deputy Atty. Gen., and John Quincy Brown, Dist. Atty., of Sacramento, and Albert H. Mundt, Chief Deputy Dist. Atty., of Represa, for respondent.

SHENK, Justice.

Defendant appeals from a judgment of conviction of first degree murder imposing the extreme penalty, and from an order denying a new trial. His brief lists four points for reversal. One challenges the correctness of the instructions as a whole. Two concern alleged errors in the admission of testimony. The fourth questions the sufficiency of the showing of premeditation. The facts are established for the most part without contradiction by the testimony of eyewitnesses to the killing and by the circumstances immediately preceding and subsequent to that event.

Defendant and the deceased, Kathryn Way, were married in Arizona in 1936. Kathryn was then sixteen years of age. Defendant was twenty-eight and had two sons by a prior marriage, which may or may not have been dissolved. Defendant was an itinerant worker. Within a few months he and Kathryn separated, became reconciled, and again separated. Kathryn

then obtained a dissolution of the marriage, either by an annulment because of her minority or by divorce.

Thereafter Kathryn entered into two marriages, the first in 1940, terminated by divorce in 1944, and the second in March, 1945, terminated by an annulment in December, 1945. Meanwhile she and defendant maintained an intermittent correspondence. A reconciliation without remarriage was effected in June, 1945, when Kathryn, against the wishes of her family, left her parents' home in Sacramento and went to live with defendant in another community. Two or three months later the couple returned to Sacramento, and in November, 1945, moved into an apartment rented from a Mrs. Eliot.

While they were residing in the apartment, and on the night of March 3, 1946, after their return from a family picnic, a serious quarrel took place. Defendant admits that on that night he accomplished an act of sexual intercourse with Kathryn against her will. He used a physical force which left marks upon her throat observable by others the next day. On the morning of that day, March 4th, Kathryn arrived at the home of her parents soon after 8 o'clock. Accompanied by her mother she went to the police station and requested an escort while she obtained her clothes and other possessions from the apartment. This was refused, so she enlisted the aid of her brother and an uncle. When the defendant returned from work he found that Kathryn had moved out, taking most of her possessions with her. Thereafter, she resided with members of her family.

Between March 4th and March 18th, the date of the homicide, defendant was persistent in his efforts to intercept Kathryn. He knew that, accompanied by her sister-in-law, she customarily conveyed her father and brother to work in the morning and returned for them shortly before the close of the working day. On six or seven occasions the defendant approached the car in which Kathryn was sitting, engaged her in conversation, and asked her to return to him. Whenever Kathryn saw him approaching she followed the practice of rolling up the car window to within a short space from the top and locking the door on her side of the car. She repeatedly told the defendant that there was no possibility of a reconciliation. On March 10th, she wrote him to the same effect.

The defendant was working the night shift at a gasoline station. His employer had shown him a .25 caliber Colt automatic pistol which, for the protection of the station, was kept loaded in the locker room. On March 16th, the defendant asked a customer, Deputy Sheriff Bonetti, to secure enough shells to fill the clip. Bonetti told defendant he could not obtain additional shells. He examined the gun at that time and saw that there were four cartridges in the magazine and one in the chamber. Subsequently, the defendant found on the seat of his employer's car a sufficient number of cartridges to fill the gun. He then began to take it home with him when he went off duty.

The defendant knew that in the daytime Kathryn was taking care of the eighteen-months-old baby of Dr. and Mrs. Hubbard. On his way to work on the evening of March 16th, he called at the Hubbard home and talked of his desire to have Kathryn return to him. On March 17th, defendant's employer noticed that the pistol was missing and when defendant came to work at 9 that night, he asked defendant about it. When defendant said he had the gun, the employer told him to get a permit in the morning to carry a weapon, as he did not even want him to have it on the station lot without a permit.

Defendant's shift ended about seven the next morning, Monday, March 18th. He went to his apartment, still carrying the gun. He saw his landlady and told her he would pay his rent after he slept. About fifteen minutes later he tried to get a drink at a saloon across the street, but was refused service before eight o'clock. He then went to the Hubbard home but found that Kathryn had already called for the baby. He returned to the saloon and consumed two double "shots" of whiskey and two bottles of beer. He next drove to the home of Kathryn's parents and talked about her to her younger brother. While driving back to town, he saw Kathryn driving toward him, with her sister-in-law and the baby as passengers in the car. He sig-

nalled them to stop. Kathryn withdrew off to the side of the road, rolled up the car window, and locked the left-hand door.

Defendant approached her and asked Kathryn to roll down the window so he might talk to her. Then by the stratagem of pretending to borrow a cigarette, he persuaded her to lower the window to a point which permitted him to reach in and unlock the door. He asked her if she would come out or if he would have to kill her in the car. Then without giving her time to make an election, he fired three shots, two of which struck her temple and the other her hand. As the sister-in-law and baby crouched in the car, defendant dragged the stricken woman to the middle of the road and beat her about the face.

Meanwhile the sister-in-law locked the car doors and refused to permit defendant to put Kathryn in the rear seat. Telling him to take Kathryn to a hospital, she drove off and caused the authorities to be notified. At this point one Heaton approached in a truck and suggested calling an ambulance. Defendant said his wife had fallen out of the car and asked assistance in putting her into the rear seat. Heaton's observation of the condition of Kathryn and of the car aroused his suspicions. As defendant drove off towards Sacramento, Heaton followed him. Apparently noting that he was being followed, defendant drove to the Sacramento Emergency Hospital, but instead of stopping, he drove over the ramp and out. Heaton tried to follow but lost sight of him. Defendant stopped and surrendered the key of the apartment to the landlady, stating that he had shot his wife.

His movements during the next hour are not definitely accounted for, but physical evidence indicates that during that period he took a wrench from his tool kit and beat the dying woman about her private parts. He appeared at his place of work about 10:15, stated he had just shot his wife, and surrendered the pistol. He then inquired about the nearest hospital, and drove away. Shortly thereafter he stopped at another service station where he had previously worked, said that his wife had been run over, and asked that an ambulance be called. At this point the police caught up with him, and he was taken into custody. Kathryn was taken to the hospital but passed away within five minutes after her arrival. Death was caused mainly by the gunshot wounds at the base of her skull.

Defendant admitted what he had done to the police captain, deputy sheriff, and chief deputy district attorney. He stated that his wife had been unfaithful to him and had caused him a lot of trouble. On taking the witness stand in his own behalf he claimed that he could not remember anything about the events immediately surrounding the killing. The jury returned a verdict finding him guilty of murder in the first degree and expressly fixed the penalty at death. A verdict was also returned finding him to have been sane at the time of the homicide.

[1] Defendant's assertion that the evidence shows that at the time of the shooting he was acting without permeditation or malice aforethought is contrary to the facts. The evidence shows a premeditated, deliberate, and cruel killing. It shows without contradiction that defendant annoyed and harassed his victim, tracked her down, and shot her in cold blood. There is no evidence that he was intoxicated or showed any sign of intoxication by reason of the liquor which he consumed shortly before the shooting. Intoxication is not urged expressly in extenuation. Even if urged by indirection it is sufficient to reiterate the recent statement of this court in People v. Honeycutt, Cal.Sup., 172 P.2d 698, 704, that "the question as to the effect of defendant's intoxication, if any, was for the jury and they, adequately instructed [as also in the present case] on the subject, impliedly found against defendant's contention. It may be noted, in this connection, that the evidence is ample to support a finding that, in the hour before the killing, the defendant deliberately resorted to the use of intoxicants with the object of dulling any compunctions he thought might otherwise hamper him in carrying out the plan he had formed."

[2] Without argument, or quotation from, or identification of any instruction objected to, defendant challenges generally the instructions as a whole on the ground

that they failed to advise the jury of the distinction between murder of the first degree, murder of the second degree, and manslaughter, and failed to conform to the law as laid down in recent cases. People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Holt, 25 Cal.2d 59, 153 P.2d 21.

An examination of the instructions shows that they were carefully prepared to meet the requirements emphasized in the cited cases. They contain the specific elements omitted in instructions which were the subject of criticism in the original opinion of this court in People v. Heslen, Cal.Sup., 163 P.2d 21 (see People v. Heslen, 27 Cal. 2d 520, 165 P.2d 250). Certain instructions follow verbatim an instruction suggested in People v. Bender, 27 Cal.2d 164, 184, 185, 163 P.2d 8, quoted from People v. Thomas, supra, 25 Cal.2d at page 900, 156 P.2d 7. The words "deliberate" and "premeditate" are defined as this court defined them in the Bender case, 27 Cal.2d at page 183, 163 P.2d 8. The instructions also contain language of a type expressly approved in People v. Honeycutt, supra, 172 P.2d page 703.

[3] A review of the charge as a whole indicates that no instruction was given of the character condemned in the cited cases. Moreover, if any instructions could be subject to criticism, the error would not be prejudicial under the facts disclosed by the record.

[4] There was no error in the admission in evidence of a photograph taken after the homicide which showed the condition of the face and chest of Kathryn as a result of the attack. Defendant asserts that the picture was admissible solely for purposes of indentification, and that since there was no question as to the identity of the deceased, the only purpose of the exhibit was to prejudice the jury. The prosecution was not required, merely because identification was unquestioned, to withhold cumulative and corroborative evidence otherwise admissible. Defendant was permitted to introduce everything which he felt might tend to favor his cause with the jury, and the prosecution could not rightly be excluded from showing the details of the crime merely because they might have a tendency to influence the jury against the defendant. People v. Lisenba, 14 Cal.2d 403, 412, 94 P.2d 569; People v. Goodwin, 9 Cal.2d 711, 714, 72 P.2d 551, and cases there cited; People v. Bannon, 59 Cal.App. 50, 56, 209 P. 1029; Code Civ.Proc. § 1954.

Defendant contends that the court erred in permitting the testimony of Mrs. Laura Hubbard given at a former trial to be read in evidence thereby depriving him of his right of cross-examination at the present trial. Mrs. Hubbard's testimony at the former trial, including examination and cross-examination, was concluded on May 29, 1946. She had informed the district attorney that as soon as her husband, Dr. Hubbard, was discharged from the Army she intended to go with him to Baltimore. Dr. Hubbard was discharged during the former trial but waited over with Mrs. Hubbard for its conclusion. A mistrial was declared about 10:30 o'clock of the morning of June 5th. About 12:30 on that day a representative of the district attorney called to serve a subpoena on Mrs. Hubbard to insure her presence at the next trial. He did not find her at home and had a similar experience when he called again in the evening. The next morning, June 6th, when he made a third call, he was informed that the Hubbards had departed for the East earlier in the day.

[5-7] It is provided in section 686 of the Penal Code (as amended, Stats. 1911, p. 364) that the defendant in a criminal action is entitled "to be confronted with the witnesses against him, in the presence of the court." But it is also there provided that where it is satisfactorily shown to the court that a witness is "out of [the] jurisdiction" or "cannot with due diligence be found within the state," and that such witness has been cross-examined in the presence of the defendant at the former trial either by him or by his counsel the testimony of that witness may be admitted in evidence at a subsequent trial. Here the examination and cross-examination of Mrs. Hubbard on the former trial satisfied the constitutional and statutory requirements. People

v. Schwarz, 78 Cal.App. 561, 578-580, 248 P. 990; People v. Wilson, 26 Cal.App. 336, 146 P. 1048, 79 A.L.R. 1392, 1411; see People v. Clark, 151 Cal. 200, 90 P. 549; People v. Sierp, 116 Cal. 249, 48 P. 88. The question whether due diligence was shown in attempting to secure her appearance at the subsequent trial was addressed to the sound discretion of the trial judge. People v. Collup, 27 Cal.2d 829, 836, 167 P.2d 714; People v. Day, 219 Cal. 562, 27 P.2d 909; People v. Barker, 144 Cal. 705, 78 P. 266; People v. Reilly, 106 Cal. 648, 40 P. 13, 122 A.L.R. 425, 439. No abuse of discretion has been shown.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




29 Cal.2d 675

## TUCKER v. STATE BAR OF CALIFORNIA.

## READ v. SAME.

**L. A. 19665, 19672.**

**Supreme Court of California, In Bank.**

**Feb. 18, 1947.**

**Attorney and client ⇐10**

Attorneys at law and solicitors in chancery entitled to practice before the Supreme Court of New Jersey, but not before the Court of Errors and Appeals, which is the court of last resort, were not entitled to take examination for admission to practice in California since they had not been admitted to practice before the "highest court of a sister state". Business and Professions Code, § 6062; N.J.S.A.Const. art. 6, § 1, par. 1; Rules of Supreme Court, rule 7, N.J.S.A. Tit. 2; Rules of Court of Errors and Appeals, rules 2, 3, N.J.S.A. Tit. 2.

**See Words and Phrases, Permanent Edition, for all other definitions of "Highest Court of a Sister State".**

Separate petitions by Alexander Tucker and William H. Read, Jr., for a writ of mandate directed to the State Bar of California to compel the respondent to permit petitioners to take examination given to attorneys from other states.

Orders to show cause discharged and petitions denied.

Cummins & Cummins and Joseph J. Cummins, all of Los Angeles, for petitioner Tucker.

Henry G. Bodkin, of Los Angeles, for petitioner Read.

Pierce Works and Jerold E. Weil, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

Petitioners seek permission to take the examination given to attorneys from other states who apply for admission to practice here. They hold certificates as attorneys at law and solicitors in chancery and are entitled to practice before the Supreme Court of New Jersey, but they have not acquired the status of counsellors at law and are not entitled to practice as such in the Court of Errors and Appeals.

The question for decision is whether petitioners "have been admitted to practice before the highest court of a sister State," as required of out-of-state attorneys before being admitted here under the provisions of section 6062 of the Business & Professions Code.

The Court of Errors and Appeals is the court of "last resort in all causes" in the State of New Jersey (Const. of N.J., art. VI, § 1, ¶ 1, N.J.S.A.), and it is therefore the "highest court" in that state.

An applicant for admission to practice law in all the courts of New Jersey must pass two examinations. If he is successful in the first examination, he is admitted as an attorney at law and solicitor in chancery. He is required thereafter to practice at least three years in the Supreme Court and to pass another examination before he acquires the status of a counsellor at law, entitling him to practice in the Court of Errors and Appeals. (Rules of Supreme Court, rule 7, N.J.S.A. Tit. 2, [N.J.S.A., 2:1 to 2:23] (1939) p. 444.) An attorney

or solicitor may appear as such of record in cases of writs of error or appeals and service may be made upon him, but only a counsellor at law is permitted to be heard orally for any party litigant at the bar of the Court of Errors and Appeals, and a brief will not be considered in that court unless it is signed by a counsellor at law. (Rules of Court of Errors and Appeals, rules 2 and 3, N.J.S.A. Tit. 2, [N.J.S.A. 2:1 to 2:23] (1939) p. 337.) See Appley v. Township Committee, 1942, 129 N.J.L. 73, 28 A.2d 177.

It is therefore clear that an attorney at law and solicitor in chancery has a very limited or restricted right of appearance before the Court of Errors and Appeals, and he is not entitled to "practice" before that court as the term is generally understood. Only a counsellor at law is granted that privilege by the laws of New Jersey, and since petitioners have not acquired that status they have not been "admitted to practice before the highest court" of that state.

The orders to show cause are discharged and the petitions for writs are denied.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




29 Cal.2d 661

## EASTLICK v. CITY OF LOS ANGELES.

L. A. 19746.

Supreme Court of California, In Bank.

Feb. 14, 1947.

**1. Municipal corporations ⇐79**

Whether the Legislature has undertaken to occupy exclusively a given field of legislation, so that a local regulation imposing a higher standard of conduct with regard to the subject covered would necessarily be in conflict therewith, must be determined upon an analysis of the statute and the facts upon which it was intended to operate.

**2. Municipal corporations ⇐69**

The Legislature has power to make regulations covering matters of state concern and properly exercised such power in passage of Public Liability Act imposing liability upon municipalities for injuries resulting from defective public streets, etc., and in exercising such power the state may regulate the manner in which the rights given by such act may be enforced. Gen. Laws, Act 5149, § 1; Act 5619.

**3. Municipal corporations ⇐79**

The act supplementing the Public Liability Act, and providing a general scheme for the presentation of liability claims, occupies the entire field with respect to the subjects covered and impliedly precludes control to that extent by municipal or local regulations although matters not covered in connection with the prosecution of such claims must be governed by other existing statutes. Gen.Laws, Act 5149, § 1; Act 5619.

**4. Municipal corporations ⇐79**

A municipality may not curtail or abridge the rights granted by act supplementing the Public Liability Act by a charter provision specifying a shorter time limitation for the filing of claims than the period fixed by such acts. Gen.Laws, Act 5149, § 1; Act 5619.

**5. Municipal corporations ⇐79**

A municipality may not impose more onerous conditions affecting any other matter covered by the statute supplementing the Public Liability Act such as the contents of the claim. Gen.Laws, Act 5149, § 1; Act 5619.

**6. Municipal corporations ⇐79**

Where act supplementing Public Liability Act required claimant to specify only the extent of the injuries or damages received, charter provision of the city of Los Angeles requiring that the claim itemize the several elements of damages and set forth the total demand imposes a more burdensome condition than prescribed by the act for operation throughout the state. Gen. Laws, Act 5149, § 1; Act 5619.

**7. Municipal corporations ⇐741(1)**

The purpose of filing a claim against a city is to enable city officials to make

proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit if settlement should be shown to be proper and such purpose is fulfilled by a claim containing the facts required by the statute supplementing the Public Liability Act and additional details affecting city's auditing regulations cannot be required of a claimant seeking redress under the Public Liability Act. Gen.Laws, Act 5149, § 1; Act 5619.

**8. Municipal corporations ⇐79**

The provisions of the act supplementing the Public Liability Act are exclusive in regulating the presentation of claims arising under the Public Liability Act, and no city charter provisions relating to the presentation of claims, whether adopted before or after the effective date of the statute, are applicable within the field covered thereby. Gen.Laws, Act 5149, § 1; Act 5619.

**9. Municipal corporations ⇐757(1)**

Where United States Navy took over Terminal Island during the war and controlled travel to and from the island but persons lawfully on the island made free use of sidewalks without interference or objection by the Navy, city of Los Angeles was not relieved from duty of inspection and supervision of sidewalk or of keeping it in repair.

**10. Municipal corporations ⇐819(1)**

In action by pedestrian against city of Los Angeles for injuries sustained as a result of a fall on defective sidewalk on Terminal Island, evidence sustained finding that the street in question was a public street in the city of Los Angeles and had never passed from the city to the United States government so as to relieve the city of the duty of inspection and maintenance.

**11. Municipal corporations ⇐822(5)**

In action by pedestrian for injuries sustained from fall on defective sidewalk on Terminal Island where the city had made repeated claims during the trial that Terminal Island was in exclusive possession of the Navy, the court properly instructed jury that maintenance of guards and patrols by the military authorities did not relieve the city from the duty of maintaining the public streets and sidewalks within its territorial boundaries in a reasonably safe condition. Gen.Laws, Act 5149, § 1; Act 5619.

**12. Municipal corporations ⇐822(5)**

In action by pedestrian against city for injuries sustained from fall on defective sidewalk which evidence showed consisted of a three or four inch overlapping of the cement above the adjoining surface and had existed for at least two years prior to the accident and that the Navy had erected a fence which cast a shadow over the sidewalk, instruction that, if jury believed that erection of fence made the sidewalk dangerous, plaintiff must prove that city had knowledge of such fact and that after acquiring such knowledge the city failed, within a reasonable time, to protect the public against it, was properly refused. Gen.Laws, Act 5149, § 1; Act 5619.

**13. Municipal corporations ⇐821(6, 15)**

Whether break in sidewalk created a dangerous condition and the city was chargeable with notice of its existence were questions of fact for jury. Gen.Laws, Act 5149, § 1; Act 5619.

**14. Municipal corporations ⇐821(19)**

The effect of the construction of a fence by third person as a concurring act in relation to question of proximate cause of pedestrian's injury on defective sidewalk was for jury. Gen.Laws, Act 5149, § 1; Act 5619.

**15. Appeal and error ⇐1068(4)**

That court placed a maximum amount of recovery by plaintiff in harmony with original prayer of complaint, instead of in harmony with lower aggregate amount of damages stated in trial amendment to conform with the proof, was not prejudicial in view of verdict for considerably less than the amount of the damages stated in the amended complaint.

**16. Municipal corporations ⇐821(25)**

Whether pedestrian who was familiar with defective sidewalk was contributorily negligent in not seeing the defect at the time of accident or having it in mind, in view of fact of erection of a fence that cast shadows over the walk, was for jury. Gen.Laws, Act 5149, § 1; Act 5619.

**17. Appeal and error ⇐996**

Where from the evidence different inferences might reasonably be drawn as to whether pedestrian was in the exercise of ordinary care for her own safety and the jury had determined the question in favor of pedestrian, jury's conclusion would not be disturbed on appeal. Gen.Laws, Act 5149, § 1; Act 5619.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ethel Eastlick against the City of Los Angeles for personal injuries resulting from fall on defective sidewalk. From a judgment for plaintiff for $5,000 the defendant appeals.

Judgment affirmed.

Prior opinion 166 P.2d 648.

Ray L. Chesebro, City Atty., Arthur W. Nordstrom, Asst. City Atty., and Leonard Husar, Deputy City Atty., all of Los Angeles, for appellant.

Kenneth Sperry and Houser & Houser, all of Long Beach, for respondent.

SPENCE, Justice.

Defendant city of Los Angeles appeals from a judgment entered upon a verdict of $5,000 in favor of plaintiff for personal injuries sustained when she tripped and fell on a broken sidewalk within defendant's territorial limits.

The accident occurred on Cannery Street, Terminal Island, in the Harbor District of the city of Los Angeles. Cannery Street extends east and west and is 100 feet wide between property lines. It is intersected by Tuna Street, which extends north and south and is 40 feet wide. The condition of the sidewalk of Cannery Street, which was alleged to have been dangerous and to have caused plaintiff to fall, consisted of a break in the cement so that part of the pavement overlapped and projected three to four inches above the adjoining surface. This raised irregularity extended across the entire width of the sidewalk.

Plaintiff was employed in the Fisherman's Cafe, located on the east side of Tuna Street about one-half block south of Cannery Street. At about 7:30 p. m., October 27, 1943, at the conclusion of her day's overtime work, she left the cafe, walked northerly on the east side of Tuna Street, crossed the intersection of Cannery Street to the northwest corner and proceeded westerly on the sidewalk, some three to five feet wide, along the north side of Cannery Street. It was dark at the time and the spot where plaintiff fell—approximately in the middle of the block—was somewhat shaded by a fence that was in the course of construction along the north curb line of Cannery Street. A street light, located about 90 feet south of the break in the sidewalk and on the other side of the newly erected fence, was burning at the time in question. Plaintiff filed her verified claim with the city of Los Angeles. Upon its rejection, she instituted the present suit and recovered damages for the personal injuries sustained.

Defendant unavailingly presents the following points as grounds for reversal of the judgment: (1) That the claim filed by plaintiff was defective because it failed to state separately and itemize the several elements of damage, and to set forth the total amount of the demand, as required by the city charter; (2) that defendant city was under no duty to keep the sidewalk where plaintiff fell in a reasonably safe condition because it had no jurisdiction over that area; (3) that there was prejudicial error in the giving and refusal of instructions affecting, respectively, the matter of defendant's liability and the damages recoverable; and (4) that plaintiff was guilty of contributory negligence as a matter of law.

Plaintiff's action is based upon the Public Liability Act of 1923, imposing liability upon a municipality for injury to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, works and property. Stats.1923, p. 675; Deering's Gen.Laws, 1937, Act 5619, p. 2630. Supplementary to this act is the claim statute of 1931, requiring that "a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality * * * within ninety days after [the] accident * * * [and

that] such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Stats. 1931, p. 2475; Deering's Gen.Laws, 1937, Act 5149, § 1, p. 2204; Johnson v. City of Glendale, 12 Cal.App.2d 389, 393, 55 P.2d 580. Plaintiff's claim was made on a form of demand furnished by defendant and was duly verified. It stated her name and address, the date and place of the accident, and it itemized sums paid on account of doctors' and nurses' bills and charges for rent of a splint, in the total amount of $35. These payments were listed as made on October 30, 1943; the claim was filed November 16, 1943. In answer to the question, "How did damage or injury occur? Give full particulars" the claim stated, "walking to Ferry Bldg. from work (at Fisherman's Cafe), tripped on broken place in sidewalk and fell fracturing leg at knee joint." In answer to the question, "What damage or injuries do you claim resulted? Give full extent of injuries or damage claimed" the claim stated, "fractured leg at knee joint with the possibility of a stiff knee." In answer to the question, "What sum do you claim on account of each item of injury or damage?" the claim stated, "wages lost, Dr. fees, X-ray pictures, rent for splint and nurses wages."

Plaintiff's claim concededly was complete as measured by the requirements of the state law. But its sufficiency as a demand against defendant is challenged upon the basis of several sections of the charter, the essentials of which are summarized in section 368, which reads: "No demand can be approved by any board, officer or employee, or be audited, unless it specify each several item, with the date and amount thereof." Section 376, in part, provides: "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part." Defendant argues that a demand is not presented within the meaning of section 376 of the charter unless it specifies each separate item of damage, with the date and amount thereof. From this premise defendant advances the further proposition that at most plaintiff's claim, filed as a condition precedent to the maintenance of suit, would authorize a damage recovery of but $35, the total amount of her itemized demand. In fact, upon this theory defendant in the trial court, at the close of plaintiff's case, moved for a directed verdict against it to the extent of said sum; that motion was denied.

[1] In attacking plaintiff's statement of her cause of action defendant does not dispute the following settled propositions: (1) That a city, by adopting a charter, becomes independent of general laws only as to "municipal affairs," and that in matters of general statewide concern the general law is paramount (Const., art. XI, §§ 6, 8; City of Pasadena v. Charleville, 215 Cal 384, 388, 10 P.2d 745; West Coast Adver. Co. v. City and County of San Francisco, 14 Cal.2d 516, 519, 95 P.2d 138); (2) that the existence of a municipality's liability for the dangerous or defective condition of its streets is a matter of state concern, Rafferty v. City of Marysville, 207 Cal. 657, 665, 280 P. 118; Douglass v.City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353; and (3) that with regard to such a matter local regulations may be enforced only if they are not in conflict with the general law. White-Satra v. City of Los Angeles, 14 Cal. App.2d 688, 689, 58 P.2d 933; Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co., 28 Cal.App.2d 215, 220, 82 P.2d 216; Wilkes v. City and County of San Francisco, 44 Cal. App.2d 393, 396, 112 P.2d 759; Helbach v. City of Long Beach, 50 Cal.App.2d 242, 247, 123 P.2d 62. However, defendant contends that its charter provision as to itemization of damages is merely supplementary to the general law—an additional, not a contrary requirement—and therefore is valid. As authority for this position, defendant cites such cases as In re Iverson, 199 Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; and Natural Milk Producers Ass'n of California v. City and County of San Francisco, 20 Cal.2d 101, 124 P.2d 25. But these cases concerned local prohibitory enactments adopted, in the municipality's exercise of the police power, in a field where the applicable state law contained

language expressly indicating that the Legislature did not intend its regulations to be exclusive. See Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 147 A.L.R. 515. "Whether the legislature has undertaken to occupy exclusively a given field of legislation," so that a local regulation imposing a higher standard of conduct with regard to the subject covered would necessarily be in conflict, "is, we think, to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate." Mann v. Scott, 180 Cal. 550, 557, 558, 182 P. 281, 284.

[2-6] Since the Legislature has power to make regulations covering matters of state concern, as it did in enacting the Public Liability Act of 1923, it also has power to regulate the manner in which the rights given by said act may be enforced. This it did when it provided, in 1931, a general scheme for the presentation of such liability claims to be effective throughout the state. While matters not thereby covered in connection with the prosecution of such claims "must be governed by other existing statutes" (Hennessy v. County of San Bernardino, 47 Cal.App.2d 183, 186, 117 P. 2d 745, 747: see, also, Thompson v. County of Los Angeles, 140 Cal.App. 73, 75, 35 P.2d 185), with respect to the subjects covered, the 1931 statute occupies the entire field and it impliedly precludes control to that extent by municipal or local regulation. Thus, a municipality may not curtail or abridge the rights so granted by specifying, through charter provision, a shorter time limitation for the filing of such claims than the period fixed by the statute. Kelso v. Board of Education, 42 Cal.App.2d 415, 418, 109 P.2d 29; see, also, Wilkes v. City and County of San Francisco, supra, 44 Cal. App.2d 393, 395, 396, 112 P.2d 759. If a municipality may not impose more onerous conditions affecting the filing period allowed a claimant under the general law, it would reasonably follow that it may not impose more onerous conditions affecting any other matter covered by the statute, such as the contents of the claim. So with the point here involved, the statute requires the claimant to specify only "the extent of the injuries or damages received." The charter's provision that the claim itemize the several elements of damage and set forth the total demand is manifestly a more burdensome condition of recital as to the matter of damages than the requirement of the statute. Such charter provision is necessarily inconsistent with the general form of claim presentation adopted by the Legislature for operation throughout the state. As so analyzed, the present case is wholly distinct from the situation in Mann v. Scott, supra, 180 Cal. 550, 556, 182 P. 281, where a local police regulation, affecting the control of traffic on the city streets and imposing a stricter requirement than did the Motor Vehicle Act at the time in question, was sustained as "in aid and furtherance of the purpose of the general law * * * fit and appropriate to the necessities of the particular locality." No considerations with respect to the city's exercise of its police power enter here.

[7, 8] Defendant unavailingly argues that its auditing practice and procedure under its charter require the itemization of damages and the recital of the total demand as prerequisite to the allowance of a claim. Unquestionably, "the purpose of filing a claim against the city is to enable city officials to make proper investigation concerning the merits of the claim and to settle it without the expense of a law suit if settlement should be shown to be proper." Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co., supra, 28 Cal.App.2d 215, 223, 82 P.2d 216, 221. Such purpose is fulfilled by a claim containing the facts required by the claim statute of 1931. Additional details affecting defendant's auditing regulations are matters of internal business which cannot burden the standard form of claim required of a claimant seeking redress in pursuance of his statutory right under the Public Liability Act. Citation of the cases of Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345, and Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, is of no assistance to defendant. They merely hold that a municipality may adopt a charter provision regulating the presentation of claims and the terms thereof are applicable to a cause of action against the city where

"there is no general law upon the subject." Neither these cases nor those of Cathey v. City and County of San Francisco, 37 Cal. App.2d 575, 99 P.2d 1109, and Chilberg v. City of Los Angeles, 54 Cal.App.2d 99, 128 P.2d 693, also cited by defendant on the point of required compliance with a city's claim provision, involved a cause of action based upon the Public Liability Act. Cf. Wilkes v. City and County of San Francisco, supra, 44 Cal.App.2d 393, 398, 112 P.2d 759. Nor does defendant's citation of the case of Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918, fortify its position here. The cause of action there arose before the enactment of the claim statute of 1931 regulating the manner of presenting claims under the Public Liability Act, and consequently the city charter provision, requiring specification of the amount demanded or claimed, governed in the absence of a "general law upon the subject." But since the enactment of the claim statute of 1931, the provisions of that statute "are exclusive" in regulating the presentation of claims arising under the Public Liability Act, and no city charter provisions relating to the presentation of claims, whether adopted before or after the effective date of the statute, are applicable within the field covered thereby. Wilkes v. City and County of San Francisco, supra, 44 Cal.App.2d 393, 397, 112 P.2d 759; see, also, Helbach v. City of Long Beach, supra, 50 Cal.App.2d 242, 247, 123 P.2d 62.

For its second ground of objection to the judgment, defendant attacks the sufficiency of the record to establish its jurisdiction over the place of the accident at the time in question. Thus, defendant argues that there was no evidence that the sidewalk where plaintiff tripped and fell was under the possession, control, or management of the city, or that the city was under any duty to keep said sidewalk in a reasonably safe condition. This argument is premised upon certain fragmentary evidence with respect to the activities of the United States Navy in the Terminal Island area since December 7, 1941, incident to this country's entry into war.

Terminal Island is the land which forms the southerly and easterly boundary of Los Angeles Harbor. The particular section of the island in question was formerly used by commercial fishermen, particularly the Japanese. As appears from testimony at the trial, the Navy "took over" Terminal Island on December 7, 1941. It took exclusive possession of some sections and excluded the public therefrom; it also took control of all travel to and from the island and required civilians passing to and from the island to obtain and carry permits issued by the Navy; it stationed guards at different points, one of them located at the northeast corner of Tuna and Cannery Streets. Plaintiff carried a pass which she regularly exhibited upon entering or leaving the island. She came across the channel from San Pedro by ferry and was accustomed to use the sidewalk in question in going to and from her place of work. Persons lawfully on the island made free use of this sidewalk, without interference or objection by the Navy. It was not closed to such use and travel at any time. From and after December 7, 1941, the city discontinued inspection and supervision of the sidewalk in question, and of streets and sidewalks generally in the areas where the Navy carried on its activities. There was no evidence of any agreement with the Navy upon the subject or that the Navy ever undertook or ever did any repair work on the streets or sidewalks. Two days prior to the date of plaintiff's accident, the Navy commenced the erection of a board fence along the northerly curb line of Cannery Street. By the time of the evening in question, the construction had progressed easterly to a point slightly beyond the place where plaintiff fell. The fence was built of boards about five feet high, some four to six inches wide, spaced two or more inches apart. The sidewalk was left open at the intersecting streets, and the fence was not intended to and did not bar or interfere with travel on the sidewalk. On each side of the fence was fastened a sign, "Property of United States Navy."

[9] There is nothing in this state of facts which would have relieved the city of its duty and responsibility to keep the sidewalk in repair. The failure to inspect it and repair it was an act of voluntary omission on the part of the city and did not result

from any necessity based upon the precautionary measures that were being taken by the Navy to guard the island and control the activities of the people thereon. No particular significance attaches to the Navy's erection and signposting of the fence as its property, for such action might reasonably be viewed as but a part of its street patrol program on the island; the general use of the abutting sidewalk was in nowise affected.

Nor is defendant's position aided by reference to the record's showing that in June, 1943—some four months prior to the date of plaintiff's accident—the United States Government commenced an action to condemn some interest in the land abutting on Cannery Street to the north of that street and west of Tuna Street, as well as certain parcels in other sections of Terminal Island. The condemnation proceeding presumably was undertaken in pursuance of the Navy's entry into possession of those parts of the island. The nature of the interest, thus sought to be acquired, does not appear. Apparently a decree of some sort had been entered in the proceeding, with which counsel herein were familiar, but no copy of it was introduced in evidence nor were its terms otherwise proved or agreed upon. Defendant argues that title to the land adjoining Cannery Street on the north, and including the sidewalk in question, which was a part of the street, and the exclusive right to the possession and use thereof, had passed from the city to the United States Government. This argument finds no support in the record.

[10] Although the answer of defendant denied that Cannery Street was a public street in the city of Los Angeles, there was ample evidence at the trial that it was plotted and constructed by the city and had been used as a public thoroughfare from the time the street was improved and the sidewalk was built in 1924 to a date subsequent to October 27, 1943. It was not questioned at the trial, nor is it questioned here, that Cannery Street was so used for many years and that the sidewalk was a part of it. There is no showing in the record that title or the right to possession and use of the sidewalk passed from the public to the United States Government at any time, so as to relieve the city of the duty of inspection and maintenance.

A map, in evidence, prepared by the Harbor Department at the time of said street construction on the island in 1924, shows Cannery Street, according to scale, to be 100 feet wide, inclusive of the sidewalk. To be correlated with this is another map in evidence, bearing the signature of the Harbor Engineer under date "6-4-42" and showing a corresponding delineation of the streets in question as well as the areas designated "Property of United States Navy." Cannery Street, as shown on this latter map, was scaled by one of the witnesses and he testified that the width was 100 feet. While this map does not show the sidewalk separately, there was testimony that the sidewalk in question was included in the 100-foot width of Cannery Street. It is also shown by said map that the area in possession of the Navy did not include the sidewalk but extended only to the border of Cannery Street at its 100-foot extremity. There is no evidence that the later condemnation proceeding affected Cannery Street or the sidewalk in question. In such circumstances that proceeding, and the Navy's taking possession thereunder of the area north of the sidewalk, did not interfere with the use of the sidewalk by the public or relieve the city of its duty to maintain it in a reasonably safe condition for public travel. Contrary to defendant's position, no boundary significance may be assigned under the record to the Navy's location of its fence along the northerly curb line of Cannery Street, bordering the sidewalk but in nowise interfering with its general use by the public.

[11] For its third ground of objection, defendant challenges the propriety of the giving and refusal of certain instructions. Because of its relation to the question of the city's continued responsibility for the maintenance of the streets on Terminal Island, the first point to be noted will be defendant's attack upon the court's giving of the following instruction: "Under date of December 12, 1941, the President of the United States, by Executive Order No. 8972, made provision for the establishment and maintenance of military guards and patrols for the purpose of protecting from injury

or destruction any national defense material and utilities. The mere fact that such guards and patrols may have been maintained by the military authorities did not relieve the defendant, City of Los Angeles, a municipal corporation, its officers or boards, from the duty of maintaining the public streets and sidewalks within its territorial boundaries, including its Harbor Department, in a reasonably safe condition." Defendant argues that the instruction was upon matters not in evidence and only served to confuse the jury as to the import of the Navy's activities on Terminal Island. An examination of the record refutes defendant's position and establishes the need for some such clarification on the matter. Defendant had made repeated claims during the trial that the Navy had entered upon Terminal Island by taking exclusive possession of sections of it and by guarding the remainder. In cross-examining plaintiff, counsel for defendant exhibited to her a photograph and read therefrom the inscription on a sign, "Terminal Island is under Navy Jurisdiction by Presidential Executive Order. (Signed) Commander * * *," and plaintiff was asked whether she saw such a sign at the entrance to the ferry as she traveled to and from the island. An objection was sustained but the question was immediately repeated and plaintiff responded that she did not remember. Thus, the existence of such a sign was disclosed to the jury in this indirect manner. Moreover, the Harbor Engineer, called as a witness for plaintiff, testified that he had written on a map which was used in evidence such statements as "Sign on Fence, 'Property of U. S. Navy,' Sign on Building, 'Warning, Federal Government Property, No Trespassing Under Penalty of Law.'" He testified that he had done this because such signs were on the property. Several times in the course of his testimony this witness took occasion to observe that the property was "under the jurisdiction of the United States Navy" and that "the United States Navy assumed jurisdiction of that area." Although there was no evidence as to the terms of Executive Order No. 8972, sufficient mention had been made of it as to render proper some appropriate instruction to the jury, and the instruction in question was a correct statement of the law. Cf. Bosqui v. City of San Bernardino, 2 Cal.2d 747, 758-760, 43 P.2d 547; Shea v. City of San Bernardino, 7 Cal.2d 688, 693, 62 P.2d 365.

[12-14] The next point to be noted in this regard is defendant's claim of error upon the court's refusal of the following instruction: "If you believe that the erection of the fence along the southerly side of the sidewalk made the condition of the sidewalk, where plaintiff fell, dangerous because it rendered the condition difficult to see, before plaintiff can recover in this case she must prove to your satisfaction that the City of Los Angeles or the Board of Harbor Commissioners of the City of Los Angeles had knowledge of such fact, and that after acquiring such knowledge, the City or the Board failed within a reasonable time to protect the public against it." The instruction was properly refused because it does not correctly reflect the factual considerations entering into the determination of the city's liability. The broken condition of the sidewalk consisted in a three to four-inch overlapping of the cement above the adjoining surface. There was testimony that this condition had existed for at least two years prior to plaintiff's accident. Whether such break in the sidewalk created a dangerous condition and the city was chargeable with notice of its existence were questions of fact for the jury to resolve. George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723; Bauman v. City and County of San Francisco, 42 Cal. App.2d 144, 157, 108 P.2d 989; Lorraine v. City of Los Angeles, 55 Cal.App.2d 27, 30-31, 130 P.2d 140; Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 693, 131 P.2d 874. An added factor entering into the scene of plaintiff's fall was the Navy's erection of the fence casting a shadow over the sidewalk in question. Under these combined circumstances the effect of the construction of the fence as a concurring act in relation to the question of proximate cause was also for the jury to determine. Bauman v. City and County of San Francisco, supra, 42 Cal.App.2d 144, 154, 108 P.2d 989. Yet by its proposed instruction, defendant would

restrict the jury to a finding that the condition of the sidewalk was dangerous only because it was somewhat shaded by the fence and would predicate the city's liability wholly on proof of its knowledge of the added hazard. Pertinent to defendant's position is the discussion of the point in Bosqui v. City of San Bernardino, supra, 2 Cal.2d 747, at page 764, 43 P.2d 547, at page 554: "The defendant city suggests that the Public Liability Act does not apply where the defective condition of the street or highway concurs with some other efficient cause or act of a third person to cause the injury. * * * In our opinion, *where the thing exists which is denounced by the statute, namely, the neglect to remedy a dangerous or defective condition after knowledge thereof, and it proximately causes the injury, the City is liable under the clear meaning of the law despite the existence of another and concurring cause.*" Emphasis added. See, also, Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co., supra, 28 Cal. App.2d 215, 219, 220, 82 P.2d 216. The cases of Nicholson v. City of Los Angeles, 5 Cal. 2d 361, 54 P.2d 725, and Whiting v. National City, 9 Cal. 2d 163, 69 P.2d 990, have no application here in relation to the establishment of defendant's liability, where it cannot be said that the break in the sidewalk was a minor or trivial defect as a matter of law. Balkwill v. City of Stockton, 50 Cal.App.2d 661, 669, 123 P.2d 596; Sheldon v. City of Los Angeles, supra, 55 Cal.App.2d 690, 693, 131 P.2d 874.

[15] Defendant's third point of challenge to be here noted is its objection to the trial court's giving of the following instruction: "The amount of damages alleged in the complaint to have been suffered by plaintiff is $8,895.00. This allegation is merely a claim and is not evidence and must not be considered by you as evidence. It does, however, fix a maximum limit and you are not permitted to award plaintiff more than that amount." Defendant points out that the complaint, upon amendment at the trial to conform with the proof, alleged items of damage to the aggregate sum of $7,385—general damages in the amount of $5,000 and special damages in the amount of $2,385—but that the prayer, as amended, was changed to $8,895. While not objecting to the propriety of advising the jury as to the amount demanded in the complaint, defendant maintains that the amount so stated should have been the total sum of the items of alleged damages rather than the inflated figure of the prayer. Regardless of the merit of defendant's objection, which properly should have been made in the trial court so that the discrepancy could have been there obviated (Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644), no harm appears to have resulted from the inaccuracy in the instruction. The verdict was for $5,000, well within the figure conceded by defendant to represent the limit of plaintiff's total demand.

[16, 17] Defendant's final point as ground for reversal is the claim that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff testified that at the point where she fell, "one piece of the sidewalk overlapped the other * * * about three inches"; that this condition extended "the entire width of the sidewalk"; that she had been working on Terminal Island "about five months," had "stepped over [the broken section] twice a day"; that she did not see the break nor have it in mind just before she fell, and that the newly erected fence cast shadows, although she was not at the time aware of the change that this made in the lighting conditions. This testimony would not establish as a matter of law that plaintiff was guilty of contributory negligence. The boards of the fence were spaced two inches or more apart. Such shadows as were cast would have alternated with strips of light; plaintiff had not previously passed along the sidewalk under these conditions, lessening the illumination shed over the area by the street light some 90 feet distant. Plaintiff explained that she came upon the break in the sidewalk before she expected and without realizing that the changed conditions, due to the construction of the fence, decreased the visibility of the break. These facts would allow reasonable differences of opinion as to whether plaintiff's failure to see the break under the new and unfamiliar conditions was a failure to exercise ordinary care for her own safety. The jury deter-

mined the question adversely to defendant; its conclusion will not be disturbed on appeal. See Moore v. Marshall, 41 Cal.App. 2d 490, 494, 107 P.2d 89.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.




78 Cal.App.2d 108

**PEOPLE v. WILSON.**

**Cr. 4039.**

District Court of Appeal, Second District, Division 3, California.

Feb. 14, 1947.

**1. Automobiles ⇐344**

The driving of an automobile in a negligent, though not grossly negligent manner, which causes the death of a human being, is "manslaughter" within the meaning of statute dealing with the unlawful killing of a human being without malice by the driver of a vehicle. Pen.Code, § 192, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Manslaughter".

**2. Automobiles ⇐344**

Where a person is doing anything dangerous or has charge of anything dangerous in its use, such as an automobile, and acts without proper precautions that a person of ordinary prudence would have used, and death of another results therefrom, his act or neglect is a criminal act even though his negligence does not amount to wanton or reckless disregard of human safety or life. Pen.Code, § 192, subd. 3.

**3. Statutes ⇐225**

Statute respecting unlawful killing of a human being without malice by the driver of a vehicle in commission of an unlawful act, should be read with statute providing that homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means, with ordinary caution, and without unlawful intent. Pen. Code, § 192, subd. 3(b); § 195, subd. 1.

**4. Automobiles ⇐346**

A homicide proximately resulting from a commission by a motorist of unlawful act, not amounting to felony, without gross negligence, or from commission of unlawful act which might produce death in unlawful manner, but without gross negligence, is not excusable under statute excusing homicide committed by accident and misfortune in doing a lawful act by lawful means, and therefore act causing death is criminal negligence within statute requiring that in every crime there must exist a union of act and intent, or criminal negligence. Pen.Code, § 20; § 192, subd. 3(b); § 195, subd. 1.

**5. Criminal law ⇐13**

Statute respecting manslaughter by driver of a vehicle in commission of an unlawful act not amounting to a felony, is not void for uncertainty, on ground that a defendant charged thereunder would not be appraised of the particular acts of which he was accused. Pen.Code, § 192, subd. 3(b).

**6. Automobiles ⇐352**

Information charging that motorist wilfully, unlawfully and feloniously killed, without malice, a named human being while defendant was operating an automobile with gross negligence was sufficient to allow proof in homicide prosecution as to how automobile was operated and to permit the establishment of facts under which motorist might be shown guilty of one or more of the acts or omissions which are the elements of the offense of manslaughter under the statute. Pen. Code, § 192, subd. 3(b).

**7. Automobiles ⇐353**

Motorist charged with homicide was required to meet evidence tending to show that deaths proximately resulted from the commission by her of an unlawful act or from the commission of a lawful act which might produce death, either with or with-

out gross negligence. Pen.Code, § 192, subd. 3(b).

**8. Automobiles ⇐357**

In prosecution of motorist, for negligent homicide giving of instruction dealing with ordinary negligence, was not error, since the negligent driving of an automobile is an unlawful act and an element of the misdemeanor offense of manslaughter. Pen.Code, § 192, subd. 3(b).

**9. Automobiles ⇐357**

In homicide prosecution of motorist charged with gross negligence, giving of instruction with reference to ordinary negligence was proper, since information charging gross negligence embraced the driving of an automobile in a negligent manner. Pen.Code, § 192, subd. 3(b).

**10. Automobiles ⇐357**

In homicide prosecution of motorist, instruction that it is unlawful to drive a vehicle on a highway at a speed greater than is reasonable or prudent having due regard for traffic, surface and width of highway and in no event at a speed endangering the safety of persons or property, was proper. Vehicle Code, § 510.

**11. Criminal law ⇐808½**

In homicide prosecution of motorist, court properly instructed in language of statute providing that motorist may proceed only with caution through intersection when traffic light is yellow, that every pedestrian crossing a roadway shall yield right of way to all vehicles, and that statutes shall not relieve motorist from duty to exercise due care for safety of any pedestrian on the road. Vehicle Code, §§ 477 (2), 562.

**12. Automobiles ⇐355(13)**

Evidence sustained conviction of motorist for negligent homicide. Pen.Code, § 192, subd. 3(b).

**13. Criminal law ⇐1028**

Where defendant was present in homicide prosecution and heard her attorney enter into stipulations that pedestrians killed died as result of being struck by defendant's automobile, but made no objection thereto, she could not on appeal question the authority of her attorney to enter into the stipulations.

**14. Attorney and client ⇐86**

An attorney has implied authority to enter into stipulations affecting procedure in the trial, as distinguished from those which go to the cause of the action itself.

**15. Criminal law ⇐1028**

A defendant may not assert on appeal procedural rights which he waived at the trial.

**16. Automobiles ⇐355(13)**

In homicide prosecution, evidence, with stipulations, was sufficient to prove the deaths of pedestrians allegedly struck by motorist's automobile. Pen.Code, § 192, subd. 3(b).

**17. Criminal law ⇐102**

The fact that motorist charged with felony of manslaughter was convicted only of misdemeanor of negligent homicide, did not deprive Superior Court of jurisdiction to pronounce judgment, since the Superior Court was the only court with jurisdiction of the felony prosecution. Pen.Code, § 192, subd. 3(a, b).

**18. Criminal law ⇐781(1)**

In homicide prosecution of motorist, motorist was not entitled to instruction that evidence of oral admissions by her should be viewed with caution, where the only evidence as to any oral admission was testimony of police officer that motorist stated that she was driving 35 or 40 miles an hour, rather than 25 miles an hour as claimed by her at the trial, where she admitted that she made the statement to the officer but explained that she was referring to speed before she reached the scene of the accident. Pen.Code, § 192, subd. 3(b).

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Bernice Wilson was convicted on three charges of negligent homicide, and she appeals.

Affirmed.

Joseph W. Ryan, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., all of Los Angeles, for respondent.

SHINN, Justice.

Defendant appeals from judgments of conviction of three charges of negligent homicide, and from an order denying her a new trial.

In count I of the information, defendant was charged with the crime of manslaughter, a felony, committed as follows: "That the said Bernice Wilson, on or about the 25th day of September, 1945, at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously kill, without malice, one Marie M. Peeler, a human being, while in the operation of a vehicle and with gross negligence." Counts II and III were the same except for the substitution of the name of Gussie Solomon in count II and John Nelis in count III. Section 192 of the Penal Code, as amended in 1945, Stats. 1945, ch. 1006, sec. 1, reads in part, as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: * * *

"3. In the driving of a vehicle—

"(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

"(b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

"This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner."

Under section 193, violation of subsection 3 (a) is punishable either by imprisonment in the county jail for not more than one year or in the State prison for not more than five years; the jury may recommend punishment in the county jail, and if such recommendation is made the court shall not sentence the defendant to imprisonment in the State prison. Violation of subdivision (b) of subsection 3 is punishable by imprisonment in the county jail for not more than one year.

[1, 2] The basis of the principal grounds of the appeal is that the driving of a vehicle in a negligent, but not grossly negligent, manner, which causes the death of a human being, has not been and may not be made a criminal offense, for the reason that ordinary negligence does not amount to criminal negligence as the latter term is well understood in law. The same argument runs throughout defendant's briefs as to the power of the legislature to denounce as a crime the acts specified in subsection 3 (b), as to the proper interpretation of the same, as to the propriety of several instructions that were given, and as to the sufficiency of the evidence to prove the commission of a criminal act. This basic proposition is unsound, and all the claims of error depending upon it are untenable. Section 20, Penal Code, reads: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." One of defendant's contentions appears to be that by force of section 20, the legislature may not denounce as a crime any act which is not committed intentionally or with criminal negligence as the latter term was understood in law at the time of the adoption of section 20 in 1872. Substantially the same contention was made in People v. Pociask, 14 Cal.2d 679, 96 P.2d 788, where the court quoted from People v. Wilson, 193 Cal. 512, 226 P. 5, as follows at page 684 of 14 Cal.2d, at page 791 of 96 P.2d: "The proper rule deducible from the cases cited in the note above referred to (note following report of Johnson v. State, 66 Ohio St. 59, 63 N.E. 607, 61 L.R.A. 277, 90 Am.St.Rep. 564) would seem to be this: That when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circum-

stances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life." And in upholding a conviction of negligent homicide for death occurring as the proximate result of injuries caused by the driving of a vehicle in a negligent manner, which was then made a crime by section 500 of the Vehicle Code (Stats. 1935, P. 2141), the court said at page 685 of 14 Cal. 2d, at page 792 of 96 P.2d: "Exhaustive research has been made into the question of what constitutes criminal negligence under the common law and as applied under statutes in other jurisdictions. See People v. Angelo, supra [246 N.Y. 451, 159 N.E. 394]; note to Johnson v. State, supra; appendix to article, 'Negligent Homicide', 25 Calif. Law Rev. 1, 37. There is no controlling authority which would permit this court to apply any other rule or definition than that declared by the legislature and, with but slight and uncontrolling exception, recognized and followed in this state."

[3, 4] Section 192, subdivision 3 (b), should be read with Penal Code section 195, subdivision 1, reading: "Homicide is excusable in the following cases: 1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." A homicide proximately resulting from the commission of an unlawful act not amounting to felony, without gross negligence, or from the commission of a lawful act which might produce death in an unlawful manner, but without gross negligence, would not be excusable under section 195, and the act that caused the death would be an act of criminal negligence within the meaning of section 20. In harmonizing the three sections it must be considered that it is implicit in subsection 3 (b) that the commission in a negligent manner, but without gross negligence, of a lawful act which might produce death would be the commission of the act in an unlawful manner, since the act, if committed with usual and ordinary caution and without any unlawful intent, would be excusable under section 195.

[5-7] It is contended that subdivision (b) is void for uncertainty, in that a defendant charged thereunder would not be appraised of the particular acts of which he was accused. We find no uncertainty in the section. The terms "lawful" and "unlawful" are well understood in law. Defendant says in her brief that an act, to be unlawful, need not be punishable as a crime, and she cites authorities to support her statement. It is a correct statement. An act which is expressly forbidden by law is an unlawful act and an act committed in a manner forbidden by law is committed in an unlawful manner. The information charged the offense of manslaughter in the language of the statute and accused defendant of causing the deaths of the three named persons while in the operation of a vehicle and with gross negligence. The information was sufficient to allow proof as to how the vehicle was operated and to establish facts under which defendant might be shown guilty of one or more of the acts or omissions which are elements of the offense of manslaughter under subsection 3. Defendant was required to meet evidence tending to show that the deaths proximately resulted from the commission by her of an unlawful act or from the commission of a lawful act which might produce death, either with or without gross negligence. People v. Dobbs, 70 Cal.App.2d 261, 161 P.2d 46. She was sufficiently appraised of the acts with which she was charged and which constituted the offense.

It was the theory of the prosecution that defendant drove her car in violation of certain sections of the Vehicle Code and with gross negligence. Instructions were given which were appropriate in a trial of these issues. Defendant assigns the giving of these several instructions as error, and a discussion of them necessitates a general statement of the evidence. Shortly after 10 o'clock on the night of September 25, 1945, Mrs. Marie Peeler was crossing Vermont Avenue from west to east at 76th Street, in the northerly unmarked crosswalk, when she was struck by an automobile driven by a 16-year-old boy, Norman Schumow, traveling in a northerly direction. Double street car tracks extended along Vermont Avenue and after the accident Mrs. Peeler was ly-

ing at the northerly line of the unmarked crosswalk about twelve or fifteen feet east of the railway tracks; she had suffered a fractured arm in the accident, was moaning and trying to speak but was not wholly conscious. A number of people gathered about her in a circle some six or seven feet in diameter and one of them examined her and found her alive. A blanket and a jacket were placed over her and a purse was placed under her head. A man stood out in the center of the street directing traffic. Quite a crowd of people had gathered and they were being ordered to step back out of the street, when, as described in the evidence, there was a flash of light and an automobile approaching from the south ran directly through the center of the crowd, knocking people in all directions. This was defendant's car; it did not change speed from the time it entered the intersection until after the people were struck, and it was stopped 85 feet north of the north curb line of 76th Street. Defendant got out of her car, returned to the scene and said, "O, my God, did I do this?" Ten people were injured, three of them fatally. Lester P. Schmidt, who was in the crowd, testified that almost immediately after the accident he walked over to where Mrs. Solomon and Mrs. Peeler lay, and that they were then dead. Officers soon arrived, measured the distance from the point of the accident to the point where defendant's car stopped, and testified that it was 85 feet. Mrs. Peeler's body was carried from a point where it lay after the first accident to a point just to the rear of defendant's car after it was stopped. The driving lights of defendant's car were on and she testified that she could see through the intersection and the crosswalk. There was no evidence that anything obstructed her view ahead of her car as she approached and crossed the intersection. She testified that she was driving about 25 miles an hour and that she observed no one in the street until she was about ten feet north of the southerly crosswalk, when she started to swerve to the left and then applied her brakes, which were in good condition. Light standards bearing two lightly frosted globes were at each of the four corners of the intersection, a similar standard was situated in the center of each block and at the time of the accident each was lighted. There were semaphore type signals at each of the four corners of the intersection. At the time of the accident they were in operation, flashing a light intermittently through an eight-inch yellow or amber globe. There were buttons that might be pushed by pedestrians which turned on red lights as signals to north and southbound traffic on Vermont. There was a marked crosswalk at the south boundary of the intersection. At the northeast corner of the intersection there was a brightly lighted store and there was evidence that the visibility at the point was good. The weather was clear and dry. One witness, who had ridden a scooter following the Schumow car, stated that the weather was very clear and that he could see in front of him for approximately half a mile. An officer who arrived after the accident testified that he had no difficulty seeing the crowd of people when he was half a block away.

[8] Instructions were given which correctly defined the terms "negligence" and "gross negligence" and the jury was further instructed as follows: "If you are satisfied beyond a reasonable doubt that the defendant committed the acts charged in the information but that the acts committed by the defendant were not accompanied by gross negligence but by ordinary negligence, it is your duty to so find in your verdict." Defendant states: "Nowhere in section 192 or 193 Penal Code, as amended, do we find legal support of the statement that ordinary negligence is sufficient to warrant the jury in finding the defendant guilty of the offenses charged." As already stated, the negligent driving of a vehicle is an unlawful act and an element of the misdemeanor offense. In the same connection defendant cites People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978, 983, which in turn cites People v. Driggs, 111 Cal.App. 42, 295 P. 51, both to the effect that "in order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence." These cases are cited in defendant's briefs under the heading of

insufficiency of the evidence, but they furnish the basis of the contention that the instructions on negligence should not have been given. This is another phase of the argument which we have already considered. Moreover, the holding in the two cited cases was expressly disapproved by the court in People v. Pociask, supra, 14 Cal.2d 679, at page 684, 96 P.2d 788.

[9] It is claimed that it was error to instruct with reference to ordinary negligence, for the additional reason that the information charged only the commission of gross negligence. It is said that the question of ordinary negligence was not within the issues. People v. Okada, 14 Cal.App.2d 660, 58 P.2d 967, and People v. Banks, 17 Cal. App.2d 508, 62 P.2d 160, cited by defendant, are not in point. The prosecutions there were under informations charging that the defendants "did wilfully, unlawfully and feloniously operate a vehicle, to wit, an automobile, in a negligent and unlawful manner, causing death," etc. Section 500 of the Vehicle Code defined negligent homicide to consist of the acts charged by the information or death caused "in the commission of an unlawful act not amounting to felony." The court instructed the jury that in order to convict it was not necessary to find the defendant guilty of driving the vehicle in a negligent manner, but that he could be convicted if it was found that death resulted from the commission of an unlawful act not amounting to a felony, although that phase of the offense was not charged in the information. This was held to be reversible error. In the present case, as we have seen, the charge as laid embraced the driving of a vehicle in a negligent manner.

The jury was instructed as follows:

"You are instructed that it is unlawful to drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on and the surface and width of the highway and in no event at a speed which endangers the safety of persons or property. Section 510 Vehicle Code."

Section 510 of the Vehicle Code reads as follows:

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

[10, 11] Conduct in violation of section 510 would necessarily be unlawful conduct. It is said in appellant's opening brief: "We have been unable to find any case wherein a criminal prosecution was had under section 510 Vehicle Code." For the reasons heretofore stated, violation of this section would have been unlawful even though not penal, and the instruction was called for. It was also proper to instruct in the language of section 477 (2) of the Vehicle Code, that "When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution," and in the language of section 562, Vehicle Code, that "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. (b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Defendant criticizes the giving of the latter instruction because it was not shown that the persons injured were crossing the roadway. No harm could have come to defendant from this instruction. The right of way rule which it states operated in her favor.

Most of the arguments above noted are again advanced under the heading of insufficiency of the evidence. Here defendant reverts to the original proposition that the crime of manslaughter cannot be founded upon the negligent operation of a vehicle. Defendant cites People v. Young, 20 Cal.2d 832, 129 P.2d 353, and several later cases which involved prosecutions under section 500 of the Vehicle Code, as amended in 1941 (repealed in 1943). That section provided: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to, the safety of others, the person so operating such vehicle

shall be guilty of negligent homicide, a felony * * *." The cited cases obviously are not in point in a prosecution for felony manslaughter or misdemeanor manslaughter in the operation of a vehicle under section 192 as it now stands.

[12] It is unnecessary to review the evidence for the purpose of pointing out wherein it was sufficient to justify a finding that defendant was not driving in the exercise of ordinary care or in the fulfillment of her duties as defined in the instructions. It is not surprising that the jury determined from the evidence that in causing the death of three people and injury to seven others, defendant was not driving with the care usually exercised by persons of ordinary prudence and caution. There was nothing to obstruct her vision or to excuse her failure to see the crowd in the street ahead of her. It was an inescapable conclusion that she failed to see them in time to avoid them only because she was paying little or no attention to what lay ahead of her. People v. Leitgeb, 77 Cal.App. 764, 176 P.2d 384.

[13-16] Another of defendant's points is that the corpus delicti was not established, for the reason that there was no proof that the three persons met death through the accidents. Defendant says: "We agree that the three persons named in the information are dead. How they came to their death we do not know, except that they came to their death (at least the two names in counts II and III) subsequent to the first accident, in which this defendant and appellant had nothing to do." As to the death of Mrs. Peeler, it was stipulated that she "died as the result of the combination of injuries sustained when she was struck by the automobile driven by Schumow, and the second car which was involved in that accident; that it was the combination of injuries suffered from both which resulted in her death." As to decedents Gussie Solomon and John Nelis, it was stipulated that they died as a result of injuries sustained "in the second accident, in which the defendant was involved." In view of these stipulations the trial proceeded as if the deaths of two of the victims were caused by their being struck by defendant's car, and the death of the third by injuries inflicted by defendant's car and that of Schumow. Defendant now contends that her counsel at the trial had no authority to enter into said stipulations. No precedent is cited which supports this contention and we are of the opinion that it is without merit. Defendant was present and heard her attorney enter into the stipulations. She at no time objected thereto nor sought to be relieved therefrom, nor did her attorney make any such request in her behalf. No contention is advanced that the stipulations were not in accordance with the facts, nor is it suggested that it would have been to plaintiff's advantage for the prosecution to call as witnesses the coroner or autopsy surgeon to give testimony as to the causes of deaths, or the relatives or friends of the deceased persons to testify to identifications of their dead bodies. It would appear that the stipulations were made in the exercise of good judgment on the part of defendant's attorney and that defendant was not prejudiced thereby. But however this may be, defendant is in no position to question the authority of her attorney. When the stipulations were made in her presence and the terms and import of them were fully understood by her, their binding force did not rest upon the authority of the attorney derived from the attorney and client relationship, any more than it did upon her consent thereto, which was evidenced by her silence. An attorney has implied authority to enter into stipulations affecting procedure in the trial, as distinguished from those which go to the cause of action itself, People v. Hanna, 36 Cal.App.2d 333, 97 P.2d 847; 5 Am.Jur. p. 318, and a defendant may not assert on appeal procedural rights which he waived at the trial. People v. White, 20 Cal.App. 156, 128 P. 417; 23 Cal.Jur. 816. As already stated, there was testimony of witnesses to the accident that after being struck by defendant's car two of the victims lay dead in the street and that the third lay injured. The evidence, with the stipulations, was sufficient to prove the deaths.

[17] Another point is that inasmuch as defendant was convicted of misdemeanors, the verdicts deprived the court of jurisdiction to pronounce judgments, and that the judgments should be reversed with a direc-

tion that the charges be dismissed. Section 17 of the Penal Code reads as follows: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." It was charged in each count of the information that defendant "did wilfully, unlawfully, and feloniously kill, without malice, [the person named in the information], a human being, while in the operation of a vehicle and with gross negligence." This was a sufficient accusation of manslaughter, a felony. People v. Dobbs, 70 Cal.App.2d 261, 161 P.2d 46. The superior court is the only one that has jurisdiction of prosecutions for offenses that may be punished by imprisonment in the State prison. People v. Lewis, 4 Cal.App.Supp.2d 775, 779, 37 P.2d 752. In each count of the information defendant was charged with the commission of a felony, and under each count she was convicted of a misdemeanor. The single offense of manslaughter encompasses acts committed with gross negligence under subsection 3 (a), and the same acts committed without gross negligence under subsection 3 (b). There could be but one prosecution and one judgment, for, although different punishment is prescribed for the different degrees of the offense, subsections 3 (a) and 3 (b) define a single offense.

[18] Defendant assigns as error the failure of the court of its own motion to give an instruction that evidence of oral admissions of the defendant should be viewed with caution. There was no necessity for such an instruction. One of the officers who arrested defendant at the scene of the accident testified that on the way to the station defendant stated to another officer in the car that she was driving at 35 or 40 miles an hour as she came up Vermont Avenue and that she struck some of the persons in the street as she turned out to avoid hitting others. Defendant testified that she was driving at about 25 miles an hour, but when questioned as to her statement to the officers she admitted having stated that she had been driving 35 or 40 miles an hour, but explained that she meant that she had been driving at that speed on the way up from the beach and not in the vicinity of the accident. There was no contradiction by defendant of the testimony of the officer, nor was there other evidence as to any oral admission which she denied having made.

Defendant was given a fair trial, in which no error occurred. The treatment which she received at the hands of the jury was by no means inconsiderate. The judgments and order denying motion for new trial are affirmed.

DESMOND, P. J., and WOOD, J., concur.




**In re BARTER'S ESTATE.**

**KUCHEL v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.***

**Civ. 15583.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1947.

As Corrected Feb. 27, 1947.

Hearing Granted April 21, 1947.

**1. Wills** ⇐439

A court has the duty so to interpret a will as to execute the testator's intention.

**2. Trusts** ⇐160(2)

If a will discloses a clear intention to impose a trust on any portion of testator's estate, equity will not permit the trust to fail for want of a trustee but will appoint one.

**3. Trusts** ⇐160(2)

If trustee designated in will rejects the trust, dies or is incapacitated for such office, chancery will execute the will by appointing a trustee.

* Subsequent opinion 184 P.2d 305.

4. Taxation ⇐876(2)
Trusts ⇐160(2)

Where testator provided that balance of his property should go to British Government for benefit of British Refugee Children or for a similar purpose, court properly named the Combined British Charitable Fund, a California corporation, as trustee in place of the British Government, which was incapacitated to act as such trustee, and after California corporation was named as trustee, no inheritance tax could be imposed on the gift, either against the British Government or against the California corporation, in view of statutory exemption of domestic charitable corporations from transfer tax. Gen.Laws, Act 8495, §§ 1, 2; Revenue and Taxation Code §§ 13841, 13842.

5. Taxation ⇐893

The state controller in assessing a transfer tax against a trust estate is not to be governed solely by the language of the will but also by such transactions as affect the beneficial succession of the estate. Gen. Laws, Act 8495, §§ 1, 2.

6. Taxation ⇐856

An "inheritance tax" is not a tax on a decedent's estate but is an excise imposed on the right to succeed to the property passing to the distributee.

See Words and Phrases, Permanent Edition, for all other definitions of "Inheritance Tax".

7. Trusts ⇐159

Testamentary trustees are not automatically qualified as such by virtue of their nomination by the testator, and while transfer of the estate to the beneficiaries results at the instant of testator's death, there is no official trustee, no transferee, until the court finally names him.

8. Charities ⇐20(1)

British Government was not qualified to hold as a trustee of charitable trust for the benefit of British refugee children.

9. Wills ⇐9

The transfer of property by will from a California testator to a foreign government is unauthorized. Probate Code, § 27; Gen.Laws, Acts 261, 652.

10. Evidence ⇐82, 83(1)

Where court appointed a charitable corporation as trustee of charitable trust because of the inability of the trustee named in the will to act, it was presumed that the court exacted a promise from the corporation to carry out the terms of the will and that the corporation would do its duty as prescribed by law and directed by the court.

11. Charities ⇐7

Refugee children of foreign country are the proper objects of the bounty of the California testator in creating charitable trust.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of John D. Barter, deceased, wherein the Inheritance Tax Appraiser filed a tax report declaring that residuary estate was taxed to British Government and tax was assessed against residue. The First Trust and Savings Bank of Pasadena filed objections to the tax report. From a judgment that the residue did not pass to the British Government but was transferred to the California Charitable Corporation, and that the transfer was not subject to tax, Thomas H. Kuchel, Controller of the State of California, appeals.

Judgment affirmed.

James W. Hickey, of Sacramento, and Donald A. Peck and Morton L. Barker, both of Los Angeles, for appellant.

Boyle, Holmes, Fry & Garrett, of Los Angeles, for respondent.

S. T. Hankey of Los Angeles, for British Charitable Fund.

MOORE, Presiding Justice.

John D. Barter, a resident of Los Angeles County, departed this life October 15, 1941. The residuary clause of his probated will was as follows:

"The balance of my property I bequeath to the British Government, to be administered and applied for the benefit of British refugee children or similar purpose."

The superior court, sitting in probate, in response to executor's petition for instructions duly decreed that the quoted provision "constituted and created a valid charitable trust for the use and benefit of the class of persons therein described," and adjudged that upon application therefor at the time of distribution of the assets of the estate the court would appoint a trustee to receive and administer the assets of said charitable trust. That decree is final.

Thereafter the court by its order appointed Combined British Charitable Fund, a California corporation devoted solely to charitable work, to fill the vacancy in said trusteeship resulting from the incapacity of the British Government so to act. That order is likewise final.

In due course the inheritance tax appraiser filed his tax report in which it was declared that the residuary estate of decedent was taxed to the British Government and a tax assessed against such residue in the sum of $4,380.93. The executor filed objections to such report. Following a hearing upon its objections, the court concluded that the residue of the estate did not pass to the British Government, but was transferred to the California charitable corporation; that such transfer is not subject to tax under the law; that the tax of $4,380.93 was erroneously fixed in the inheritance tax appraiser's report and should not have been assessed, and ordered that the rest be modified by striking therefrom the portion which assessed the British Government in the sum of $4,380.93. The state's appeal is resisted by the Combined British Charity Fund as well as by the executor.

The "agreed statement on appeal" concludes with the announcement that the "question involved on this appeal is whether or not an inheritance tax based upon the value of the residue of the estate was lawfully assessed by the inheritance tax appraiser against the British Government."

The Inheritance Tax Act, Gen. Laws, Act 8495, provides that a tax shall be "imposed upon the transfer of any property * * * or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted." § 2. The Act also defines transfer to include "the passing of property or any interest therein * * * by inheritance, descent, devise * * * or exempt property orders in probate * * *," § 1, and provides that transfers to corporations exclusively engaged in charitable work under the laws of this state shall be exempt from the transfer tax. (Revenue and Taxation Code, §§ 13841, 13842; also, Stats.1935, p. 1266.) The justification for such exemption of domestic charitable corporations lies in the fact that the state is compensated for the loss of revenue by its relief from the burden of appropriating public funds for the relief of the needy. People v. O'Donnell, 327 Ill. 474, 158 N.E. 727. No such benefit inures to this state by the transfer of its wealth to a foreign country.

[1-3] Appellant's thesis is that the transfer of the residue to the British Government was effected at the moment of decedent's death and of necessity the transfer tax thereupon became payable; that the right of the state to collect a tax on decedent's estate attached at the same time, and that the court's action in "diverting the bequest contrary to the will" cannot deprive the state of its right to tax. But in making this contention appellant fails to observe that all of the property of a decedent is "subject * * * to the control of the superior court for the purposes of administration, sale or other disposition." (Probate Code, § 300.) It is the duty of a court so to interpret a will as to execute the intention of the testator. If it discloses a clear intention to impose a trust upon any portion of decedent's estate equity will not permit the trust to fail for want of a trustee but will appoint one. Estate of McDole, 215 Cal. 328, 332, 10 P.2d 75; Estate of McCray, 204 Cal. 399, 402, 268 P. 647. If a designated trustee rejects the trust, dies or is incapacitated for such office, chancery will execute the will by appointing a trustee. Smith v. Davis, 90 Cal. 25, 33, 27 P. 26, 25 Am.St.Rep. 92. Such power is inherent in courts of equity "over all matters of trust and trustees, and they never allow a trust to fail for want of a trustee." Fatjo v. Swasey, 111 Cal. 628, 635, 44 P. 225, 226.

[4] The beneficiaries of the trust herein are an indefinite class, i. e. British refugee children. They are essentially the devisees under the will (Estate of Loring, 29 Cal.2d 423, 175 P.2d 524), and the British Government was the designated trustee. But the British Government having been found to be incapacitated to act as such trustee it was incumbent upon the court to appoint a trustee that is qualified. Pursuant to such duty Combined British Charitable Fund, a California corporation, was so designated. It qualified and the transfer of the residuary estate was to such trustee. It did not for one moment pass to the British Government. That entity could not, and made no attempt to don the robes of such California office. Hence in no view of its rights or of its relation to the beneficiaries of the trust does it necessarily follow that decedent's estate was transferred to the British Government, but on the contrary it passed by due and proper orders of the court to a charitable corporation of this state qualified to execute a charitable trust. Such transfer exempted it from the transfer tax.

[5, 6] The state controller in assessing a transfer tax against a trust estate is not to be governed solely by the language of the will but also by such transactions as affect the beneficial succession of the estate. "The rate of taxation, as well as the amount of exemption, depends on relationship to the decedent." Estate of Rath, 10 Cal.2d 399, 405, 75 P.2d 509, 512, 115 A.L.R. 836. While the distribution must be made according to the will, yet "for purposes of fixing the inheritance tax beneficial succession is the measure." Ibidem. The court having established the California charitable corporation at the transferee of the trust estate, the controller became thereby obligated to exempt such estate from the transfer tax. The inheritance tax is not a tax on a decedent's estate but is an excise imposed on the right to succeed to the property passing to the distributee. Estate of Letchworth, 201 Cal. 1, 5, 255 P. 195; Estate of Watkinson, 191 Cal. 591, 598, 217 P. 1073.

If the rule contended for by appellant should prevail, that is that the court require the payment of a transfer tax, is it conceivable that a tax should be exacted from the California charitable corporation whose sole duty is to administer a charity fund? No other entity could be the object of such imposition, for surely it would not be suggested that the British Government, which received nothing and presumptively was not consulted prior to its designation as trustee by decedent, should pay the tax. If the British Government cannot become the transferree of the fund it cannot be taxed; and if the charitable corporation as trustee of a valid charitable trust is exempt, the tax was improperly assessed against the residue of the estate and the order appealed from is correct.

[7] The soundness of the above conclusion will be perceived upon reflecting that testamentary trustees are not automatically qualified as such by virtue of their nomination by the testator. The naming of them by the testator amounts to nothing more than a recommendation by the author of the will. While the purpose of the trust and the beneficiaries determine the fact of the creation of a trust, the identity of the trustee is not determined prior to the moment the order appointing him is entered. In other words, while the transfer of the estate to the beneficiaries results at the instant of death, yet there is no official trustee, no transferee, until the court finally names him. Also, other events besides the appointment of a trustee subsequent to death may affect the amount of the tax. In Estate of Parrott, 199 Cal. 107, 248 P. 248, the creditor filed his claim for the total amount due on the note of decedent and her brother; but because decedent's brother as a joint obligor thereafter paid one half of the debt prior to the report of the inheritance tax appraiser, the latter deducted from the taxable estate only the balance remaining unpaid after the brother's payment. There had been an understanding from the inception of the indebtedness that the share owing by the joint obligor was not to be considered as Mrs. Parrott's debt notwithstanding the potential enforcibility of the entire debt against her. If the value of the taxable estate transferred by the will of Mrs. Parrott

could be determined by the payment of one half of her debt after the creditor had filed his claim, by a parity of reasoning the taxability of decedent's estate was properly determinable after the court had named the transferree of the residuary estate. It has been held also that a testator may in creating a trust direct the formation of a charitable corporation for the care of needy children, and that the residuary estate was properly considered as if it had been in the possession of an extant corporation formed by direction of the will or as if it were in the control of the probate court for the purpose of accomplishing the testator's charitable design. Le Fevre's Estate, 233 N.Y. 138, 135 N.E. 203. The cited case determined that the benevolent gift passed simultaneously with the death of the decedent and that the formation of the corporation was a detail of court administration. The appointment by the superior court of the California corporation as the conduit through which the objects of the testator herein could be realized was in pursuance of the constitutional and traditional exercise of its power. Such corporation is not only devoted to charitable objects but is subject to state control and to the jurisdiction of the probate court, and therefore it is not subject to a transfer tax.

[8, 9] Appellant argues that no reason for the incapacity of the British Government appears in the record. Indeed, the very phrases of the record gleam with nothing but its incapacity. Not only did the court find that the testamentary trustee was incapable of holding such office but it requires no citation of authority to convince an impartial mind that the British Government cannot qualify to hold any office under the laws of this state. Moreover, there is no authority for the transfer of property by the will of a California resident to a foreign government. (See sec. 27, Probate Code; the Bank Act, Stats.1909, p. 87; Deering's General Laws, Act 652; Alien Property Act, Act 261, Deering's General Laws.) The wisdom of the court's rejection of the British Government as trustee of the fund is emphasized by the knowledge that the superior court has no jurisdiction over that government. In event it should as such trustee disregard judicial orders with respect to the management of the fund the court would be helpless to enforce them. (See Rustomjee v. The Queen, 1 Q.B.D. 487, 495.)

[10, 11] Appellant suggests that it does not appear whether the California corporation will carry out the terms of the will. It must be presumed not only that the court below exacted a promise to that effect but also that a qualified trustee will do its duty as prescribed by law and directed by the court. Also, the declaration that the court below reasoned its way to the order appealed from by way of the doctrine of cy pres is not warranted by the record. From the foregoing recitals it is clear that the court in the exercise of its equity jurisdiction, after having found the testator's nominee to be incapacited for the trusteeship, appointed a capable trustee and thereby identified the transferee of the testamentary trust estate. Contrary to appellant's contention that a bequest for the benefit of British refugee children is not within the scope of the exemption, it is true that the refugee children of Great Britain or of any other power allied with the United States in the recent war or, for that matter, refugee children of former enemy states, might be the objects of the bounty of a California testator; and if the trustee of such trust as might be created for its administration were a California charitable corporation or if it were one or more persons subject to the jurisdiction of the courts of this state then the transfer of a charitable trust to them would be exempt from the transfer tax.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

78 Cal.App.2d 204

**BARHAM et al. v. KHOURY et al.**

**KHOURY et al. v. BARHAM et al. (SABA, Intervener).**

**Civ. 15686.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1947.

**1. Gifts ⇐53**

A "gift causa mortis" must be made with a view of the donor's death, the donor must die of the ailment or peril which he feared at the time of the gift, and there must be a delivery and an acceptance by the donee. Civ.Code, § 1149.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Causa Mortis".

**2. Gifts ⇐60**

Unless the donor intends to divest himself completely of control and dominion over the property, the gift causa mortis is incomplete. Civ.Code, § 1149.

**3. Appeal and error ⇐1008(1)**

Whether donor intended to divest himself completely of control and dominion over the property allegedly given to another causa mortis is a question of fact to be determined by trial court from all the evidence. Civ.Code, § 1149.

**4. Gifts ⇐62(2), 75**

Delivery of property must be absolute in order to constitute a gift causa mortis, but the donor retains a revocable expectancy. Civ.Code, § 1149.

**5. Gifts ⇐62(2)**

In order to constitute a gift causa mortis, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. Civ.Code, § 1149.

**6. Gifts ⇐62(2, 5)**

Delivery of subject matter of gift causa mortis may be symbolic, and conferring upon the donee power to take possession of the gift and hold it is sufficient, or the property may be delivered to a third person for the donee or given to a trustee to distribute as directed. Civ.Code, § 1149.

**7. Gifts ⇐53**

A gift in view of death is not defeated by testamentary writing of the donor. Civ. Code, § 1149.

**8. Gifts ⇐55**

A "gift causa mortis" is distinguished from a "gift inter vivos", in that in the latter no defeasance exists, whereas in the former defeasance is an essential element. Civ.Code, § 1149.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Inter Vivos".

**9. Gifts ⇐53**

Any language used by donor attempting to provide expressly with reference to his death has no effect upon the validity of a gift causa mortis, since such language merely repeats the legal implication and emphasizes that a gift causa mortis was intended. Civ.Code, § 1149.

**10. Gifts ⇐53**

The execution of a writing does not enhance the validity of a gift causa mortis, its only advantage being to contribute to certainty in the proof. Civ.Code, § 1149.

**11. Gifts ⇐62(1)**

It is the actual delivery of the property that converts an unexecuted and revocable purpose into an executed and complete gift. Civ.Code, § 1149.

**12. Gifts ⇐75**

A gift causa mortis is revocable while the donor lives. Civ.Code, § 1149.

**13. Gifts ⇐62(1)**

Where dominion and control over subject matter is postponed until some future date, there is no executed gift but only an unenforceable promise to make a future gift. Civ.Code, § 1149.

**14. Gifts ⇐80**

The failure to prove donor's declaration that the gift is to be effective only in event of his death does not impair the gift, since such condition is implied. Civ.Code, § 1149.

15. Evidence ⇐594

Where there is no reasonable impeachment of a witness, the court must base its findings upon his uncontradicted testimony.

16. Gifts ⇐82(1)

Gifts causa mortis are not regarded with favor and must be established by clear and convincing proof of the essential elements. Civ.Code, § 1149.

17. Gifts ⇐82(1)

A physician, who for more than five years lived in patient's home and was paid a generous salary and acted as patient's adviser, was required to prove alleged gift causa mortis by clear and convincing evidence. Civ.Code, § 1149.

18. Appeal and error ⇐996

Where two inferences are reasonably deducible from the facts, the appellate court cannot substitute its inferences for those of the trial court.

19. Appeal and error ⇐931(1)

All conflicts in the evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of trial court's findings.

20. Appeal and error ⇐989

The power of the appellate court begins and ends with its determination that there is or is not substantial evidence to support trial court's finding.

21. Appeal and error ⇐996

If from all the facts in evidence, as well as from appellant's testimony, trial court drew inferences and made deductions which are not unreasonable, judgment cannot be reversed merely because no witness took the stand to contradict appellant's testimony.

22. Evidence ⇐586(3)

A trial court may weigh probabilities against positive testimony.

23. Evidence ⇐588

Facts inconsistent with testimony of a witness and inherent improbabilities of his testimony constitute reasonable grounds for trial court to discredit witness.

24. Appeal and error ⇐994(3)

Credibility of witnesses is to be determined solely by trial court.

25. Evidence ⇐594

A court may not arbitrarily disregard the testimony of an unimpeached witness, yet witness' testimony may be nullified by his manner, motives, content of his utterances, or by such behavior as may reasonably be deemed inconsistent with the truth.

26. Gifts ⇐82(2)

Evidence sustained finding of trial court that there was no gift causa mortis to physician by patient.

27. Executors and administrators ⇐59

In action by executors against one claiming property of decedent as gift causa mortis wherein decedent's mother intervened and claimed certain articles as her own property, evidence sustained finding that such articles were the property of intervener.

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Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action in claim and delivery by Frank F. Barham and A. Laurence Mitchell, as executors of the estate of Maggie George, deceased, against N. N. Khoury and others to recover jewels valued in excess of $30,000 claimed by the named defendant to have been given him by decedent six days prior to her death, wherein Mary Saba intervened and claimed certain articles of such jewelry. From a judgment for plaintiffs and intervenor, the named defendant and another appeal.

Judgment affirmed.

Paul Barksdale D'Orr and Frank H. Love, both of Los Angeles, for appellants.

A. G. Ritter, of Los Angeles, for plaintiffs and respondents.

Newton Van Why, of Los Angeles, for intervenor and respondent.

MOORE, Presiding Justice.

The question for decision is whether the court below was required to find the facts as given in the uncontradicted testimony of appellant Khoury, or did it act in a lawful exercise of the judicial function in inferring from the circumstances of the alleged gift and the history of that appellant's

relationship to the donor that there was no gift in view of death.

Prior to her decease, July 1, 1945, and at all times subsequent to June, 1940, decedent Maggie George resided in her comfortable home in the city of Beverly Hills. Her husband having accumulated a competency departed this life prior to the events unfolded in this narrative. Only the aged mother, Mary Saba, intervenor herein, remained to solace and comfort her widowed daughter whose body was ill and whose years were rushing to an untimely and pathetic close. During the same period she kept two or three servants and appellant Khoury, doctor of medicine. He testified that after he had practiced his profession at San Bernardino for about three months she induced him to live in her home, to serve her as physician and to help her with her business; that she promised him a salary and a bequest of all of her property if he would stay as long as she lived. He moved in during July, 1940. For three months he served her under a written contract as chauffeur to perform such services as she might direct and to act as her companion and medical adviser. Later a second writing defined the terms of his employment until February, 1942, when mutual releases of all obligations between the parties were effected. During the succeeding years Doctor Khoury served her at salaries ranging from $400 to $600 monthly.

On July 25, 1945, respondents qualified as executors of Mrs. George's will of May 22, 1944, and in August filed this action in claim and delivery to recover jewels valued in excess of $30,000 which Khoury claims to have been given to him by decedent six days prior to her demise. From an adverse judgment Doctor Khoury brings this appeal. Inasmuch as the judgment does not materially affect Mr. Love, Doctor Khoury alone will be referred to as appellant. Mary Saba intervened, claiming specified articles of the jewelry. She was likewise successful. She will be referred to as intervenor.

Appellant's Proof.

Inasmuch as the judgment is based upon inferences drawn in large measure from the testimony introduced on behalf of appellant a fair presentation of the issues necessitates the substantial reproduction of all of the testimony relating to the alleged gift. No one other than appellant was present on June 25, 1945, when, he says, decedent placed him in possession of certain diamonds to be his if she did not return from the hospital whither she was bound that day. Neither was any other person present on the two occasions in April of the same year when she delivered to him a manila envelope containing the stones. However, in August, 1943, Attorney Love advised and witnessed a presentation of the jewels to appellant. He had known decedent for more than three years. On August 24, 1943, while he visited her for the purpose of preparing her will, she told him of her promise to appellant in 1940 to leave him all of her property if he should remain with her to the end of her life. He drafted the will pursuant to her instructions and she executed it on August 27. Two days later he returned to assist her in the execution of a codicil. Mrs. George was very ill at the time. She told her attorney that she had suffered the worst spell of her life and was very much alarmed about her condition; that Dr. Khoury and a consultant had agreed that she should be hospitalized; that she feared she had reached the end of her trail; "I know my condition better than anybody. Now, I told you the other day I think a lot of Doctor Khoury; I want him to have my jewels. * * * I have got those jewels here in the house. * * * What I am afraid of is I might die. * * * I don't want those worthless nieces and nephews of mine coming in, ransacking my house and running off with those jewels." After she had informed him of their presence in the highboy, of her fears that she might not survive the trip to the hospital and of the probable acts of her relatives in depriving Doctor Khoury of the jewels, Mr. Love advised her that "maybe you had better give them to him right now, if that is what you want." Answering her summons, appellant thereupon entered the room and was introduced to the witness who repeated the fears of Mrs. George and her desire that he have "certain jewels in this house. * * * I have told her how she can give them to you."

Pursuant to directions of decedent, appellant took a brown manila envelope from the drawer of the highboy and laid it on her bed. Then, in the language suggested by the witness, she said, "If I don't come back from the hospital alive, I want you to have these jewels," and she placed the package in Doctor Khoury's hand. Appellant's testimony concerning the same event differs in no essential respect from that of Attorney Love.

Mrs. George entered the hospital August 29, 1943, only later to return to her home, when appellant gave back the jewelry which she locked again in the drawer. In 1945 she made three trips to the hospital. With reference to each of those occasions only appellant testified as to decedent's gift of the jewels. They were always in the same envelope in which appellant kept them during her sojourns at the hospital, and upon each of her returns home he restored to her the packet which she placed again in its accustomed drawer, or had him do so. Her statements to him on the days of her departure for the hospital, according to his testimony, are as follows: (1—early April) "Here, Doctor, I think it is going to be a one-way trip, and if I die, don't come back from the hospital alive, I want you to have this jewelry." (2—late April) "Here is the key to the chest, Doctor; I want you to have this jewelry." She said, "You take it now." (3—June 25) She told me that she didn't feel that she was going to come back, and it was a one-way trip. She said, "Here is the key to the chest drawer; and if I die, I want you to have all this jewelry, if I don't come back from the hospital alive." On her last departure appellant took the key from her hand, removed the jewelry and a pair of binoculars from the top drawer, put the jewels in his pocket, the binoculars in a grip in his closet and returned the key to Mrs. George who, as she was about to enter the ambulance, asked him to retain the key for safe keeping.

Appellant Applies the Law to His Testimony.

[1-11] With his testimony as to the gift of the jewels uncontradicted appellant invokes the statutes and the decisions of this state and authorities from many other jurisdictions in support of his proposition that a genuine donatio causa mortis was made to him June 25, 1945. Section 1149 of the Civil Code provides "a gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." It is ubiquitously the law that the essential attributes of a gift causa mortis are the following: (1) It must be made with a view of the donor's death; (2) the donor must die of the ailment or peril which he feared at the time of the gift; (3) there must be a delivery; (4) there must be an acceptance by the donee. The intent with which the delivery is made is important. Unless the donor intends to divest himself completely of control and dominion over the property the gift is incomplete. The intention is a question of fact to be determined by the trial court from all the evidence. Delivery of the thing must be absolute, the donor retaining a revocable expectancy. The donor must not only part with possession of the property but must relinquish to the donee all dominion and control over it. However, delivery may be symbolic. Conferring upon the donee power to get the gift and hold it is sufficient. Also, it may be delivered to a third party for the donee, or given to a trustee to distribute as directed. A gift in view of death is not defeated by a testamentary writing of the donor. Such a gift is distinguished from a gift inter vivos in that in the case of the latter there is no defeasance whereas in the former the right of defeasance on the part of the donor is an essential element. In re Escolle's Estate, 134 Cal.App. 473, 480, 25 P. 2d 860; Larsen v. Van Dieken, 34 Cal.App. 2d 352, 364, 93 P.2d 563; Mutual Benefit Life Insurance Company v. Clark, 81 Cal. App. 546, 551, 254 P. 306; Donovan v. Hibernia Savings & Loan Society, 90 Cal. App. 489, 502, 265 P. 995; Grymes v. Hone, Executor, 49 N.Y. 17, 19, 10 Am.Rep. 313; Reh v. Ertrachter, 196 Mich. 210, 162 N. W. 978; In re Hennessy's Estate, 253 App. Div. 6, 300 N.Y.S. 766; Johnson v. Colley, 101 Va. 414, 44 S.E. 721, 99 Am.St.Rep. 884; Smith v. Eshelman, 235 Ala. 588, 180 So. 313. Any language used by the donor

attempting to provide expressly with reference to his death has no effect upon the validity of a gift causa mortis. Such language merely repeats the legal implication and emphasizes that a gift causa mortis was intended. 4 Page on Wills, section 1688, p. 796; Grymes v. Hone, supra; Johnson v. Colley, supra. The execution of a writing does not enhance the validity of a gift causa mortis. Its only advantage is to contribute to certainty in the proofs. It is the actual delivery of the property which converts the unexecuted and revocable purpose into an executed and completed gift. Knight v. Tripp, 121 Cal. 674, 679, 54 P. 267.

[12-14] While a gift causa mortis is revocable while the donor lives, yet in order thus to alienate a possession the immediate surrender of all dominion and control over the property given is a sine qua non. And in the event such dominion and control is postponed until some future date, as for instance the death of the donor, it becomes an unexecuted and unenforceable promise to make a future gift. Mutual Benefit Life Insurance Company v. Clark, supra. Failure to prove the donor's declaration that the gift is to be effective only in event of his death does not impair the gift. Such condition is implied. Donovan v. Hibernia Savings & Loan Society, supra; Grymes v. Hone, supra.

If the court herein had found that decedent made a gift of her jewels to appellant it would have sufficient support in appellant's testimony. His version of the transaction is that she made a complete delivery of the precious stones to him and placed them beyond her own dominion and control during the last five days of her life. According to his testimony and the authorities above cited the valuables became finally vested in appellant on the day of Mrs. George's death.

Findings Have Sufficient Support.

[15, 16] The court below did not adopt the testimony of appellant as the basis of its decision. Of course, where there is no reasonable impeachment of a witness the court must of necessity base its findings upon his uncontradicted testimony. In attempting to establish a gift causa mortis the recipient is met on the threshold of the temple with the doctrine that such gifts are not regarded with favor. They contravene the general rules prescribed by statute for the testamentary disposition of property and for this reason they should be established by clear and convincing proof of the requisites of such a gift. Knight v. Tripp, supra.

[17] In appraising the testimony of appellant the court below was obliged in the execution of its judicial function to require him to establish that the gift was made. This arises from the confidential relationship which existed between the two. He was not only decedent's employee but he held the exalted station of both adviser and physician. He had entered her home as such employee in July 1940. He was thereafter in constant association with her for five years preceding her demise. He was conscious of his entire possession of her confidence as demonstrated by her original employment of him and by her gift in 1943 as well as by keeping him in her home at a generous salary during the five years. Under the circumstances it was incumbent upon appellant to prove every element necessary to establish a gift "by clear and convincing evidence." Mutual Benefit Life Insurance Company v. Clark, supra, at page 550 of 81 Cal.App., at page 306 of 254 P.

[18-20] When a judgment is challenged on the ground of the insufficiency of the evidence to support the findings, four principles govern the conduct of the reviewing court, namely: (1) When two inferences are reasonably deducible from the facts the appellate court is forbidden to substitute its deductions for those of the trial court; (2) all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the findings; (3) the power of the appellate court begins and ends with its determination that there is or is not substantial evidence to support the finding. In re Bristol's Estate, 23 Cal.2d 221, 223, 143 P.2d 689; Federal Construction Company v. Brady, 122 Cal.App. 446, 447, 10 P.2d 130. Evidence which may in the transcript appear relatively unsubstantial may have been "overwhelming in its persuasiveness" when

recited in the presence of the court. In re Bristol's Estate, supra.

[21] From the foregoing it is inescapable that if from all the facts in evidence as well as from appellant's testimony the trial court drew inferences and made deductions which are not unreasonable the judgment cannot be reversed merely because no witness took the stand to contradict appellant's narrative of the events of June 25, 1945. He encountered in limine the doctrine that the confidential relationship between himself and decedent imposed upon him the burden of proving the gift. He testified that when he was first invited to enter decedent's home he was promised not only a salary but also a legacy of her entire estate. Not only did decedent make no bequest in her last will of the jewels to him, but before he had served her two years she released her from obligation to bequeath him anything. Inferring her wishes from her testamentary declaration appellant had ceased to be the primary object of her bounty. By her will of August 27, 1943, she left to appellant the residue of her estate after making provision for the support of her mother. By her will of January 25, 1944, she bequeathed to him all of her jewelry, personal property and personal effects and nominated him as her executor. But, by her will of May 22, 1944, she gave him only $3,000, while she left her trucks and trucking business worth $50,000 to respondents and the residue to her mother. From the diminution of appellant's legacy from practically all of her estate by the will of January to practically nothing in the will of May, the court may with reason have inferred that decedent's intention was more likely expressed in her final testamentary declaration. The court may have concluded that her feeling of affection for, or her sense of obligation to, Doctor Khoury had undergone a genuine change after January, 1944, and that there was no change prior to her departure for the hospital on June 25, 1945. Since mention of her jewelry was made in the January will and omitted from the May will, the following were not unreasonable deductions: (1) That if in May, 1944, she wished appellant to have the jewels as she had in August, 1943, and in January, 1944, she would have so declared; (2) that the mention of appellant in the last will as legatee of only $3,000 indicated a radical change of heart and that he should not take the $30,000 worth of her estate; (3) that if in January, 1944, she wished Khoury to have all of her jewelry, her home and all her personal property and revoked that devise in May, she knew from former experiences that she could in June, 1945, append a codicil to vest him with ownership at her death. From the facts that the will is the customary and common device used for transferring one's riches to strangers to the blood, and that at the moment of expressing her final testamentary wishes decedent had appellant in mind but did not bequeath him the jewelry, the court may reasonably have inferred that she had no desire in the last month of life to give the precious stones to him.

[22] In view of the five years appellant lived upon decedent's largess it must have impressed the court that if she had entertained so liberal a fondness for him as to desire that he become possessor of $30,000 of her wealth in addition to the home and salary she had supplied him it would have been the natural thing, the irrepressible wish of her heart, to declare in her last will that she desired to bestow upon him her jewels as she had done in January, 1944. If she disliked her nieces and nephews, as he reports her to have declared, she knew that her will would transfer the diamonds to the legatee named, and that a safety deposit box would hold them until she might have passed over the great divide. The court was authorized by law in the exercise of the judicial function to weigh probabilities against positive testimony. This doctrine is applied with special force when the other party to a transaction has been silenced by the grim reaper and where the rights of such deceased are seriously affected. That Mrs. George was disposed to employ counsel to write her wills; that she may have employed counsel who persuaded her that transfers of her properties should go by devise rather than by gift to the end that she might more satisfactorily partition her estate and facilitate the increase or decrease in the amount passing to each bene-

ficiary; that she might have receded from a desire entertained in 1943 to enrich appellant with her jewels because of the home she had afforded him and the liberal salary she paid him; that a failing woman like Mrs. George would not blast her estate by giving property of the value of $30,000 to a stranger while her ignorant, sick, helpless, Lebanese mother, 89 years old, whom the daughter cherished, must remain for an indefinite period "awaiting alike the inevitable hour"—these are reasonable probabilities according to which decedent might have acted and against which the trial court balanced the testimony of appellant that she gave him the jewels.

Furthermore, it is not probable that the unfortunate lady could have passed over to the doctor a packet of precious stones which included possessions of the mother of a value in excess of $3,000 without a mention of such ownership, while leaving the latter only support for life. The mother's title thereto was established by her testimony in the presence of the court. She had obtained them either "through my earnings during many years" or "Maggie, she give it to me." In either event the court properly weighed the probability if not the certainty that Maggie would not heartlessly have deprived her mother of her own wealth so unceremoniously as to instruct a stranger to take it from a drawer. And thus balancing probabilities against the testimony of appellant the court was not arbitrary in rejecting the latter.

[23-26] Also, appellant's inconsistent behavior arose like a ghost in the night to confront him. Four days after the passing of decedent appellant filed his verified petition for special letters of administration of her estate in which he averred that the aggregate value of decedent's personal property would be $45,000. On the same day he filed his petition for probate of her January will. He alleged therein that her estate consisted of jewelry, furniture and miscellaneous property of an estimated value of $25,000. The court was not obliged to accept as true his statement that he did not tell his attorney that there was jewelry belonging to the estate or that he did not read his petition which declared the jewelry. He told no one of the gift from decedent prior to his notifying respondent Mitchell on July 27, although he was in the office of Attorney Ritter on July 17 and on other occasions prior to Mr. Mitchell's demand for the jewels on July 26, 1945. His excuse for not telling Messrs. Mitchell and Ritter of his gift from decedent was his fear that they "would beat him up." These facts were fairly to be considered by the court in appraising the sincerity of appellant, who had been licensed to practice his profession in Wisconsin and in Missouri prior to 1935 and in California in 1937, and may have induced the belief that appellant's testimony was created out of his desire unjustly to enrich himself with the valuables of his departed friend. Moreover, such circumstances as (1) his claiming a gift from one deceased upon his unsupported word, (2) his having the exclusive opportunity to gain possession of the property, (3) the evidently weakened mind and will of decedent, (4) appellant's long delay in disclosing his claim of a gift, (5) his telling no one until some weeks after her demise, (6) his failure in 1945 to have her declare her wishes expressed in the presence of another or to request her to memorialize the gift by a writing, (7) his having lived largely upon her bounty for over five years, (8) his alleging in a petition for letters her ownership of expensive jewelry,—such circumstances and the inherent improbabilities of his testimony were reasonable grounds for the fact finder to discredit appellant, and his credibility was to be determined solely by that tribunal. Bohn v. Gruver, 111 Cal.App. 386, 393, 295 P. 891. While the court may not arbitrarily disregard the testimony of an unimpeached witness, Hynes v. White, 47 Cal.App. 549, 190 P. 836, yet his testimony may be nullified by his manner, by his motives, by the content of his utterances, or by such behavior as may reasonably be deemed inconsistent with the truth. Bohn v. Gruver, supra. The most positive testimony may be contradicted by inherent improbabilities or by circumstances that are inconsistent with its truth, and the manner of one's testifying may influence the court to disregard his positive testimony concerning a particular fact. Staples v. Haw-

thorne, 208 Cal. 578, 584, 283 P. 67; Caldwell v. Weiner, 203 Cal. 543, 546, 264 P. 1100.

As to Mrs. Saba.

[27] The foregoing will suffice to answer appellant's contentions as against Mrs. Saba. That unhappy soul testified on her own behalf and specified the jewels that belonged to her. Under the authorities cited the finding that the property belonged to intervenor cannot be disturbed. In re Bristol's Estate, supra.

Judgment affirmed.

McCOMB, and WILSON, JJ., concur.




78 Cal.App.2d 132

## PEOPLE v. WOODSON.

Cr. 4079.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1947.

As Amended March 10, 1947.

1. Licenses ⇐18½

A transaction whereby individual without permit from Corporation Commission gave his note for amount received and his vendor received document purporting to entitle investor to undivided interest in profits to be derived from partnership enterprise, was "sale of securities" in violation of Corporate Securities Act. Gen.Laws, Act 3814, § 2, subds. 3, 6, 7, §§ 3, 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale of Securities".

2. Licenses ⇐18½

A document purporting to entitle investor to undivided interest in profits derived from enterprise was a "security" within provision of Corporate Securities Act defining security as a note, evidence of indebtedness, certificate of interest or participation, or certificate of interest in profit-sharing agreement. Gen.Laws, Act 3814, § 2, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

3. Licenses ⇐18½

Under Corporate Securities Act, an individual as well as a company or corporation is prohibited from selling any security of his own issue. Gen.Laws, Act 3814, § 2, subds. 3, 6, §§ 3, 17.

4. Licenses ⇐18½

While the courts have declined to give an inclusive or exclusive definition of the term "security" as used in Corporate Securities Act, courts will look through form to substance and determine whether transaction in question is within terms of such act. Gen.Laws, Act 3814, § 2, subd. 7.

5. Licenses ⇐5

The state may require an individual who issues securities to public to obtain a permit, notwithstanding that the individual proposes to issue securities in private transactions. Gen.Laws, Act 3814, § 2, subds. 3, 6, 7, §§ 3, 17.

6. Licenses ⇐18½

The issuance of partnership securities and limited partnership agreements without a permit are prohibited by Corporate Securities Act. Gen.Laws, Act 3814, § 2, subds. 3, 6, 7, §§ 3, 17.

7. Licenses ⇐18½

The issuance without a permit of promissory note accompanied by security as collateral for its payment, or promissory note and profit-sharing agreement as parts of the same transaction, are in violation of Corporate Securities Act. Gen.Laws, Act 3814, § 2, subds. 3, 6, 7, §§ 3, 17.

8. Licenses ⇐18½

The Corporate Securities Act does not extend to ordinary commercial transactions, to interest from the lending of money, nor to the profits which one may make by his own efforts as the result of any ordinary commercial contract. Gen.Laws, Act 3814.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Harry E. Woodson was convicted of selling securities without a permit in violation of Corporate Securities Act, Gen.Laws, Act 3814, and he appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Laughlin E. Waters, Deputy Atty. Gen., of Los Angeles, for respondent.

WILSON, Justice.

The question raised by this appeal is not, as stated by appellant, whether a partnership can be organized without a permit from the Corporation Commissioner, but is whether an individual or a partnership may offer for sale or sell securities of his or its own issue without a permit.

Appellant was charged with four separate violations of the Corporate Securities Act, was tried without a jury, and was convicted on three counts and acquitted on one. The appeal is from the judgment of conviction.

The applicable sections of the Corporate Securities Act, 2 Deering's General Laws, 1944 Ed., Act 3814, p. 1418, are as follows: Section 2, subd. 3: "The word 'company' includes all * * * partnerships of every kind, * * * and also individuals as hereinafter defined." Subd. 6: "The word 'individual' in so far as it is included in the definition of a 'company,' includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue." Subd. 7: "The word 'security' shall include any stock, bond, note, * * * evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement * * *". Subd. 8. " 'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value * * *." (Stats.1945, ch. 399, p. 853.)

Section 3: "No company shall sell any security, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do * * *". (Stats. 1941, ch. 615, p. 2064.)

Section 17: "Every company which shall directly or indirectly offer for sale, or negotiate for the sale of or sell, or issue, or cause to be issued any security contrary to the provisions of this act, * * * shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars." (Stats. 1931, ch. 423, pp. 937, 950.)

Appellant's method of operation varied but little in dealing with the several persons from whom he obtained money. He placed an advertisement in a newspaper reading: "Assoc. Sportsman, club & cattle ranch. Nom. inv. Box A–84, Times."

Sam Nicholas answered this advertisement and was later met by appellant. The latter told Nicholas that he had a lease on a ranch in Modoc County with which was to be operated a "club membership deal." In return for $2,000 Nicholas was to receive a one-fifth interest in all appellant's transactions and was to be employed on the ranch at a salary of $300 per month. Nicholas paid said sum to appellant and received a promissory note for $2,000, due 60 days after date, and a document entitled "Certificate of Limited Partnership," reciting that appellant was the general partner and Nicholas the limited partner, and that the latter should receive by way of income 5/25ths of the net profits of the partnership.

Dave Badel answered a similar advertisement and through it met appellant. The latter told Badel that he had leased the ranch above mentioned and desired an associate to invest $1,000 or more for the purpose of buying cattle to be placed on the ranch. In return for his investment Badel was to receive 2/25ths of the profits and was to be employed on the ranch at $300 per month. Badel paid $2,000 to appellant and in return received a promissory note, due 120 days after date, and an agreement reciting that appellant held a lease on the ranch; that he had purchased 1,000 head of cattle to be placed thereon; that when they were sold an accounting would be rendered and after the promissory note had been paid appellant would pay 2/25ths of the profits on the cattle transaction to

Badel; that the latter should be employed during the life of the agreement at a salary of $300 per month.

Edward Holland also met appellant through an advertisement and gave him $1,000 in return for which he received a promissory note, due nine months after date, and a "share lease" agreement wherein appellant purported to lease to Holland 100 acres of land in Modoc County, stated to be a part of a larger acreage to be operated by appellant; that appellant should operate the land and deliver one half of the net crop to Holland. The agreement recited the execution of said note and provided that excess earnings should not be declared as a profit until the note and the operating charges had been paid.

The evidence concerning the fourth charge in the information related to a transaction with C. L. Whipp, similar in nature to that made with Nicholas. Whipp received a promissory note for the amount paid to appellant and a "certificate of limited partnership." He was promised employment for himself and his wife at $250 a month and was to receive a one-fifth interest in the profits. The acquittal on this charge was because the transaction was consummated in another county.

Needless to say, none of the parties received any return whatsoever on their investments. Appellant had not applied for or received a permit from the Corporation Commissioner authorizing any of the transactions.

[1] In each instance appellant gave his promissory note for the amount received and in each instance the investor received a document purporting to entitle him to an undivided interest in the profits derived from the enterprise,—a sale of securities in violation of the statute.

[2-5] The term "security as defined in the statute includes a note, evidence of indebtedness, certificate of interest or participation, and certificate of interest in a profit-sharing agreement. The documents issued by appellant are within the statutory definition. The word "company" as defined by the statute includes partnerships of every kind and individuals. An individual as well as a company or corporation is prohibited from selling any security of his own issue. People v. Craven, 219 Cal. 522, 525, 27 P. 2d 906. While the courts have declined to give an inclusive or exclusive definition of the term "security" they will look through form to substance and determine whether the transaction is one coming within the terms of the statute. Domestic & Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 555, 51 P.2d 73. The state may require an individual who issues securities to the public to obtain a permit (Idem, 4 Cal.2d at page 558, 51 P.2d 73; People v. Craven, supra; In re Leach, 215 Cal. 536, 541, 12 P.2d 3) and it may do so although the individual proposes to issue securities in private transactions. Cecil B. De Mille Productions, Inc., v. Woolery, 9 Cir., 61 F.2d 45, 50; Domestic & Foreign Petroleum Co., Ltd., v. Long, supra, 4 Cal.2d at page 556, 51 P.2d 73.

[6, 7] The issuance of partnership securities (People v. Simonsen, 64 Cal.App. 97, 100, 220 P. 442) and limited partnership agreements (People v. Dutton, 41 Cal.App. 2d 866, 869, 873, 107 P.2d 937) without a permit are prohibited by the statute. The transactions charged against appellant are similar to those in the Dutton case wherein the documents in evidence were held to be "securities" within the definition of the statute. It is a violation of the act to issue without a permit a promissory note accompanied by a security as collateral for its payment (People v. Weibert, 18 Cal.App.2d 457, 468, 64 P.2d 169) or a promissory note and a profit-sharing agreement as parts of the same transaction. People v. Sidwell, 27 Cal.2d 121, 128, 162 P.2d 913.

[8] We are not unmindful of what is said in People v. Davenport, 13 Cal.2d 681, 687, 91 P.2d 892, that the statute does not extend to ordinary commercial transactions, to interest from the lending of money, nor to the profits which one may make by his own efforts as the result of any ordinary commercial contract. Appellant's transactions do not come within those exceptions.

Judgment affirmed.

MOORE, P. J., and McCOMB, J.

## DE LOSS v. LEWIS et al.

Civ. 13180.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1947.

Rehearing Denied March 22, 1947.

Hearing Denied April 21, 1947.

**1. Appeal and error ⇐927(3)**

On plaintiff's appeal from judgment entered after trial court granted defendant's motion for nonsuit, evidence was stated in light most favorable to plaintiff's case.

**2. Automobiles ⇐181(1)**

"Wilful misconduct" within automobile guest statute is intentionally doing something in operation of automobile which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that injury to guest will be probable result. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilful Misconduct".

**3. Automobiles ⇐245(24)**

Evidence whether motorist sued for injuries sustained by guest was guilty of wilful misconduct within automobile guest statute in that motorist should have known that injury to guest was probable result of known defective condition of automobile which had bad brakes and which got out of control while motorist was coasting down steep, narrow road full of sharp curves to save gasoline, was for jury. Vehicle Code, § 403.

**4. Trial ⇐142**

Whether a particular inference can be drawn from certain evidence is a "question of law" but whether the inference should be drawn in any given case is a "question of fact" for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

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Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Personal injury action by William De-Loss against W. J. Lewis and another. From the judgment, the plaintiff appeals.

Reversed.

Palmquist & Hanlin, of Oakland, for appellant.

Charles V. Barfield, of San Francisco (Franklin A. Plank, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries on the theory of wilful misconduct on the part of the defendant with whom he was riding as a guest. At the close of plaintiff's case the trial court granted defendant's motion for a nonsuit.

[1] The single question presented on the appeal is whether the evidence of wilful misconduct was sufficient to take the case to the jury. The evidence, which must be stated in the light most favorable to plaintiff's case, is that defendant invited plaintiff to take a ride in defendant's automobile into the hills above Oakland along Skyline Boulevard and Redwood Road in the evening of September 9, 1944. On the return trip defendant drove the car down Redwood Road at a "coasting" speed which left the car out of control. The road was steep, narrow, full of sharp curves and down grade all the way. The car was old, had been bought second-hand, and had been driven approximately 35,000 miles by defendant. For some months before the accident defendant had known that the brakes on the car were in bad condition, and that the emergency brakes would not hold at all when the car was running down grade. On the night in question he put the car in neutral to save gas and coasted down grade negotiating two curves successfully. Then the car went completely out of control, crashed through a fence, and landed in a farm. The car was so badly wrecked that it was beyond repair. Plaintiff's injuries consisted of cuts about the face received when the car went through the fence.

Plaintiff's appeal rests upon the theory that if the evidence is sufficient to justify the reasonable inference that respondent should have known that injury to his guest

was a probable result of the defective condition of the car (of which respondent was well aware) a case was made for the jury. His theory is grounded on sound reasoning.

[2] Wilful misconduct sufficient to enable a guest to recover under section 403 of the Vehicle Code is defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990, as follows: "'Wilful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." This definition has been adopted in Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194; and in Weber v. Pinyan, 9 Cal. 2d 226, 233, 70 P.2d 183, 112 A.L.R. 407.

In Restatement, Torts, Sec. 500, we find this language: "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

"Therefore," as said in Hastings v. Serleto, 61 Cal.App.2d 672, 682, 143 P.2d 956, 961, "the question of whether the defendant driver herein intentionally drove his automobile with a wanton and reckless disregard of the possible result of such driving or whether he intentionally drove his automobile with a knowledge, express or implied, that serious injury would be a probable (as distinguished from a possible) result thereof, is essentially one of fact for determination by the fact finder."

[3] Since it was the province of the jury to infer from the facts proved that respondent, knowing the hazards of the road and the defective condition of his car, deliberately and intentionally flirted with danger knowing that injury to his guest would be the "probable result" the trial court erred in taking the case from the jury.

[4] This, however, should not be construed as a holding that such inference should or must be drawn on a retrial of the issue of wilful misconduct. As said in Blank v. Coffin, 20 Cal.2d 457, 461, 126 P. 2d 868, 870: "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. (See cases cited in 10 Cal.Jur. 738, 739, sec. 60.)" We merely hold that such an inference would have been reasonable and might have been drawn on appellant's case alone in the absence of any rebuttal on the part of the respondent.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.




78 Cal.App.2d 282

**PEOPLE v. MAYES.**

**Cr. 2413.**

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1947.

Rehearing Denied March 14, 1947.

Hearing Denied March 27, 1947.

**1. Robbery ⇐24(1)**

Evidence sustained conviction of first degree robbery.

**2. Criminal law ⇐877**

Acquittal of one of two defendants charged with participating in same robbery and tried together did not require acquittal of codefendant, though both defendants were identified by victim of robbery, where alibi of acquitted defendant rested upon entirely different facts from that presented by codefendant and was corroborated.

**3. Conspiracy ⇐23**

Acquittal of one of two defendants charged separately and not jointly with participation in the same robbery did not

require acquittal of codefendant on ground that basis of charge must have been conspiracy and acquittal of one must result in acquittal of both.

**4. Criminal law ⇐736(2)**

Whether defendant's signature of alleged confession was genuine was a question of fact for jury under conflicting evidence.

**5. Criminal law ⇐1139**

Defendant having offered no expert evidence at trial as to alleged forgery of his signature on confession and offering nothing on appeal in support of contention that no handwriting expert was available at time of trial was not entitled to have expert evidence as to signature presented to appellate court.

**6. Criminal law ⇐1158(4)**

Whether a confession is free and voluntary so as to be admissible is a preliminary question addressed to trial court whose decision to admit a confession will not be disturbed by reviewing court unless error therein appears as a matter of law from the record presented.

**7. Criminal law ⇐532(2), 1144(12)**

Trial court has considerable discretion in determining whether confession was voluntary and hence admissible in evidence and where testimony is conflicting on the subject, it must be assumed that confession was properly admitted.

**8. Criminal law ⇐1158(4)**

Conflicting evidence as to whether confession of robbery was voluntarily made so as to be admissible in evidence or obtained as a result of physical abuse was for trial court.

**9. Criminal law ⇐519(9)**

A confession obtained after several days of persistent questioning by police officers of a wounded man, kept incommunicado and denied counsel, would be inadmissible as not being voluntarily made.

**10. Criminal law ⇐519(9)**

Persistent questioning by police officers of a wounded man, kept incommunicado and denied counsel, as a result of which an admittedly voluntary statement was obtained would not necessarily as a matter of law destroy voluntary character of confession made six days later without further abuse intervening.

**11. Criminal law ⇐775(3)**

Jury should be instructed to acquit defendant if evidence of claimed alibi, considered with all the other evidence, raises a reasonable doubt of defendant's presence at time and place of crime.

**12. Criminal law ⇐829(7)**

Refusal to give specific requested instruction on reasonable doubt created by evidence as to alibi was not reversible error, in view of instructions given with respect to alibi and general instructions as to reasonable doubt, where alibi rested solely on defendant's uncorroborated testimony and evidence connecting defendant with crime charged was overwhelming.

**13. Criminal law ⇐959**

Denial of motion for new trial without granting a continuance to prepare and file affidavits in support thereof was not abuse of discretion, where defendant offered no evidence in support of application for continuance, made no showing of what affidavits would contain or what the newly discovered evidence would prove and gave no reason why affidavits had not already been secured or reasonable ground for belief that affidavits could be obtained. Pen. Code, § 1181, subd. 7.

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Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Delbert Howard Mayes was convicted of robbery of the first degree and from the judgment of conviction and an order denying his motion for a new trial, defendant appeals.

Judgment and order affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., of San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant was found guilty of robbery of the first degree and appeals from the judgment of conviction entered upon this verdict and from an order denying his motion for a new trial. His cause was consolidated for the purpose of trial with the cause against one Arthur Neal, who by separate information was accused of participating in the same robbery with defendant Mayes. Arthur Neal was found not guilty in a separate verdict.

In the morning of May 23, 1945, a jewelry store at 419 Kearny Street in San Francisco was held up by two men, who threatened the owner, Sol Riskin, with firearms, tied him up and twice untied him again to unlock the safe and an inner strong box for them. They took a considerable quantity of jewelry, including gold coins and a number of watches and also some money from the safe. After having been in the shop for three quarters of an hour, unmasked and undisguised, they left with the jewelry and money in a suit case they had found in the shop. At the trial defendants Mayes and Neal were positively identified by the complaining witness as the men he had seen for three quarters of an hour in his shop. They were also recognized by police officer Witry of the Chicago police, who was on duty with the United Nations Conference in San Francisco at the time of the robbery, as two men who had drawn his attention earlier on the morning of the crime when they were standing opposite the jewelry store. He testified that when on their passage through Chicago he told them so, they had each conceded that they had been there at the time. However, their ages and sizes did not coincide with those furnished by Riskin to the police after the robbery.

On July 5, 1945, Mayes was arrested in Dayton, Ohio, and at the time of his arrest was shot in the right arm. He had then on his person some gold coins subsequently identified by the complaining witness as taken during the robbery; among them was a peculiar, very thin gold coin which the complaining witness easily identified because of a certain plugged hole in it.

After his arrest, appellant was taken to a hospital where he stayed for four days after which he was removed to the county jail in Dayton. He testified at the trial that during all the time he was in the hospital and the county jail he was interviewed by police officers and that he had asked for an attorney but that his request was denied and that nobody was permitted to see him. When Inspector O'Leary of the San Francisco police arrived he again asked for an attorney, but was told that he did not need one.

After long conversations with Inspector O'Leary, appellant promised that he would make a statement which he made on the next day, July 11, 1945. He repeated this statement to a stenographer in the presence of police officers and after it had been transcribed signed it. At the trial it was admitted in evidence without objection; Mayes testified that he was not abused in any way when the statement was taken and that the information was given freely and voluntarily.

In this statement he declared that a certain Tony Depilla, whom he knew in San Francisco, contacted him at Dayton, Ohio, in the first half of June and asked him to help dispose of a suit case full of jewelry Depilla had with him; that he helped him sell part of it to "fences" and that he, Mayes, himself bought some jewelry—among which the gold coins found on him—and some watches; that he had pawned seven of these watches in Cincinnati under false names. (This last statement he tried to retract at the trial.)

Mayes was then taken to Cincinnati, where the watches were redeemed. They were at the trial identified by the complaining witness as taken during the robbery; some of them could be identified by the case and movement numbers of which the complaining witness had kept book.

In the Cincinnati jail appellant had an opportunity to consult with his attorney. At the trial a confession was admitted in evidence purportedly signed by appellant in Cincinnati on July 17, 1945. The confession states in detail what happened during the robbery in Mr. Riskin's store, in complete agreement with Mr. Riskin's testimony in that respect, and how appellant disposed of the booty in Ohio. The evidence with re-

spect to this confession is conflicting. Appellant testified that on July 17, when his attorney again visited him, the attorney told the police officers that Mayes was not fit to be questioned because he had been drugged that morning in connection with the treatment of his wounded arm; that nevertheless, after the attorney had left, he was taken to the office of Captain of Police, Pat Hayes, there accused by Inspector O'Leary of being himself Tony Depilla, and when he denied having taken part in the robbery, handcuffed by the officers to a chair and beaten by Inspector O'Leary and Captain Hayes on body and face so that he bled badly. The purported confession was dictated by Inspector O'Leary, and did not correspond with actual questions and answers. No stenographer was present. A Federal Bureau of Investigation officer took the dictation of Inspector O'Leary on a typewriter. Appellant had not signed the typed paper. The witness Margaret Dixon from Dayton, Ohio, testified that when she visited Mayes in jail on July 16 or 17, 1945, his face was all swollen around the mouth and nose, and his face and front of his shirt were bloody.

However both Inspector O'Leary and the witness Courtland Jones, the FBI agent who took the statement down on a typewriter, testified that no force, violence or threats of any kind were used; that Mayes was not handcuffed to a chair nor beaten, that the questions were put and answered as stated and that appellant signed in their presence. They denied that appellant's attorney had warned them that Mayes was not fit to be questioned and the witness Courtland Jones moreover testified that Mayes in the office of Captain Pat Hayes requested that his attorney be summoned before he should make a statement and that no questions were asked before Mayes had conferred with his attorney alone.

At the trial the appellant testified also that he had lived in San Francisco for several months, had returned there from a visit to Dayton, Ohio, on May 20, 1945, and had gone back again to Dayton on May 25. He had however not been in San Francisco in the morning of May 23. He had gone on May 22 to Reno where he had gambled the night through and had returned to San Francisco in the evening of the 23d. This alibi was in no way corroborated. The person with whom he allegedly had made the trip to Reno and whose car allegedly was used for it, was not called as a witness, although defendant's counsel stated with respect to him: "he was in court this morning."

Defendant Neal denied ever to have been in San Francisco. His sister, Mrs. Virginia Neal, testified that in May, 1945, defendant was living at her home in Dayton, Ohio, and was home every night, particularly on May 23d.

[1, 2] Appellant contends that the verdict against him is contrary to the evidence. There cannot be the least doubt that the evidence stated amply supports the verdict; any conflict in it was resolved by the jury against appellant. Such finding is binding upon appeal where there is legal evidence to support it. People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259. Appellant, however, argues that both the defendants Mayes and Neal were identified by the complaining witness, that Neal was nevertheless found not guilty and that therefore there also must be a reasonable doubt as to the guilt of appellant. The following statement from People v. Quinn, 111 Cal.App. 614, 621, 295 P. 1042, 1045, is in point: "It should be remembered that the defendants were not charged jointly, but that each of them was separately charged with the commission of the offense, and that the 'defense' of 'alibi' of one defendant rested upon an entirely different state of facts and circumstances from that presented by his codefendant. It was altogether possible that one of them was guilty of the offense of which he was charged and at the same time that his codefendant was wholly innocent."

[3] As to Neal the evidence that he was in Ohio on the day of the crime and his denial ever to have been in California may have caused the jury to give him the benefit of a doubt which the jury need not have felt in the case of appellant. Appellant's contention that as the defendants were jointly charged with the commission of the same crime the basis must be conspiracy and the acquittal of one should result in the acquittal of the other is without merit. De-

fendants were not charged jointly but separately and not with conspiracy but with robbery.

[4, 5] Neither is there any merit in appellant's contention that the signature to the statement dated July 17, 1945, is not his signature, nor any basis for his desire to have expert evidence as to this handwriting presented to the appellate court. Whether the signature was his was a question of fact for the jury who heard the contradicting evidence and inspected the signature on the statement and other specimens of defendant's signature admitted in evidence. Appellant did not offer any expert evidence at the trial nor does he offer now anything in support of his contention that no handwriting expert was available at that time.

[6-10] Appellant further contends, that his confession, if he did sign it, was not a free and voluntary confession. "The rule is well settled that whether or not a confession is free and voluntary is a preliminary question addressed to the trial court. People v. Loper, 159 Cal. 6, 112 P. 720, Ann. Cas. 1912B, 1193; People v. Siemsen, 153 Cal. 397, 95 P. 863; People v. Grafft, 61 Cal. App. 7, 214 P. 273; People v. Middleton, [65] Cal.App. [175], 223 P. 448. A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary. See authorities last above cited. Where the evidence is conflicting on the subject it must be assumed that the testimony concerning defendants' confessions was properly admitted. People v. Tugwell, 28 Cal.App. 348, 152 P. 740." People v. Castello, 194 Cal. 595, 599, 600, 229 P. 855, 856. In this case the evidence with respect to the alleged physical maltreatment on July 17, 1945, in the Cincinnati jail is certainly conflicting and so far as this alleged physical maltreatment is involved it must be held that the confession was properly admitted. Appellant argues however that regardless of any physical maltreatment, the persistent questioning by police officers of a wounded man, kept incommunicado and denied counsel is sufficient to make a confession inadmissible, certainly when it is inconsistent with an earlier voluntary statement of that defendant. That such a confession would be inadmissible if it was given under the influence of such treatment and circumstances is not denied. People v. Dye, 119 Cal. App. 262, 6 P.2d 313; People v. Quan Gim Gow, 23 Cal.App. 507, 138 P. 918. However the evidence in this case does not show such influence. Appellant's evidence with respect to these circumstances relates only to his confinement in Dayton, at the end of which he made the statement of July 11, 1945, which appellant himself represents as a voluntary, uninfluenced statement. There is no evidence of any abuse between the time of this first statement and the moment that Inspector O'Leary in Captain Hayes' office accused appellant of being himself the Tony Depilla mentioned in that statement. It cannot be said that abuse which may have occurred prior to July 11, 1945, but which did not influence the voluntary character of a statement of that date, must necessarily, as a matter of law, have destroyed the voluntary character of a confession given 6 days later without further abuse intervening. Appellant's testimony that during this period he succeeded in having the assistance of his attorney, but not through the cooperation of the police officers, is insufficient to show further abuse vitiating the confession as a matter of law. The admission of the confession must be sustained. Moreover, the trial judge instructed the jury in substance that only a voluntary confession might be considered by them, and that they had the right to pass on the question whether the purported confession was freely and voluntarily made and to reject it if they did not believe it was so made. If the jury, following this instruction, might have rejected the confession there still would be sufficient legal evidence in the record to sustain the verdict.

[11] Appellant contends further that the court erred in refusing to give a certain instruction on his defense of alibi proposed by appellant, and in giving in its place an instruction of its own, which did not contain the statement present in substance in the proposed instruction, that the jury should acquit the defendant if the evidence

as to the alibi, considered with all the other evidence, raised a reasonable doubt of his presence at the time and place of the crime. That an instruction such as that omitted, correctly states the law and should be given was held in People v. Fong Ah Sing, 1883, 64 Cal. 253, 28 P. 233. The People concede that giving the instruction proposed by appellant would have been proper, but deny that the failure to do so is reversible error, in view of the instructions that were given with respect to alibi and the general instructions given repeatedly as to reasonable doubt.

The instruction as to alibi given by the court is practically identical with the one given in People v. Hovermale, 76 Cal.App. 91, 98, 243 P. 878, and in that case the identical questions were raised. The court affirmed the judgment of conviction, stating (at page 99 of 76 Cal.App., at page 881 of 243 P.): "The instruction given sufficiently covers all that was necessary on the mere question of alibi; but it does not advise the jury that if the evidence tending to establish the alibi was sufficient to create a reasonable doubt that the jury should acquit. However, it does appear from the general instructions in several places that the court instructed the jury that if they were not convinced beyond a reasonable doubt of the guilt of the defendant they should render a verdict of acquittal. Manifestly, if the jury believed that the defendant was in Monrovia at his brother-in-law's house on the evening of November 7, or if they had any reasonable doubt upon the question of his being there, they could not possibly have concluded beyond a reasonable doubt that he was one of the trio who perpetrated the robbery." The Hovermale case was followed in People v. Brooks, 79 Cal.App. 519, 250 P. 211 and its reasoning finds support in People v. Foster, 198 Cal. 112, 127, 128, 243 P. 667. In People v. Powell, 83 Cal.App. 62, 65, 66, 256 P. 561 and People v. Garvey, 93 Cal.App. 497, 504, 269 P. 702—both following the decision of this court in People v. Perrin, 67 Cal.App. 612, 617, 227 P. 924—it was held that a specific instruction on reasonable doubt caused by evidence as to an alibi was unnecessary in view of other instructions given and that there was no reason for the trial court to call attention to any particular line of testimony.

However, another line of cases, deriving from People v. Visconti, 31 Cal.App. 169, 160 P. 410, 411, holds it reversible error not to give a requested specific instruction on reasonable doubt caused by evidence as to alibi notwithstanding the fact that general instructions on reasonable doubt were given. To this line of cases belong for instance: People v. Garrett, 93 Cal.App. 77, 268 P. 1071; People v. Vasquez, 93 Cal. App. 448, 269 P. 549; People v. Quinn, 111 Cal.App. 614, 295 P. 1042. Most decisions with respect to the point in question are reviewed by the Supreme Court in the recent case of People v. Kane, 27 Cal.2d 693, 700, 701, 166 P.2d 285, which case itself is concerned with the refusal to give a specific instruction not relating to alibi. Although none of the cases cited above is disapproved, the majority opinion is based on the Visconti case and reverses for the refusal to give more specific instructions as to reasonable doubt with respect to defendant's theory of defense, notwithstanding the fact that the general instructions had been given. Considering the present state of the authorities we would hesitate to hold that an instruction on alibi as given in this and in the Hovermale case together with general instructions on reasonable doubt would under all circumstances make a requested specific instruction on reasonable doubt caused by the evidence as to an alibi superfluous. But neither will the refusal to give such an instruction in all cases be deemed a sufficient cause for reversal. Statement of the Supreme Court in denying a hearing of the Visconti case, 31 Cal. App. 172, 160 P. 410, 411. Much may depend on the strength of the alibi evidence compared to the strength of the evidence of guilt. See Annotation 118 A.L.R. 1303, 1313.

[12] As in People v. McCoy, 127 Cal. App. 195, 198, 15 P.2d 543, we are of opinion that the error, if any, in refusing the proposed instruction and omitting to instruct on reasonable doubt caused by the evidence as to the alibi, does not require a reversal under the circumstances of this

case. The jury was fully and fairly instructed on reasonable doubt and its attention was called to appellant's evidence regarding alibi by the fair though incomplete alibi instruction of the court. His alibi rested solely on his own completely uncorroborated testimony. The evidence connecting him with the robbery was overwhelming. The error, if any, has not resulted in a miscarriage of justice.

Finally appellant contends that the trial court abused its discretion in denying his motion for a new trial, without granting him a continuance to prepare and file affidavits and without giving him an opportunity to state what his affidavits would contain or what the newly discovered evidence would prove. The record shows that appellant's attorney asked for a continuance of 10 days to file his affidavits, as defendant's right under the law; that the court stated its understanding of the law to be that the court might pass upon the motion for a new trial immediately, that appellant's attorney reiterated his contention without any showing whatever in support of his application and without making any offer of a showing what his affidavits would contain or what the newly discovered evidence would prove, whereupon the motion was denied.

Under the provision of Penal Code sec. 1181, subd. 7 defendant was not entitled to a continuance under any and all circumstances as a matter of right. With respect to this provision 8 Cal.Jur. 440 (sec. 461) contains the following: "It is provided in the code that if time is required by the defendant to procure affidavits of the witnesses by whom the newly discovered evidence is expected to be given, the court may postpone the hearing of the motion for such length of time as under all circumstances of the case may seem reasonable. The matter of allowing a continuance under this provision rests in the discretion of the court. In determining whether a continuance shall be granted, the court is called upon to determine whether the defendant is entitled to it, and if so for what period of time and whether such continuance will probate justice. Therefore, the defendant should offer some evidence in support of his application. He should make a showing of what is expected to be set forth in the affidavits of the witnesses, and of a reason why the affidavits have not already been secured. He should also give the court reasonable grounds for his belief that the affidavits can be obtained."

[13] The correctness of the above statement of the law is fully supported by the decisions. People v. Peyton, 47 Cal.App. 2d 214, 224, 117 P.2d 683; People v. Buck, 46 Cal.App.2d 558, 566, 116 P.2d 160; People v. Parisi, 87 Cal.App. 208, 217, 261 P. 1072; People v. Burrows, 27 Cal.App. 428, 434, 150 P. 382; People v. Ross, 134 Cal. 256, 259, 66 P. 229. None of the showing required by these authorities having been made or offered, the application was properly denied. People v. Ross, supra; People v. Burrows, supra; People v. Parisi, supra.

Appellant relies on People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934, in which case the Supreme Court reversed a judgment and order denying a motion for a new trial because of refusal to permit counsel for the defendant a reasonable opportunity to prepare and present the motion. The circumstances shown in that case have no similarity whatever with those in the case at bar. They disclosed "not only that counsel for the defendant was misled as to the date upon which he would be required to argue the motion, but also that the trial judge entertained an egregious misconception of his duties and of the relative powers and functions of the trial court and reviewing court in respect to such a motion." (at page 15 of 27 Cal.2d, at page 938 of 161 P.2d) No question of either kind is involved in this case.

The judgment and order appealed from are affirmed.

GOODELL, and DOOLING, JJ., concur

Hearing denied; SCHAUER, J., dissenting.

78 Cal.App.2d 268

**PAULSEN et al. v. SPENCER.**

Civ. 3536.

District Court of Appeal, Fourth District, California.

Feb. 25, 1947.

**1. Automobiles ⇐173(5)**

Failure of motorist to leave a rear light on automobile lighted, while he left his stalled automobile parked at night on right shoulder of highway and went to get help, was negligence. Vehicle Code, § 627(c).

**2. Automobiles ⇐245(62)**

Whether negligence of motorist, who parked stalled automobile during the night on right shoulder of highway and left automobile to get help without leaving a rear light lighted, was the proximate cause of death of driver of trailer truck which collided with automobile while parked, was for jury. Vehicle Code, § 627(c).

**3. Automobiles ⇐242(8)**

Presumption that driver of motor tractor truck, who was killed when his truck collided with automobile driven by defendant which had been parked during the night on shoulder of highway, was traveling at a lawful rate of speed, that he was on proper side of road, and was at all times exercising ordinary care for his own safety, was evidence required to be considered in death action sufficient to support a verdict for plaintiff unless overcome by satisfactory evidence.

**4. Automobiles ⇐242(8), 244(45)**

In death action, evidence was sufficient to overcome presumption that deceased, who was killed at night when trailer truck he was driving collided with defendant's automobile which had been parked along shoulder of highway without a rear light lighted while defendant went to get help to start his stalled automobile, was traveling at a lawful rate of speed, was on the proper side of the highway, and was at all times exercising ordinary care for his own safety, and sustained judgment for defendant. Vehicle Code, § 627(c).

**5. Automobiles ⇐242(8)**

In death action, in determining sufficiency of evidence to overcome presumption that deceased, who was killed when trailer truck he was driving collided with defendant's automobile parked at side of road at night without rear light lighted, was traveling at a lawful rate of speed, that he was on the proper side of the highway, and was at all times exercising ordinary care for his own safety, that deceased had lights of the strength required by the Vehicle Code was required to be presumed. Vehicle Code, § 627(c).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Death action by Delloris D. Paulsen, Valerie Rae Paulsen, and Diana Lee Paulsen against Julyan W. Spencer. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Claflin & Chain, of Bakersfield, for appellants.

West & Vizzard, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for the death of Ray Lester Paulsen. The jury brought in a verdict in favor of the defendant, and the plaintiffs have appealed from the judgment.

The accident occurred at about 1:30 A.M. on November 25, 1945, on Highway 99 at a point about eleven miles south of Gorman. On that night the respondent was driving a 1942 DeSoto automobile north on this highway, traveling in the easterly of the three traffic lanes. When he reached the point in question his engine stopped and he was unable to start it. At this point the highway was upgrade and was straight for something like half a mile. After his engine stalled the respondent allowed his car to coast backward and to the south, along the east lane, to a point where the highway had been cut through a hillock. There is evidence that he backed his car up against the side hill in this cut, and parked it on the easterly shoulder. The shoulder was

six feet wide at that point and his car was six feet wide. He testified that the wheels of his car were entirely off the pavement but that the fenders may have overhung the easterly edge of the pavement. He put on his brake, turned off his lights and locked the doors of the car. He then caught a ride in a passing car going north. In the meantime, some four to six cars going north passed without stopping. The respondent was unable to get help at Gorman and Lebec, the garages being closed, but finally secured help at the Grapevine garage and returned to his parked car, having been gone something over an hour.

In the meantime two traffic officers in a state car, traveling north in the easterly traffic lane, at 35 or 40 miles an hour, passed the parked car and then backed up to investigate. One of the officers testified that they noticed a car parked on the east shoulder "parked against the bank" and that they stopped to investigate. The other officer, who was driving, testified "I had passed the car before I realized it was something that should be looked after," and that they then checked by radio to see whether or not the car had been stolen. These officers testified that while they made no measurements they thought the rear left tire on the parked car was from six inches to a foot on the pavement. While the officers had flares with them they did not put them out. The officers then drove north to Gorman and inquired as to the owner of the parked car. Receiving no information they then drove south.

When they again reached the point where the car had been parked they found that there had been an accident. The parked car was still on the easterly shoulder but about 16 feet 9 inches north of where it had been. Its left rear fender was completely knocked off, its bumper was hanging down, and there was considerable damage to the left part of the rear end and the left side of that car. There were gouge marks on the east edge of the pavement 16 feet 9 inches south of where the parked car then stood, and from those gouge marks dual tire marks ran northerly in a zigzag manner, and passing over all three lanes of the pavement, for a distance of 206 feet before they left the pavement on the easterly side. From that point they ran northerly about 100 feet along the easterly shoulder and into a canyon, some 60 feet deep. There was found a GMC tractor truck, the kind which is used to pull a semi-trailer although no semi-trailer was attached. Underneath this truck Paulsen was found dead. He had left home with this tractor truck on the previous morning. There was evidence that this tractor truck was eight feet wide. Pictures of respondent's car after the collision and of the marks left on the pavement by the truck, which were taken that night and the next morning, were introduced in evidence.

[1, 2] The appellants first contend that it must be held, as a matter of law, that the respondent was guilty of negligence and that such negligence proximately resulted in the death of Paulsen. While there is some evidence indicating that the respondent parked his car as well off the pavement as was reasonably possible under the circumstances, there would seem to be no question that he was negligent in not at least leaving a rear light lighted, as required by section 627(c) of the Motor Vehicle Code. However, a question of fact was presented as to whether that negligence was a proximate cause of the death of Paulsen. This is true because of the other circumstances which appear, with the reasonable inferences therefrom, which will be referred to in connection with the next point raised.

It is next contended that the jury's verdict must have been based upon a finding that Paulsen was guilty of contributory negligence, and that the evidence is entirely insufficient to support such a finding. It is argued that the presumption that the deceased was traveling at a lawful rate of speed, that he was on the proper side of the highway, and that he was at all times exercising ordinary care for his own safety, is evidence in this case; that since there were no eyewitnesses to the accident this presumption is of a particularly strong nature; and that there was no evidence which is sufficient to overcome this presumption.

[3] It is well settled that this presumption is evidence which must be considered

in such a case, and that it is sufficient to support a verdict unless overcome by satisfactory evidence. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. But this presumption is rebuttable and when there is substantial evidence to the contrary it becomes a question of fact for the jury. Nelson v. Myers, 94 Cal.App. 66, 270 P. 719; Estate of Braue, 45 Cal.App.2d 502, 114 P.2d 386; Mar Shee v. Maryland Assurance Corporation, Baltimore, 190 Cal. 1, 210 P. 269.

[4, 5] Taking the evidence most favorable to the appellants, the respondent's car was parked on the right shoulder with only a foot or two of it extending over the pavement. It appears that a number of other cars traveling in the east lane passed it without difficulty. Even the traffic officers had passed it before they realized that anything was wrong, and then they seemed to be more concerned as to whether or not it was a stolen car. They had flares which they did not put out and it is a reasonable inference from their testimony that they did not consider this necessary. The road was straight, affording a clear view for at least three-eighths of a mile to the south of the parked car, and it must be presumed that the deceased had lights of the strength required by the Vehicle Code. No reason appears why he should not have seen what other drivers saw. The truck driven by the deceased was eight feet wide and the damage to the parked car shows clearly that it was struck a foot or more to the right of the left rear fender. An inference could well be drawn that the deceased was driving with several feet of his truck extending over the right shoulder. It appears that the parked car, with its emergency brake on, was struck with such force as to push it upgrade a distance of nearly 17 feet and that, thereafter, the truck which struck it proceeded on up a comparatively steep grade for a distance of 300 feet and then went over into the canyon. This evidence, with the reasonable inferences therefrom, presented a question of fact for the jury. It could neither be held, as a matter of law, that this evidence was unsubstantial nor that it was insufficient to overcome and dispel the presumption that the deceased had used due care for his own safety. It is hardly possible to reconcile the evidence here with the use of such care by the deceased.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




78 Cal.App.2d 234

**JACKMAN et al. v. MAU.**

**Civ. 15610.**

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1947.

**1. Trade-marks and trade-names and unfair competition ⇐23**

A property right attaches to a trade-name which has been used for a number of years to identify and designate the business conducted.

**2. Trade-marks and trade-names and unfair competition ⇐23**

Where plaintiffs for a number of years used the trade-names "Jackman", "Jackman from California" and "Jackman of Hollywood" to designate men's and women's wearing apparel manufactured by plaintiffs and distributed at wholesale to retail stores, plaintiffs had a property right in such names which the law would recognize and protect.

**3. Trade-marks and trade-names and unfair competition ⇐67**

The law is watchful in protecting the public from fraud or deceit resorted to by a pretender to falsely lead buying public to believe that they are purchasing the goods of the merchant who, through a trade-name and honest effort, has established a reputation and public demand for his product.

**4. Trade-marks and trade-names and unfair competition ⇐73(1)**

The fact that a defendant uses his own name in labeling his goods or conducting his business does not shield him from injunctive action if such use is calculated to

cause confusion or to deceive the public with reference to an earlier established trade-mark or trade-name, even though the names are not identical but are sufficiently similar to cause confusion and injury.

**5. Trade-marks and trade-names and unfair competition ⇐100**

Finding that the use of the name "Jackmau of Hollywood" was not sufficiently similar to plaintiffs' trade-names, "Jackman from California" and "Jackman of Hollywood," to deceive the public was contrary to evidence in light of exhibits disclosing a similarity so close that difference was indistinguishable except on minute examination.

**6. Trade-marks and trade-names and unfair competition ⇐68(1), 69**

The law affords protection against unfair competition of one who seeks by imitation of a trade-name or by other artifice to induce persons to deal with him in the belief that they are dealing with another, and such protection may be invoked when there is present an intent to deceive or the doing of things reasonably likely to deceive.

**7. Trade-marks and trade-names and unfair competition ⇐71**

Where defendant adopted a name and sign in connection with its retail clothing business confusingly similar to plaintiffs' trade-mark and trade-name used in connection with their wholesale clothing business, defendant's use of such name could be enjoined as unfair competition notwithstanding that there was no direct competition between the parties, since the adopted name was prima facie broad enough in its concept to be mistaken by ordinary unsuspecting persons for the name used by plaintiffs.

**8. Fraud ⇐50**

A charge of "deception", which is but another term for fraud, must be proven.

See Words and Phrases, Permanent Edition, for all other definitions of "Deception".

**9. Equity ⇐65(2)**

Plaintiffs, in suit to enjoin defendant's use of the name, "Jackmau of Hollywood," as confusingly similar to plaintiffs' trademark, "Jackman of Hollywood," did not come into court with "unclean hands" because of addition of the words "of Hollywood" although plaintiff manufactured goods in downtown Los Angeles, since the use of the geographical name "Hollywood" with merchandise could be descriptive either of origin, quality or style.

See Words and Phrases, Permanent Edition, for all other definitions of "Unclean Hands".

**10. Evidence ⇐25(2)**

District Court of Appeal took judicial notice that "Hollywood" is not a separate municipality or geographical entity, but is merely a district within the City of Los Angeles.

See Words and Phrases, Permanent Edition, for all other definitions of "Hollywood".

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by M. Jackman, Katie Jackman, Sidney Jackman and Lawrence Jackman, a copartnership doing business as M. Jackman & Sons, against Jack A. Mau to enjoin defendant from using the name "Jackmau of Hollywood" in connection with his business. Judgment for defendant and plaintiffs appeal.

Reversed and remanded for a new trial.

Bachrack & Keilsohn, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for appellants.

Bertram H. Ross, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiffs appeal from an adverse judgment in an action for an injunction to restrain defendant from using the name "Jackmau of Hollywood" in connection with his business, upon the ground that such name conflicts with plaintiffs' prior established trade names, devices and labels, injured plaintiffs in their business, their good will and reputation, and misled, confused and deceived the public.

At the trial, it was established by stipulation or testimony that plaintiffs are copartners, conducting a manufacturing business

under the fictitious name of "M. Jackman & Sons". This partnership manufactures men's and women's wearing apparel and sells and distributes the same at wholesale to retail stores in the state of California and throughout the United States.

Prior to 1930, plaintiff M. Jackman was engaged in the manufacturing of formal wearing apparel, but since 1930 the business conducted under the name of "M. Jackman & Sons" has consisted chiefly in the manufacture of sportswear and leisure clothes.

In connection with their business plaintiffs used, and have used since 1930, distinctive trade names, labels, letterheads and devices incorporating the written signature of plaintiffs Jackman in the following manner and style: "Jackman". In 1944, plaintiffs incorporated in certain of their labels, letterheads and devices the written signature of plaintiff M. Jackman in the manner following: "Jackman from California". Plaintiffs also used the designation on some of their sportswear, as well as on all the formal wear manufactured by them, "Jackman of Hollywood".

In their complaint, plaintiffs alleged that they had expended large sums of money in advertising their manufactured products, and the name "Jackman"; that in the year 1945, between $25,000 and $35,000 was so expended, while the budget for advertising for the year 1946 was between $35,000 and $45,000.

In September, 1945, the defendant, whose true name is Jack Mau, and who is also known as "Jack A. Mau", opened a store at 139 East Seventh Street in the city of Los Angeles, for the sale at retail of men's and women's wearing apparel and for the rendering of cleaning, pressing and alterations services. Plaintiffs' place of business is located at 309 East Eighth Street, which, like that of respondent, is in the downtown garment manufacturing district of the city of Los Angeles, approximately three blocks away from defendant's place of business, but in the same general area.

Defendant advertises his place of business by signs over his store, on letterheads and business cards, using the device of joining together his first and last name in written signature in script form and adding the words "of Hollywood" after said name, making it read in its entirety, "Jackmau of Hollywood".

The articles of men's and women's wearing apparel manufactured and sold by plaintiffs are known to the public, and to the buyers and consumers thereof, by the trade names, labels and devices, "Jackman" and "Jackman of Hollywood".

Respondent offers for sale and sells the same type of sportswear and leisure clothes as has been and is being manufactured by plaintiffs. Th retail price range for the merchandise of the respective parties was shown to be as follows:

| MERCHANDISE | PLAINTIFF | DEFENDANT |
|---|---|---|
| Sports Jackets | From $29.50 | $24.50 |
| Sports Shirts | From $15.00 | $ 7.95 |
| Slacks | From $17.50 | From $14.50 to $16.50 |

On October 20, 1945, plaintiffs made a demand upon defendant to desist and discontinue using, in connection with his business, the trade name and design "Jackmau of Hollywood". Defendant refused to discontinue the use of said name, but offered to change the name as requested by plaintiffs on condition that the latter bear the expense of such change, which offer was refused by plaintiffs.

It was established at the trial, and in fact admitted by defendant himself, that following the commencement of his business operations, at least a half dozen customers had come into his store and asked for sportswear manufactured by "Jackman". Two buyers for retail stores dealing with plaintiffs observed the name and manner in which defendant's name appeared upon his place of business and believed that it was plaintiffs' store. Mail intended for the defendant and addressed to him as "Jackmau", was delivered by the Post Office Department to plaintiffs.

The trial court found that plaintiffs used and adopted the trade names and devices, "Jackman from California" and "Jackman of Hollywood", which have been advertised by plaintiffs throughout the United States in connection with the goods manufactured by them in the city of Los Angeles.

The court, however, found that plaintiffs do not manufacture any merchandise, nor do they transact any business in Hollywood; that plaintiffs manufacture their merchandise and do business wholly from 309 East Eighth Street, Los Angeles, which is in the wholesale and manufacturing district of the city of Los Angeles.

The court further found that plaintiffs have spent large sums of money in advertising the wearing apparel manufactured by them through various advertising media, and that they have used the trade names and devices, "Jackman from California" and "Jackman of Hollywood" in connection with the sale of their merchandise; that plaintiffs' merchandise is known under the name of "Jackman" by department store buyers and by a certain portion of the public that purchases and wears plaintiffs' merchandise.

The court also found that defendant's true name is Jack Mau; that he also used the name of "Jack A. Mau"; that in September of 1945 he opened a store at 139 East Seventh Street in the city of Los Angeles, for the sale at retail of men's and women's apparel, and for the rendering of cleaning, pressing and alterations services. The court further found that the defendant has no trademark, uses no labels, but does use his own name in front of his place of business and on the windows thereof, running his first and last name together, and displays the name over his place of business, "Jackmau of Hollywood".

It was further found by the court that, because plaintiffs have never manufactured or sold goods in Hollywood, and at all times have manufactured their goods at 309 East Eighth Street in the city of Los Angeles, which is not in that portion of the city commonly known and designated as "Hollywood", they are deceiving the public in using said trade name and device, "Jackman of Hollywood".

Finally, the court found "that it is untrue that the use of the name 'Jackmau of Hollywood' is so similar to the trade name of plaintiffs 'Jackman from California' that it is calculated to deceive the purchasers and consumers of plaintiffs' articles and/or the public in general. That there is not sufficient similarity in the trade name 'Jackman from California', used by plaintiffs, and that of 'Jackmau of Hollywood', used by defendant, to deceive the public."

[1-4] That a property right attaches to a trade name which has been used for a number of years to identify and designate the business conducted, has long been the law in California. In the instant case there is no denial that the trade names "Jackman", "Jackman from California"; and "Jackman of Hollywood" have been used by plaintiffs for a number of years to designate the business which they were conducting. Under such circumstances, the law recognizes and will protect the property right which attaches to the name. Ward-Chandler Bldg. Co. v. Caldwell, 8 Cal.App. 2d 375, 377, 47 P.2d 758. Another element involved in cases of this character is the watchfulness of the law in protecting the public from the fraud or deceit resorted to by a pretender to falsely lead the buying public to believe that they are purchasing the goods of the merchant who, through a trade name and honest effort, has established a reputation and public demand for his product. Carolina Pines, Inc., v. Catalina Pines, 128 Cal.App. 84, 87, 16 P.2d 781. And the fact that defendant was using his own name does not shield him from injunctive action if such use is calculated to cause confusion or to deceive. As was said in Hoyt Heater Co. v. Hoyt, 68 Cal.App.2d 523, 527, 157 P.2d 657, 659, "One must use his own name honestly and not as a means of pirating the good will and reputation of a business rival; and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business". Also, it is not necessary as a prerequisite to obtaining equitable relief in cases of this character that the names be identical. It is sufficient if though not identical they are sufficiently similar as to cause confusion and injury. Academy of Motion Pictures, etc., v. Benson, 15 Cal.2d 685, 692, 104 P.2d 650. In the case just cited at page 692 of 15 Cal.2d, at page 653 of 104 P.2d the Supreme Court quotes with approval the following rule enunciated in the case of Celluloid Mfg. Co. v. Cellonite Mfg. Co., C.C., 32 F. 94, at page 97: "Sim-

ilarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to affect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

Appellant first challenges as not supported by the evidence and as being directly contrary thereto, finding No. 8, reading: "That it is untrue that the use of the name 'Jackmau of Hollywood' is so similar to the trade name of plaintiffs, 'Jackman from California', that it is calculated to deceive the purchasers and consumers of plaintiffs' articles and/or the public in general that there is not sufficient similarity in the trade name 'Jackman from California' used by plaintiffs and that of 'Jackmau of Hollywood' used by defendant to deceive the public."

[5, 6] We find ourselves in accord with this contention of appellants. The exhibits, consisting of photostatic copies of the business cards of the respective parties, photographs of the advertising signs utilized by appellants, and the signs used by respondent on the front of his place of business, have been brought here on this appeal. They bear out appellants' claims that respondent adopted the firm name, label and device "Jackmau of Hollywood" in imitation of appellants' firm name, label and device. An inspection of the exhibits shows the most marked similarity of appearance between the respective names. By using the name "Jackmau" in script form as he did, respondent creates a similarity with appellants' name, the difference in which is indistinguishable except upon minute examination. That the law will afford protection against the unfair competition of one who seeks by imitation of a trade name, or by other artifice, to induce persons to deal with him in the belief that they are dealing with another, is of course well settled. This doctrine rests on the basis of fraud and may be invoked when there is present an intent to deceive, or the doing of things reasonably likely to deceive. In a case such as the one now before us it is not necessary, in order to establish an invasion of appellants' right, that the imitation of their trade name be identical for, as heretofore quoted from the case of Academy of Motion Pictures, etc., v. Benson, supra, "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another". Having in mind the rule that what similarity is sufficient to effect the object has to be determined by the circumstances of each case, we find in the instant case that the photographs and photostats furnish a practical demonstration of sufficient similarity to induce confusion or deception. That such confusion did ensue is further shown by respondent's admissions that, in several instances, customers entered his store asking for merchandise manufactured by appellants. Added to this is the testimony of Jay Harvey, a buyer for Brown's Wearing Apparel Store, a firm that purchases articles of sportswear from appellants. With reference to respondent's store, this witness testified:

"Well, on my way to the wholesale district on Los Angeles Street, many times I go up Seventh Street; I saw this store and a sign, and thought it was an outlet of Jackmans', and I called them about it."

Upon further interrogation, the witness testified:

"Q. When you looked at this sign, then, you thought that Jackman had opened a retail store and outlet? A. I thought it was—it looked like 'Jackman of Hollywood' to me."

Maurice J. Hibler, buyer and manager of Desmond's six stores in California, testified:

"Q. I show you plaintiffs' Exhibit number 6 which consists of three photographs of the store of the defendant located at 139 East Seventh Street, Los Angeles, and ask you if you have ever personally observed the front of that store? A. Yes, I did, about, sometime I believe in the early part of December; I was walking down Seventh Street on the opposite side of the street, and I noticed the sign and noticed the similarity of the signature—at first I was amused because I didn't think it was possi-

ble that Jackman would operate a retail store; and the next time I visited Jackmans' I learned that there was no connection whatsoever.

"Q. Then when you saw this sign on the front did you actually think that that read 'Jackman'? A. Yes, I definitely did."

Then there was the testimony of the confusion created in the Post Office through delivery of some of respondent's mail to appellants.

That the trial judge shared the belief that the similarity in the names with which we are here concerned would reasonably lead to confusion and deception is manifested by what he said in announcing his decision at the close of the trial. We quote from the reporter's transcript: "I will say this, as far as the two signs are concerned; that when they are using script I think the majority of people would be confused; that when they are in the business or custom of buying this sort of goods, while I don't know anything about it, I am satisfied from the testimony given, particularly that of the manager of Desmond's, that Jackman's is a name that is well known in the trade, and a 'u' and an 'n' as written will be confused time and again, especially if anybody writes as the Court does; they take my 'u's' for 'n's' and 'n's' for 'u's', I know."

When, however, appellants refused to waive findings, the court did say: "I want it clear, Mr. Ross, that the Court does not believe, in spite of the similarity of sign, that the public that deal with Jackmans'—with the plaintiff—is likely to be deceived by the sign now used by the defendant Jack Mau."

We search the transcript in vain for any contradiction of the foregoing testimony, and are therefore led to the conclusion that the evidence does not support the questioned finding but in fact is directly contrary thereto.

[7] Respondent, however, urges that the parties herein are not engaged in competitive businesses; that appellants are manufacturers who sell and distribute their goods at wholesale through retail stores, while respondent operates a single store for the sale at retail of men's wearing apparel and for the rendition of cleaning, pressing and alterations services. Therefore, argues respondent, he not being engaged in a business which competes with that of appellants, the use by him of appellants' trade name does not impinge upon the latter and can not be characterized as unfair competition. While it is true that most of the cases dealing with unfair competition are concerned with instances in which the respective parties are engaged in business directly competitive, nevertheless, as said in Academy of Motion Picture, etc., v. Benson, supra, 15 Cal.2d at page 689, 104 P.2d at page 652, "But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and defendant are engaged in non-competing businesses." The true test is—has the defendant "adopted a name which prima facie is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff". Academy of Motion Picture, etc., v. Benson, supra, 15 Cal.2d at page 691, 104 P.2d at page 653.

In the case at bar, one element of deception that might go abroad in mercantile circles is that appellants are engaged in the retail business in direct competition with the retailers to whom appellants sell at wholesale. In fact, as hereinbefore noted, the buyer and manager for Desmond's testified, "* * * I didn't think it was possible that Jackman would operate a retail store". The witness Jay Harvey, a buyer for Brown's Wearing Apparel Store, testified that when he observed respondent's store and the type of name thereon, he "* * * thought it was an outlet for Jackman's and I called them about it". Equity will not countenance the use by respondent of the trade name "Jackmau", written in script form and similar to the manner in which appellants' long possessed trade name is written because respondent may thereby reasonably confuse and deceive the buying public into the belief that his is a "Jackman" retail store.

The case of Alhambra Transfer, etc., Co. v. Muse, 41 Cal.App.2d 92, 106 P.2d 63, relied upon by respondent, is not helpful. In that case the holding was that the trade name used by plaintiff was not susceptible under our law of exclusive use. No such

question is here involved. The only other case cited by respondent on the question immediately under discussion is Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 P. 480, 53 L.R.A. 384, 82 Am.St.Rep. 346. As to that case we find ourselves in accord with the views expressed by the court in W. & H. Walker v. Walker Bros. Co., 1 Cir., 271 F. 395, 398, wherein it was said: "If the California case (Nolan brothers Shoe Co. v. Nolan, 131 Cal. 271, 63 P. 480, 53 L.R.A. 384, 82 Am.St.Rep. 346) means that a concern may not extend its business, under its own name, from retail to wholesale, we should not be disposed to follow it. But, whether that case is unsound or not, it had reference to a wholesale business which had been suspended, and where a name was sought to be established in respect to a new and another kind of business".

Appellants next direct their attack to finding No. 7 as not being supported by the evidence. It reads as follows: "That plaintiffs in using the trade name 'Jackman of Hollywood' are deceiving the public in using said trade name and device, in that plaintiffs have never manufactured or sold goods in Hollywood or done business from Hollywood and that at all times plaintiffs have manufactured their goods and carried on their business from 309 East 8th Street in the city of Los Angeles, which is not in that portion of the city commonly known and designated as 'Hollywood'."

The view of the trial judge which gave rise to this finding was expressed by him when, at the conclusion of the trial, in announcing judgment for the defendant, he said: "Judgment is for the defendant, on the grounds that the plaintiff does not come into court with clean hands; that he himself is deceiving the public by his advertising of a type that he complains is also being done by the defendant".

But the main, if not the only, serious objection appellants urged against respondent was his use of the name "Jackmau" in script form so that it was similar to appellants' trade name of "Jackman", and thereby confusing and deceiving prospective buyers and misleading the public into believing that respondent was retailing goods manufactured by appellants. Indeed, by finding No. 5 the court found, "That plaintiffs' merchandise is known under the name of 'Jackman' by department store buyers and by certain portions of the public that purchases and wears plaintiffs' merchandise". This finding, supported as it was by competent and substantial evidence, negatives the questioned finding that the value of appellants' trade name was dependent upon any geographical appendage it might carry.

[8] It is also noteworthy in regard to the challenged finding No. 7 that not a scintilla of evidence was produced to show that anyone was deceived through appellants' use of the designation "of Hollywood". It is axiomatic that a charge of deception, which is but another term for fraud, must be proven. In the absence of any evidence whatsoever that the inclusion in appellants' trade name of the designation "of Hollywood" adds anything whatever to the representations of the quality of the manufactured merchandise or the manufacturing firm's reputation, or that in adopting the words "of Hollywood" someone has been deceived and defrauded or is likely to be deceived or defrauded, appellants can not be held guilty of deception as a matter of law. Scandinavia Belting Co. v. Asbestos & Rubber Works, 2 Cir., 257 F. 937, 959.

[9, 10] Undoubtedly, the trial judge's decision was in great part influenced by the belief that, as stated by him, "The plaintiff does not come into court with clean hands". This assumption was, as stated by the court, predicated on the fact that appellants were not manufacturing their goods in Hollywood, but there is no evidence that appellants' use of the phrase "of Hollywood" was intended to or did imply that the goods were manufactured in Hollywood. Standing alone, "Hollywood" is a geographical name, and its use in connection with the manufacture of merchandise may be descriptive either of origin, quality or style. There was no proof that appellants represented that their sportswear was manufactured in Hollywood. In any event, the court will take judicial notice of the fact that Hollywood is not a separate municipality or geographical entity, but is merely a dis-

trict within the city of Los Angeles. Undoubtedly, it is true that he who comes into equity must come with clean hands, but we fail to perceive in the evidence any testimony that because appellants adopted the designation "of Hollywood" anyone has been deceived or defrauded or is likely to be deceived or defrauded. There being no testimony that appellants were guilty of willful misconduct, fraud or deception in regard to the matter here in litigation, the courts of chancery are open to them for the redress of any wrongs allegedly inflicted upon them.

The judgment is reversed and the cause remanded for a new trial in conformity with the views herein expressed.

YORK, P. J., and DORAN, J., concur.




78 Cal.App.2d 313

**COLEMAN et ux. v. GALVIN.**

Civ. 3516.

District Court of Appeal, Fourth District, California.

Feb. 27, 1947.

Rehearing Denied March 26, 1947.

Hearing Denied April 24, 1947.

**1. Execution ⇐371**

Superior court of county in which judgment debtor resided and had his place of business had jurisdiction to order examination of judgment debtor supplementary to execution issued on judgment obtained in another county upon filing with clerk of such court of abstract of the judgment and presentation to judge of an affidavit showing existence of required facts. Code Civ.Proc. §§ 674, 714–716, 722.

**2. Execution ⇐374**

A judgment debtor examination is intended to be summary and factual, according the widest scope for inquiry concerning property and business affairs of judgment debtor; the object of proceedings being to compel judgment debtor to give information concerning his property.

**3. Execution ⇐386**

A third person or corporation alleged to have property of a judgment debtor or to be indebted to him may be examined concerning such matters in proceeding supplementary to execution. Code Civ.Proc. § 717.

**4. Appeal and error ⇐225**

Judgment creditors could not complain on appeal that trial court in proceeding supplementary to execution should have ordered secretary of corporation by which judgment debtor allegedly was employed to produce books, records, and insurance policies, where judgment creditors after examining secretary made no further request for an order in connection with production of other books, records, or policies.

**5. Appeal and error ⇐225**

Judgment creditors, having made no further request for an order requiring attendance of witness subpoenaed to appear at judgment debtor examination or for an order of contempt, could not complain on appeal of waiver by trial court of attendance of such witness. Code Civ.Proc. § 1209, subd. 9; § 1211.

**6. Witnesses ⇐297, 308**

A witness may not arbitrarily refuse to testify on ground that he might thereby incriminate himself unless a real danger of such self-incrimination exists in fact, and trial court is charged with responsibility of determining whether such danger exists.

**7. Witnesses ⇐297**

Judgment debtor, at judgment debtor examination, could not refuse to answer questions concerning employment, rental of safe deposit box, and ownership of war bonds, life insurance, realty, money, and debts of others on ground that answers might tend to incriminate him, since answers to such questions would not show a transfer or concealment of assets with intent to defraud creditors. Pen.Code, § 154.

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Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Supplemental proceedings by Kee Coleman and wife, judgment creditors, against

John Galvin, judgment debtor, for the purpose of discovering property subject to execution. From an order refusing to compel judgment debtor to answer questions and terminating the proceedings, the judgment creditors appeal.

Order reversed.

See also 66 Cal.App.2d 303, 152 P.2d 39.

Earl C. Berger, of San Francisco, for appellants.

Ray W. Hays, of Fresno, and J. Frank Murphy, of Santa Cruz, for respondent.

GRIFFIN, Justice.

Plaintiffs and appellants recovered a judgment against defendant and respondent in Santa Clara County for $20,000 as a result of an automobile accident. The insurance carrier paid $11,952.74 upon the judgment. An abstract of judgment, for the balance remaining due, was filed on May 2, 1945, in Fresno County. On September 26, 1945, an order was made requiring the judgment debtor to appear for examination, on supplemental proceedings. The affidavit in support of the order recited that the judgment debtor now resides in Fresno County and that about $8,000 was still due upon the judgment; that he was employed by the Diocese of Monterey-Fresno of the Roman Catholic Church, and that their office, records and officers were also located in that county; that property belonging to the judgment debtor might be located therein which is subject to execution. It was ordered that the Monsignor John Galvin, His Excellency Philip Scher, the Bishop, and the Right Reverend James H. Culleton, the Chancellor-Secretary of the Diocese of Monterey-Fresno appear and answer all questions pertaining to the judgment debtor's property and bring with them all records pertaining to same and also all automobile insurance policies and records of transactions involving assignments of property by the judgment debtor to the Bishop or other persons or institutions subject to their control. A subpoena duces tecum was ordered for such purpose.

At the hearing, on October 17, 1945, the defendant, the judgment debtor, was sworn. The original automobile insurance policy, covering defendant's car, was produced and received in evidence. Before any question was propounded of the witness, his counsel stated that he had instructed the judgment debtor "to refuse to answer any questions in response to the interrogatories taken under supplemental proceedings on the ground that any of his answers might have a tendency to incriminate himself," and cited Sec. 154 of the Penal Code; Ex parte Clarke, 103 Cal. 352, 37 P. 230; and In re Berman, 105 Cal.App. 37, 287 P. 125, 126.

Counsel for plaintiffs suggested that he first be allowed to ask some questions of the witness before the court ruled. After some argument the court agreed. Several questions followed. Counsel for defendant then objected on the same ground "as originally made" and the trial court sustained objections to all previous questions bearing on the subject. The witness was then separately asked certain questions hereinafter set out in full in respect to his property. After counsel again admonished his client that he need not answer the questions propounded on the ground that they might incriminate him, the trial court asked the witness: "You refuse to answer, do you? An affirmative answer followed and the court again sustained the objection. Counsel for plaintiffs then explained the reason for his questions and stated that he had in his possession a deed indicating that Father Galvin owned an interest in certain real property in Los Angeles, and described it. Counsel for defendant then again instructed his client to refuse to answer on the constitutional grounds and the trial court again sustained the objection. Defendant was then asked if he (Father Galvin) was employed and the court sustained the objection on the ground that "it may tend to incriminate him" after which counsel for plaintiffs addressed the court and said:

"* * * to clear the record * * * I would ask the same questions to cover the property from the date of entry of judgment, October 1, 1943 until the present time. My last line of questions were limited on their face to today, October 17, 1945. Now, if I would ask the same questions relating back to the period October 1st and to include the period October

1, 1943 until today, Mr. Murphey, would your objections be the same? * * *

"Mr. Murphey: I believe they would.

"Mr. Berger: And I take it, Your Honor—

"The Court: The ruling would be the same.

"Mr. Berger: * * * I do not want that lack of knowledge to work against the rights that my two clients might have, and therefore I am going to ask your Honor to suggest to me what I might do in order to have this witness answer questions pertaining to such assets as may be used to pay the judgment.

"The Court: Well, the Court won't instruct counsel as to how to handle his case. * * *

"Mr. Berger: Well, then, I must admit that I am at a loss to understand how the judgment-debtor can be examined and be required to pay a judgment that remains unpaid. And that being the case, why it is perfectly futile to try to proceed and ask any further questions here. I am through with this witness at the present time because of the Court's rulings."

The Chancellor-Secretary was then called as a witness. He testified that defendant was not exactly "employed" by the corporation; that he is a priest—"a part of the corporation"; that he receives no compensation for his duties; that he has his living from the church, i. e. "honesta sustenata," a place to sleep, some clothes, his food and reasonable diversion, totaling about $1,000 a year; that the books of the corporation show he has not taken more than that from the church and that it has no monies or other personal property belonging to Father Galvin. He was then asked if the church did not have a blanket policy which applied to automobile accidents in which priests might be involved as drivers. He replied that the blanket policy held by it only covered judgments rendered against the church; that if the court would instruct the reporter not to write anything down he would answer the question; that in his "humble opinion" the policy would not cover Father Galvin's accident. He was then called upon to produce the policy described. He replied that if he had the policy he would bring it, and he could find out what company wrote it, if ordered to do so by the court. A recess was then taken and the witness was to phone his insurance agent for the information. No further questions were asked of him. Counsel for plaintiff then renewed his request to reexamine the judgment debtor further and offered to submit further authorities to the trial court in support of his contention that the defendant should have been allowed and compelled to answer the questions propounded as to whether he now has any assets subject to execution. The court then informed counsel for plaintiffs that he had his "remedy by appeal," if any, denied his motion, and terminated the proceedings. From this order plaintiff appealed.

The respondent, on this appeal, for the first time challenges the jurisdiction of the Superior Court of Fresno County to issue an order for the examination of the judgment debtor because it is based upon a judgment obtained in Santa Clara County. He cites Corcoran v. Harris, 94 Cal.App. 19, 270 P. 391, decided September 14, 1928. This case does hold that under the law as it then existed, and where no abstract of judgment was filed in the latter county, the order for examination must issue out of the county in which the judgment was entered, and if the judgment debtor resides in another county that court should appoint a referee and hear the matter in the county of the debtor's residence.

In 1929 (Stats.1929, p. 847), one year after the date of the decision relied upon by respondent, section 722 of the Code of Civil Procedure was enacted, which section now provides that when any judgment debtor does not reside or have a place of business, in the county where the judgment roll is filed, an order authorized to be made under any provisions of this chapter (Pt. 2, Title 9, Chap. 2), (and this is such an order), (See secs. 714–716, C.C.P.), may be made by any judge of a court of similar jurisdiction of the county where such judgment debtor resides or has a place of residence (Fresno County is the county in which the judgment debtor resides and has his place of business), upon

the filing with the clerk of an abstract of the judgment in the form prescribed by sec. 674, C.C.P. (such a form of abstract was so filed), and upon presenting to the judge an affidavit showing the existence of the facts required to be shown herein (such an affidavit was so filed).

[1-3] It clearly appears from the record that the Superior Court of Fresno County had jurisdiction to hear such proceedings, i. e., the examination of a judgment debtor relating to his property generally. The proceeding is intended to be summary and factual. It affords the widest scope for inquiry concerning the property and business affairs of the judgment debtor. No formal issues are framed, for the very object of the proceedings is to compel him to give information concerning his property. It has been stated that the examination of a debtor who has property which he refuses to apply toward the judgment covers the same field as is had for precisely the same purpose, to wit, of having disclosed, by an examination of the debtor, some property not exempt from execution which the judgment creditor may have subjected to sale under his execution. A third person or corporation alleged to have property of a judgment debtor or to be indebted to him may be examined concerning the same. C.C.P. Sec. 717; 11 Cal.Jur. p. 152, sec. 87; People ex rel. Dorris v. McKamy, 28 Cal. App. 196, 151 P. 743; McCullough v. Clark, 41 Cal. 298; Watson v. Pryor, 49 Cal.App. 554, 193 P. 797.

[4] Counsel for plaintiffs first complains that the trial court should have ordered the witness Culleston to produce his books, records and policies of insurance belonging to the church. We see no merit to this claimed error of the trial court because the witness testified fully in respect to the same and made an offer to call the insurance agent and ascertain additional information for the benefit of the plaintiffs. From the record it would appear that plaintiffs were satisfied with the information received and that the records or books would not disclose any further evidence valuable to him. At any rate, counsel for plaintiffs made no further request for an order in connection with the production of any other books, records or policies, and he should therefore not be heard to complain in this respect.

[5] He next argues that the Bishop was subpoenaed to appear at such hearing and that apparently the trial court, through some outside information, waived the requirement that this witness appear at the hearing and that the trial court did not consult with counsel for plaintiffs about such waiver. The trial judge told counsel, for the first time, at the hearing, that he had been informed that the Bishop knew nothing about the property of the defendant Galvin or the books or records of the Church and that therefore he was not present at the hearing. While it might appear that counsel for plaintiffs should have been apprised of the action about to be taken as to the apparent waiver of the presence of the witness thus subpoenaed, it does not appear from the record that he made any further request for an order requiring his attendance or for an order of contempt. On this appeal he cannot be heard to complain in this respect. C.C.P. Sec. 1209, subd. 9; C.C.P. Sec. 1211; Drew v. Superior Court of Mendocino Co., 180 Cal. 711, 182 P. 417.

The third point presented is more meritorious and deserving of consideration. It might appear that the trial court was led into error in reference to its rulings on some of the questions propounded to defendant, from the statement of counsel for defendant. Mr. Murphy, counsel for defendant, in his remarks to the court, said: "In re Berman * * *" holds "that it is the witness's province to state whether he believes the question would incriminate himself, that must in the nature of the case be his decision to make, because the court cannot know what his inference is in the matter; so he is the one to make the decision in the matter." We do not believe that the case cited goes this far, for if it did, any judgment debtor could claim such privilege and could never be compelled to testify as to his property holdings.

In Re Berman, supra [105 Cal.App. 37, 287 P. 130], the petitioner had given a deposition and had answered certain specified questions in a certain manner. By way

of impeachment, as a witness on a supplementary hearing, he was asked if the answers given in the deposition were "not * * * 'a true statement of fact.'" In each case the witness declared his wish to stand upon his constitutional rights and refuse to answer on the ground that it might tend to incriminate him. One could readily understand, under these circumstances, why he might elect to refuse to answer the questions as propounded for the reason that they might, if answered contrary to his previous statement, tend to convict himself of perjury. It was under these circumstances that the court there held that the witness could not be compelled to answer the questions.

In Ex parte Clarke, supra, relied upon by defendant, the petitioner had been adjudicated an insolvent debtor. His assignee in insolvency filed a petition charging him with having concealed and disposed of property which should have been turned over to the assignee for the benefit of creditors. It was in that same insolvency proceeding he was ordered to appear and be examined upon the matters alleged. It was there held that he could not be made to answer the questions. It is apparent that a disclosure that he did conceal part of his property and not declare it in the insolvency proceeding might subject him to prosecution under Section 154 of the Penal Code.

Section 154 of the Penal Code does provide that "Every debtor who fraudulently removes his property or effects out of this state or fraudulently sells, conveys, assigns or conceals his property with intent to defraud, hinder or delay his creditors of their rights, claims or demands, is punishable by imprisonment in the county jail * * *."

[6] The general rule, taken from the several cases bearing on the question, is discussed in Re Berman, supra, and it is there said [105 Cal.App. 37, 287 P. 128];

"* * * that the witness cannot arbitrarily refuse to testify without the existence in fact of a real danger; and that some discretion must rest in the court whereby it may prevent the mantle of protection from being turned into a cloak for fraud and trickery."

Justice Marshall's decision in the case of U. S. v. Burr (In re Willie), 25 Fed.Cas. page 38, No. 14,692e, and Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819, are cited. Then People v. Forbes, 143 N.Y. 219, 38 N.E. 303, is cited and this portion is quoted:

"'They should be compelled to swear unequivocally that their testimony would incriminate them, and then the court should be satisfied that there is reasonable ground to apprehend danger to the witnesses from their being compelled to answer.'"

Also, In re Stewart, 121 Wash. 429, 209 P. 849, 852, is cited as setting forth the modern rule as found in 28 R.C.L. 428, where it is said:

"There are several English authorities which hold that a witness is the sole judge of whether answering a certain question asked would tend to incriminate him. There are also American authorities which seem to lean to the same view. However, the great weight of authority is to the contrary, and it is now settled, both in England and in this country, that it is the province of the court to determine in the first instance under all the circumstances of the case whether any direct answer to a proposed question has a tendency to criminate a witness, and, of course, it is the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretense of defending himself, screen others from justice, or withhold evidence which he might safely give. Otherwise it would be in the power of every witness to deprive parties of the benefit of his testimony, by a merely colorable pretense that his answers to questions would have a tendency to implicate him in sime crime or misdemeanor, or would expose him to a penalty or forfeiture, when it is clear that the questions have no such tendency."

Summarizing the cases therein discussed, the court held: "* * * that the court is first charged with the responsibility of determining whether there is a *real danger.*" (Italics ours).

Measured in the light of these general rules, can it be said that all of the questions propounded to the witness entitled him to swear to and rightfully claim the immunity, i. e., that the answers thereto would tend to or would criminate him, and that the trial court was justified in holding that there was a *real danger* that they would?

It seems doubtful to us that Father Galvin ever intended that such interpretation could be placed upon his refusal to answer the questions propounded, that is, first, the inference that he had in fact violated section 154 of the Penal Code and fraudulently sold or concealed his property with intent to defraud his creditors; second, being under oath to tell the truth, that he intended to swear that if he gave answer to the questions propounded, his answers would in fact criminate him or tend to criminate him and furnish evidence of the fact that he had so violated that section. To entitle him to that protection it must be so inferred, and that he wished to claim his privilege for that reason.

[7] Since the witness and his counsel wish to insist upon exercising this privilege, it will be necessary for us to analyze some of the questions propounded, separately, and in the light of the general rule above mentioned. The first question: "Q. Father Galvin, are you employed by anyone at the present time?" Under no argument presented do we see any *real danger* that this question to which the court sustained an objection, might criminate him or tend to criminate him. The ruling, therefore, was erroneous. Second: "Q. Father Galvin, do you have a safe deposit box in any bank or trust company?" We likewise see no merit to the form of objection made to this preliminary question. An affirmative or negative answer to it would not tend to criminate the witness. Third: "Q. Do you own any U. S. War Bonds, Father?" The plaintiff should have answered the question. Likewise, an affirmative or negative answer to this preliminary question could not be reasonably construed as constituting a *real danger* that thereby the witness tended to or did criminate himself. Fourth: "Q. Does anyone owe you money at the present time?" We do not see how an affirmative answer to this question would criminate the witness. Section 154 of the Penal Code describes the offense as the fraudulent sale, assigning or concealing of the debtor's property. If some creditor owes defendant money at the present time, it cannot reasonably be held from that fact alone that any property of the judgment debtor has been fraudulently sold, assigned or concealed. The question seems quite proper and harmless.

The same conclusion should be reached as to whether he, at the present time, owns life insurance or real estate or money. We see nothing in these preliminary questions that would show that defendant had had money, real estate or life insurance and had later fraudulently concealed it, with intent to defraud creditors.

Viewing the record of the examination of the witness and the few preliminary questions propounded, we are not prepared to hold that the trial judge was justified in determining that there was a *real danger* that if the defendant was compelled to answer these specified questions as propounded, that he would thereby tend to or would in fact incriminate himself.

The order is reversed.

BARNARD, P. J., and MARKS, J., concur.

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## RAZZANO v. KENT.

No. 13293.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1947.

Rehearing Denied March 26, 1947.

Hearing Denied April 24, 1947.

1. Tenancy in common ⇐55(7)

A cotenant cannot recover the total damages caused by a trespass to the leasehold, but may recover only for his proportionate interest.

2. Pleading ⇐129(1)

Allegation in complaint was admitted by failure to deny it by the answer.

3. Pleading ⇐36(1)

A party is bound by the admissions of his own pleadings.

4. Pleading ⇐127(2)

In action for damage to plaintiff's leasehold, failure of defendant to amend his answer at trial so as to deny plaintiff's ownership of the entire leasehold interest was an "admission" of plaintiff's ownership of the entire interest rather than a one-half interest allegedly shown by lease introduced into evidence by plaintiff, and was binding upon defendant and authorized recovery of total damages by plaintiff.

5. Trespass ⇐51

Only past damages may be recovered for an abatable temporary trespass since the continuing trespass gives rise to new causes of action for each day the trespass continues.

6. Mines and minerals ⇐125

Evidence sustained finding that plaintiff had an established gold dredging enterprise on a leasehold which he was operating at a substantial profit to himself and that his business was destroyed by the wrongful acts of defendant in so flooding plaintiff's dredging operations and leasehold so as to make it impossible for plaintiff to further carry on the dredging operations, and plaintiff was entitled to recover for loss of prospective profits from date plaintiff was forced to abandon operation to date of expiration of lease, and was not required to wait until expiration of lease before filing suit. Civ. Code, § 3283.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by George J. Razzano against E. A. Kent for damages for flooding plaintiff's leasehold. From an adverse judgment, defendant appeals.

Judgment affirmed. Appeal from order denying motion for new trial dismissed.

Hardin, Rank, Meltzer & Fletcher, of Oakland, and Rowan Hardin, of Sonora, for appellant.

Nat Brown and C. H. Hogan, both of Stockton, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff and respondent for damages in the sum of $2,112 and from the order denying defendant's motion for a new trial.

The complaint, which was filed on June 25, 1941, alleged that "the plaintiff is and for more than one year last past has been the lessee of and as such in possession of * * *" certain real property commonly known as Montezuma Flat in Tuolumne County, which land had been leased for the purpose of dredging for gold; that he dredged said land for a year prior to May 1, 1941, at a substantial profit to himself; that "defendant does and for more than one year last past has carried on dredging operations on property adjacent to and above" plaintiff's property; that such operations of defendant caused a mass of muddy water to flow into the pond used by plaintiff in carrying on his operations to such an extent that on May 1, 1941, it became impossible for plaintiff to continue his dredging operations profitably; that on May 1, 1941, defendant, without plaintiff's consent, constructed a dirt dam on the lower end of plaintiff's leasehold across the swale through which the muddy waters were accustomed to flow into the lands below and that this caused the muddy water to be impounded on and to cover a substantial part of plaintiff's leasehold, ren-

dering it impossible for plaintiff to carry on his dredging operations on that portion of the property; that at the time plaintiff was forced to cease dredging operations there remained on the property covered by his lease approximately 100,000 square yards of gravel to be dredged, the average gold content of which was 25 cents per square yard, and that by reason of defendant's wrongful acts plaintiff was damaged in the sum of $10,000.

In his answer defendant did not deny the allegation that plaintiff was the lessee of the property, but did deny practically all of the other material allegations of the complaint.

The trial court found in accordance with the allegations of plaintiff's complaint except as to the allegations concerning damages. In this respect the court found: "At the time when plaintiff was forced to abandon his gold dredging operations on his leasehold by the acts of the defendant which resulted in the flooding of plaintiff's leasehold and his dredging operations with muddy water and slime from defendant's mining operations to such extent that plaintiff could no longer profitably operate, the plaintiff had left on his leasehold a substantial amount of gold bearing gravel which he could and would have dredged and mined at a substantial profit to himself before the expiration of his lease, if he had not been prevented from doing so by the wrongful acts of the defendant. From such continued and completed mining operations the plaintiff would have realized for himself a net profit of not less than $2,112.00, and by reason of the wrongful acts of the defendant and as the proximate result of such acts, the plaintiff has been and is damaged in the sum of $2,112.00."

Appellant does not attack the sufficiency of the evidence to sustain a judgment in favor of respondent, nor does he contend that the evidence is insufficient to show that the acts of appellant caused damage to the leasehold interest in the sum awarded by the court. Appellant does, however, seek a reversal of the judgment upon several grounds which we shall discuss in the order of their statement in appellant's opening brief.

The first ground relied upon by appellant is "that the plaintiff, a cotenant, cannot recover the total damages done to the leasehold interest when the undisputed record shows him to be the owner of only a one-half interest therein." Appellant points out that in the early part of the trial respondent introduced into evidence a written lease between one Joe Sanguinetti and respondent and C. J. Karr, and states that no further evidence was introduced as to whether C. J. Karr had sold or assigned his interest to respondent, and appellant contends that the record therefore shows that respondent and C. J. Karr were cotenants and that C. J. Karr is still the owner of a one-half interest in the lease. Appellant points out also that there are no findings as to the interest of Karr, nor do the findings show whether the judgment represented all or only one-half of the damages suffered by the leasehold premises, and appellant argues that the findings are insufficient and uncertain and that the judgment must therefore be reversed.

In support of this contention appellant cites the cases of Melrose v. Cooley, 50 Cal. App. 768, 196 P. 105, and Muller v. Boggs, 25 Cal. 175, in which the rule is laid down that while a tenant may commence in his own name alone an action to recover possession of the leasehold premises from a stranger, he cannot recover the total damages for the loss of any profits, but only for that proportion thereof which corresponds to his interest in the land.

The Melrose case, supra, was one where plaintiff brought an action for damages for trespass and conversion of a pipe line. The case was tried on the theory that plaintiff was the sole owner of such pipe line. The appellate court there stated in effect that the record showed the plaintiff was only the owner of an undivided interest in the said pipe line and therefore was entitled only to such damages, both compensatory and punitive, as may be just for any injury done to her one-half interest and no more. Since the jury had awarded her damages on the theory that she was the sole owner, it was therefore necessary to reverse the judgment.

The Muller case, supra, was one where the plaintiff was found to be the owner of

only an undivided three-fourths interest in certain real property. The Supreme Court therefore held that the plaintiff was entitled to recover only three-fourths of the rents and profits and that the judgment being for the full amount was therefore erroneous and had to be reversed. Since, however, the plaintiff was willing to remit one-fourth of the judgment, the court modified the judgment in accordance with such offer and affirmed it. (See also 7 Cal. Jur. 371, sec. 39)

[1, 2] It would seem to be settled law in this state that a cotenant cannot recover the total damages caused by a trespass to the leasehold, but may only recover for his proportionate interest. So in view of the fact that it is clear from the record in the instant case that the amount awarded respondent was for the total damages to the leasehold, it would be necessary for us to reverse the judgment if it were also clear from the record that respondent was not the owner of the entire leasehold interest. The trial court found that "*the plaintiff* [respondent], *as lessee, was in possession*" of the leased premises. (Emphasis added.) This finding is in accordance with a similar allegation in the complaint, which allegation was admitted by failure to deny it by the answer. It is clear from the evidence that respondent was regarded by all of the parties as the owner of the lease. The lease as executed on October 13, 1939, 20 months before the commencement of the action, was between Sanguinetti and respondent and C. J. Karr, and while there is no direct evidence as to what Karr's interest was, or that his interest had been assigned to respondent, yet it is fairly inferable from the evidence that such was the fact. Counsel for appellant cross-examined respondent at great length and produced many witnesses, but he made no statement nor asked any question during the entire trial tending in any way to dispute respondent's ownership of the entire leasehold interest.

[3] Furthermore, if appellant desired to question the fact of respondent's ownership of the entire leasehold interest he should have done so at the trial and should have moved to amend his answer accordingly, as the lease was introduced in evidence early in the trial. A party is bound by the admissions of his own pleadings.

In 21 Cal.Jur. 155, sec. 106, it is stated: "Except in actions for divorce, 'every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true.' In other words, like a default, a failure to deny a material averment in a complaint is an admission of the truth of the fact stated, which is conclusive against the pleader, and obviates the need for introducing evidence and making a finding upon the fact involved. Indeed, as a fact so admitted is not in issue, evidence tending either to establish, modify or contradict it should not be received or considered, and a finding contradictory thereto should be disregarded. The rule is the same where a denial is insufficient. * * *"

[4] In Bloss v. Rahilly, 16 Cal.2d 70, at page 77, 104 P.2d 1049, at page 1052, the court stated: "Defendants further contend that, 'An appropriator's right to take foreign water may not be quieted where at the time of his application and the issuance of the permit thereon the water had no existence.' They cite and rely upon section 1(d) of the act. While we believe there was sufficient evidence to show the existence of the foreign water in the creek at the time of the application, we are of the opinion that defendants are in no position to raise the point on this appeal. Plaintiff alleged in his complaint the existence of said foreign water in the creek 'since 1927'. Defendants admitted in their answers the existence of said foreign water in the creek 'since 1927' and affirmatively alleged its existence therein 'since many years prior to 1927'. It is therefore a sufficient answer to this contention of defendants to state that said contention is based upon a statement of fact which is contrary to the admissions and allegations found in their own pleadings." See also United Air Services, Ltd., v. Sampson, 30 Cal. App.2d 135, 86 P.2d 366; Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 41 P.2d 378.

Appellant's second and third grounds for reversal of the judgment are: "The court

erred in granting the plaintiff as part of his damages the loss of future profits occurring after the suit was filed which resulted from the act of the defendant in committing the temporary continuing trespass in allowing the muddy water to run down the natural creek bed" and "The court erred in awarding any damages for loss of future profits after May 1, 1941, which was caused by the muddy water running down the natural creek bed as there is no evidence in the record that the trespass continued on after May 1, 1941, to June 25, 1941, when suit was filed, or on to October 23, 1941, when the lease terminated." These contentions are discussed together by appellant and we shall do likewise.

The two acts of trespass set forth in the complaint and findings are that on or about the first day of May, 1941, the muddy water flowed from defendant's mining operations through the plaintiff's leasehold and into plaintiff's dredging pond, causing the plaintiff to discontinue his dredging operations in that portion of the leasehold; and that on or about the first day of May, 1941, the defendant constructed a dam which impounded water over a portion of the leasehold making it impossible for plaintiff to dredge that portion thereof.

As hereinbefore set forth, respondent in his complaint alleged, and the trial court found, that it was on or about May 1, 1941, that the acts of appellant rendered it impossible for him to continue his dredging operations.

[5] It is appellant's contention that the trespass caused by allowing the muddy water from his operations to drain into respondent's pond was in the nature of an abatable temporary trespass and therefore the respondent was entitled only to recover damages as to this injury for the period from May 1, 1941, until June 25, 1941, the date the suit was filed. Appellant argues that in the case of an abatable temporary trespass the respondent can recover only *past* damages since the continuing trespass gives rise to new causes of action for each day the trespass continues, and appellant cites the following authorities in support of this well-established legal proposition: Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833; Lindberg v. Linder, 133 Cal.App. 213, 23 P.2d 842; 25 C.J.S., Damages, § 31, pp. 498, 499; 17 C.J. p. 766. Appellant then asserts that if respondent had waited until the termination of his lease on October 13, 1941, he would then have been entitled to recover for all the damages he might have suffered, but that because the trial court allowed plaintiff to recover for the loss of all his prospective profits the judgment must therefore be reversed. The appellant also contends that even if it be assumed that the respondent could recover prospective damages, still it was incumbent upon the respondent to prove the continuance of the temporary trespass from May 1, 1941, until the time of the expiration of the lease. The appellant argues that the record and findings are silent on this point. The appellant concludes, therefore, that the respondent is not entitled even to past damages, that is, from May 1, 1941, until the date of the filing of the suit, to say nothing of prospective damages.

It is true that here the action was brought before the termination of the lease and therefore before expiration of the time in which plaintiff had to dredge the property. However, here there are other circumstances present that would seem to distinguish the instant case from the rules contended for by appellant. Here the evidence shows and the trial court found that by reason of defendant's wrongful acts, the plaintiff was forced to discontinue and abandon his dredging operations on May 1, 1941. In this respect the plaintiff testified in effect that he began his operations in November, 1939; that he had plenty of water all the time until defendant Kent began his upper operations in 1940; that then mud and silt began to run into his ditch; that he could not get water in any other way to operate on the high ground; that he complained to defendant's employees but nothing was done directly to stop this; that he first complained in June or July of 1940. Plaintiff further testified that the mud continued to flow into the pond until it became so thick in May of 1941 that he could no longer operate; that the acts of defendant caused him to quit his operations and to move his dredger out; that he

moved his equipment to another operation at Wallace, Calaveras County; that it cost him $500 to move the equipment, plus expenses for assemblage at the other site. It would seem, therefore, that the wrongful act was completed as of May 1, 1941, when the plaintiff was forced to abandon his dredging operations and move his equipment, and that respondent was entitled to recover for the loss of all prospective profits.

That a party can recover prospective profits is well settled by the case of National Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12. In that case the plaintiff was in the business of extracting natural soda products from the bed of Owens Lake. The lake had dried up due to defendant's diversion of the water of the Owens River. Plaintiff erected a plant for its purposes and its operation depended upon the continuation of the diversion by defendant. On February 6, 1937, defendant allowed a large amount of water to flow into the lake and continued to do so intermittently until July 1, 1937. The plaintiff was unable to resume operations until October, 1937. Plaintiff's action for damages was filed thereafter. There the court stated in part, 23 Cal.2d at page 199, 143 P.2d at page 17: "In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. [Citing cases.] If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. [Citing cases.]"

Appellant asserts further that assuming that respondent is entitled to recover prospective damages, he cannot do so in this case without proving that the nuisance actually continued during the period for which he recovers the loss of profits. We believe that there is sufficient evidence in the record to show the continuance of the trespasses of appellant.

As to the flooded portions of respondent's leasehold caused by the erection of the dam, the plaintiff testified that even if the dam had been blasted out at the time of its discovery, that is, about May, 1941, he still would have been unable to have mined it immediately as there would be too much mud left behind; that it would not have washed out until way later in the rainy season. Therefore, as to this property the plaintiff was clearly justified in abandoning the operation and the wrong was complete as of May 1, 1941; and the appellant makes no contention to the contrary.

As to the wrong of defendant in allowing mud from his upper operation to flow into plaintiff's ditch and thence into his pond, the evidence shows and the court found that this situation existed for a year prior to May 1, 1941. The plaintiff testified that the only reason he operated until the spring of 1941 was that during the winter months he had plenty of run-off water, that is, surface rain waters, and therefore the mud did not bother him too much. It would thus appear that as long as Kent maintained his operations on the upper property, the mud and silt would continue to flow into plaintiff's ditch and pond in the absence of affirmative evidence to the contrary. In the reporter's transcript in relation to testimony given by the defendant Kent the following appears: "Q. After the water passed from your dredging operation and passed down through the Razzano property and passed down to the property you were dredging below, did you have any trouble in operating your dredger, from that water that came through the two dredging operations? A. No, we operated for a year in there, from December, 1940, to, I think it was, pretty nearly a year, October or November, 1941."

It would seem, therefore, that it can be inferred that water continued to run down from defendant's upper operation at least until November, 1941, as it did not bother defendant's lower operation during this time. This being so, it could also be inferred that the same mud condition during this time would prevail as to the respondent in the absence of evidence to the contrary,

and therefore that in any event the respondent would have been unable to operate his dredge during this time. Thus it would appear that there is sufficient evidence of the continuance of this alleged trespass until October of 1941. It is therefore difficult to see how the appellant can maintain that there is no evidence of such continuance, if such proof is actually required under the circumstances of this case.

[6] As we have hereinbefore pointed out, the record supports the court's findings that on May 1, 1941, respondent had an established gold dredging enterprise on the leasehold which he was operating at a substantial profit to himself, and that his business was destroyed by the wrongful acts of appellant in so flooding respondent's dredging operations and leasehold as to make it impossible for him to further carry on said operations. Under such circumstances we do not believe that appellant's contention that in order to recover his total damages respondent was required to wait until the lease expired before filing suit is supported by either reason or authority.

In McCormick on Damages, p. 51, sec. 13, it is stated: "This practice of remitting the plaintiff to a later suit for the continuance of harmful conduct after the commencement of the action and before the trial, while a logical application of the theory of successive rights of action for successive wrongs, has the obviously inconvenient result of increasing litigation over what may broadly be regarded as a single controversy. In equity, when suits for injunction were brought to restrain the continuance of a nuisance or like continuing injury, this consideration of convenience prevailed. These courts, in order to terminate the entire controversy in one suit, will, in the injunction suit, give as an incident thereto compensation for the loss or injury already suffered, and, carrying out the same policy, will allow recovery for the harm or damage sustained through the continuance of the wrong down to the time of the final disposition of the case.

"The directness and practicality of this result has led in several jurisdictions to the acceptance of this chancery rule allowing damages for a continuing wrong down to the time of trial, as a general rule for all actions, whether legal or equitable. This sensible alteration in the common-law practice will doubtless, in the fullness of time, be adopted, by statute or rule of court, in the other states."

The California case of Hicks v. Drew, 117 Cal. 305, 49 P. 189, and Civil Code section 3283 are cited by McCormick in support.

Section 3283 of the Civil Code states: "Damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

In Hicks v. Drew, supra, the court said, 117 Cal. at pages 311, 312, 49 P. at page 191: "The trial judge instructed the jury as follows: 'No damage can be recovered in this action for injury to plaintiff's feelings, but only such pecuniary damage as accrued to her property by reason of the maintenance by defendant of a bulkhead at the foot of California street, and of such damage she can recover only so much as accrued to her before the commencement of this suit, and after the 29th day of November, 1891.' Section 3283 of the Civil Code provides: 'Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof.' By this section of the Code, plaintiff was entitled to recover damages suffered subsequent to the filing of the complaint, and for this reason: the instruction given is unsound as a proposition of law. Neither was a supplemental pleading necessary to support such a recovery. This court said in McLennan v. Ohmen, 75 Cal. 558, 17 P. 687: 'Besides, plaintiff was entitled, under his original complaint, to recover damages for detriment resulting after the commencement of his action.' In line with the legal principle declared by the aforesaid section of the Code, see Morgan v. Reynolds, 1 Mont. 163; Greenl.Ev. § 268a." To the same effect see Berry v. Bank of Bakersfield, 177 Cal. 206, 211, 170 P. 415; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 27, 276 P. 1017.

Appellant makes a final contention that the court included in the total judgment awarded to respondent an indefinite amount

of damages for the construction of the dam, but we find nothing in the findings or judgment to justify this statement. The court found that but for the wrongful acts of appellant respondent would have a profit of $2,112 and the judgment was for that amount.

In view of the foregoing, we conclude that the judgment should be and is hereby affirmed. The appeal from the order denying appellant's motion for a new trial is dismissed.

PETERS, P. J., and WARD, J., concur.




78 Cal.App.2d 194

**In re COLLINS' ESTATE.**

**BROWN v. STEVENS et al.**

**Civ. 15555.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1947.

1. Wills ⇐743

Where nonresident beneficiary under will of widow assigned an undivided interest in her legacy to her nephew who in turn assigned an undivided interest in his share to his wife, his wife was entitled to succeed to a part of widow's estate, a portion of which was community property of the widow and her deceased husband who was the father of the nonresident beneficiary.

2. Executors and administrators ⇐21(1)

Nephew of nonresident beneficiary, under will of her father's widow, had no right under statute to be appointed administrator with the will annexed of widow's estate. Probate Code, § 422.

3. Executors and administrators ⇐21(1)

Resident assignee of a nonresident legatee under domestic will of widow was not "entitled to succeed to some portion of the estate" so as to be entitled to priority over public administrator to be appointed administratrix with will annexed, though such assignee would have inherited had there been no will because she was a niece of the widow's deceased husband, and part of estate was community property of the widow and her deceased husband. Probate Code, §§ 409, 422, subds. 9, 10.

4. Executors and administrators ⇐17(1)

The designation in statute dealing with order of priority of right to letters of administration, of seven classes of persons who hold priority over the public administrator, excludes all other classes. Probate Code, § 422.

5. Executors and administrators ⇐21(1)

The order of preference of those who could qualify as administrators with will annexed under statute, of a domestic will, was required to be determined by the statute dealing with order of priority of right to letters of administration of a person dying intestate. Probate Code, §§ 409, 422.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Mary E. Collins, deceased, wherein Ben H. Brown, public administrator, sought appointment as administrator, and wherein Nellie B. Stevens and Irwin M. Stevens opposed the appointment of the public administrator, on ground that they were entitled to appointment as administratrix and administrator with will annexed. From a judgment in favor of the public administrator, Nellie B. Stevens and Irwin M. Stevens, opposed by the public administrator, and Myra L. Barber and Charles Carter, legatees, appeal.

Judgment affirmed.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellants Stevens for legatee and respondent, Myra L. Barber.

M. B. Butler, of Pasadena, for legatee and respondent Charles Carter.

J. H. O'Connor, Harold W. Kennedy, County Counsel, and J. P. Wright, Deputy County Counsel, all of Los Angeles, for petitioner and respondent Ben H. Brown.

MOORE, Presiding Justice.

The question posed by this appeal is whether the resident assignee of a nonresident legatee under a domestic will is entitled to priority over the public administrator to be appointed as administrator with will annexed, even though such assignee would have inherited had there been no will.

[1] Decedent was the widow of one Palmer Collins. The court found that her next of kin were her brother, Charles Carter of Iowa, and her nephew, Irwin Stevens of Long Beach, California; that petitioners are residents of California but that neither are they legatees nor do they succeed to any part of decedent's estate under the will; that Myra Barber, a nonresident beneficiary under the will and daughter of Palmer Collins, has assigned an undivided interest in her legacy to her nephew, Irwin Stevens, who in turn assigned an undivided interest of his share to his wife, Nellie, which entitles her to succeed to a part of decedent's estate, "a portion of which was the community property of decedent and Palmer Collins." In re Estate of Watts, 179 Cal. 20, 23, 175 P. 415.

[2] No contention for the right of Irwin Stevens to be appointed administrator with will annexed is advanced on this appeal. Happily so, for no basis for such appointment can be found in any of the statutes which prescribe the guiding rules. Section 42, Probate Code,[1] excludes Irwin by reason of the fact that he does not come within the first six classes of potential appointees. While he is entitled to share in the estate only by virtue of the assignment he is not a legatee, nor is he next of kin.

[3, 4] However, appellants seriously urge that it was error to deny letters to Nellie Stevens. They contend that inasmuch as Nellie is not only assignee of a legatee of decedent but also would be entitled to take on distribution had Mrs. Collins died intestate, she is entitled to letters of administration in preference to the public official. In support of such contention they quote section 409, Probate Code, which reads: "* * * Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators, except that, as to foreign wills, a person who is interested in the will has priority over one who is not." The next step in their argument is that Nellie, as a bona fide resident of California, a niece of Palmer Collins and therefore heir at law of decedent, is entitled to be appointed. They point to the language of section 422 which places the public administrator in the eighth class, next below "the relatives of a previously deceased spouse, when [such relatives are] entitled to succeed to some portion of the estate." While Nellie's California residence might qualify her for the appointment as provided by section 420, she has not been nominated by any of the classes of persons designated by section 423 Probate Code,[2] to entitle her to be named administratrix. Since she is not *"entitled to succeed* to some portion of the estate"

1 "Order of priority of right to letters. Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof: (1) The surviving spouse, or some competent person whom he or she may request to have appointed. (2) The children. (3) The grandchildren. (4) The parents. (5) The brothers and sisters. (6) The next of kin entitled to share in the estate. (7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate. (8) The public administrator. (9) The creditors. (10) Any person legally competent."

2 "Nomination. * * * Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in court. If the person making the request is a child, grandchild, parent, brother or sister of the decedent, the nominee shall have priority next after those in the class of the person making the request; otherwise the court, in its discretion, may appoint either such nominee or a person of a class subsequent in rank to that of the person making the request; but other persons of the class of the person making the request shall have priority over such nominee."

as is required of "relatives of a previously deceased spouse" (subd. 7, sec. 422; In re Estate of Crites, 155 Cal. 392, 393, 101 P. 316), she qualifies under no section of the Probate Code. While in the event of Mrs. Collins' intestacy Nellie would have been entitled to a share of her estate by virtue of her relation to Palmer Collins and of the community character of the estate, still she would not be eligible to appointment as administratrix with will annexed because she was not related to decedent. Under familiar rules of statutory construction the designation of the seven classes of persons who hold priority over the public administrator excludes all others. In Estate of Pardue, 22 Cal.App. 178, 180, 70 P.2d 678.

[5] The will of decedent is a domestic will. The order of preference therefore of those who may qualify as administrator with will annexed under section 409 must be determined by section 422. In re Estate of Martens, 10 Cal.2d 395, 399, 74 P.2d 238. Neither of the last two mentioned sections gives preference to the assignee of a nonresident legatee over any of the seven classes of potential appointees specified in section 422 ahead of the public administrator of a domestic will. It would be different had the will been executed in another state. In such event Nellie Stevens and her husband might have qualified under section 409 which authorizes the appointment as administrator of a foreign will a person who is interested therein in preference to one who has no interest. In re Estate of Engle, 124 Cal. 292, 56 P. 1022. But no advantage or priority exists by virtue of section 422 in favor of a California assignee of a foreign legatee under a domestic will who does not as an heir at law succeed to a share of the testator's estate. The right of succession is the controlling consideration (In re Estate of Crites, supra), and that right derives from the consanguineal relationship or its equivalent of the petitioner to the testator and not by virtue of an acquisition by assignment of an interest in a legacy. Since Nellie Stevens does not come within any of the first six classes of persons listed in section 422, although she is a niece of the predeceased spouse of decedent, she is a stranger and therefore not "entitled to *succeed* to some portion of the estate." In re Estate of Moran, 176 Cal. 216, 168 P. 18. Consequently she could qualify only as a creditor or as a person legally competent (See sec. 422, subds. 9 and 10) after the public administrator.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.




78 Cal.App.2d 226

**METCALF v. DREW et al.**

**Civ. 15357.**

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1947.

**1. Brokers ⇐38(4)**

In action by bankruptcy trustee against broker to recover secret profits allegedly realized on broker's sale of land of bankrupt, evidence supported finding that broker fraudulently concealed higher bid from trustee and that trustee did not have actual or constructive knowledge of such concealment.

**2. Appeal and error ⇐1012(1)**

The appellate court will not weigh evidence where the evidence supports the trial court's findings.

**3. Brokers ⇐38(7)**

In action by bankruptcy trustee against broker to recover secret profits allegedly realized on broker's sale of land of bankrupt, evidence supported finding that trustee and bankruptcy estate suffered damage in amount of $82,778.75 by broker's fraudulent concealment of higher bid from trustee.

**4. Damages ⇐24**

An award of damages must be predicated on something more than mere possibilities.

**5. Brokers ⇐38(4)**

In action by bankruptcy trustee against broker to recover secret profits allegedly realized on broker's sale of land of bankrupt, evidence warranted finding that confidential relationship existed between trustee and broker, who was retained to find a buyer for the land, requiring broker to disclose to trustee a higher bid for property than the bid made by purchaser.

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action to recover secret profits, for damages and for equitable relief by H. F. Metcalf as trustee of E. P. Newport Corporation, Ltd., a corporation, bankrupt, against John Drew, J. A. Charlesworth and others. The cause was dismissed as to all defendants other than the named defendants. From a judgment for the plaintiff, the named defendants appeal.

Affirmed.

Buel R. Wood, of Los Angeles, for appellant J. A. Charlesworth.

Samuel DeGroot and Aaron Sapiro, both of Los Angeles, for appellant John Drew.

Bailie, Turner & Lake and Allen T. Lynch, both of Los Angeles, for respondent.

DORAN, Justice.

The events leading up to this litigation consist of the adjudication in bankruptcy of the F. P. Newport Corporation, Ltd. on January 12, 1937, and the appointment of the respondent, H. F. Metcalf as trustee on March 19, 1937. At the time of adjudication the Newport Corporation owned certain North Hollywood acreage described in the complaint, together with other tracts thereto adjoining. The trustee Metcalf and appellant Charlesworth were both licensed real estate brokers and during the times involved herein occupied the same offices at 115 W. 7th Street in Los Angeles under an "informal" arrangement, acting, however, independently of each other. An oral agreement was entered into under which Charlesworth was to receive a commission of 5% upon finding a buyer for the acreage, and on November 28, 1941, Charlesworth submitted to the trustee a written offer to purchase the property for $625 per acre, or a total purchase price of $87,135, the proposed purchaser being John Drew. The offer was accepted by the trustee and thereafter the sale to Drew was confirmed in the bankruptcy court on January 29, 1942, resulting in an escrow whereby Drew was to pay $10,000 down and execute a trust deed for the balance. The trust deed contained provisions for a subdivision program to be carried out on the property.

The complaint herein was filed by the trustee to recover secret profits, for damages, and equitable relief, and after alleging consummation of the bankruptcy sale of January 29, 1942, hereinbefore referred to, avers that the appellant Charlesworth, on or about December 11, 1941, received from H. H. Hagge and Lilly J. Hagge, a written offer to purchase the acreage for the sum of $174,270, which offer was accepted by John Drew about January 16, 1942. Paragraph XI of the complaint alleges that the broker Charlesworth did not communicate the Hagge offer to the trustee or to the bankruptcy court, and that the trustee had no knowledge thereof until about August 4, 1943, a few days previous to the filing of the complaint. It is further alleged that Charlesworth and Drew conspired to "fraudulently conceal from the plaintiff and said Bankruptcy Court the fact that the defendants Hagge were willing to pay * * * $174,270.00, and to prevent said defendants Hagge from acquiring knowledge of * * * and from becoming bidders for said property at said bankrupt sale thereof, * * * all to the damage of plaintiff and said bankrupt estate and the creditors thereof in the sum of $87,135." Charlesworth is alleged to have represented to the trustee Metcalf that the offer made by Drew "was the highest and best offer said Charlesworth had received or been able to obtain for the said property", whereas said representation was false in view of the Hagge offer of twice that amount, and known by the broker to be false. It appears that both Drew and Charlesworth testified at the bankruptcy hearing when the sale to Drew was confirmed.

The cause was duly dismissed as to all defendants other than Drew and Charlesworth, and was tried by the court without a jury, resulting in a judgment for the plaintiff-respondent. The trial court found that the Hagge offer of $174,270 was not communicated to the trustee or to the bankruptcy court, and that Drew and Charlesworth had conspired to conceal such offer for the purpose of deriving a secret profit from the sale at $87,135 to Drew as confirmed by the bankruptcy court. It was further found that the trustee had no knowledge of the larger offer; that the trustee had not been guilty of laches; that it was the duty of the appellant Charlesworth "to promptly and fully disclose to plaintiff (trustee) each and every offer received for said property or brought to his attention", and that "both defendants knew of the duty"; that "by reason of the fraud and deceit practiced on plaintiff by defendants", and of the conspiracy, concealment, etc., "plaintiff as the Trustee in Bankruptcy * * * has been damaged in the sum of $82,778.75."

Both Drew and Charlesworth gave notice of appeal, but the defendant Drew failed to perfect the appeal. On May 28, 1946, one E. A. Piller, assignee of the judgment secured by the trustee Metcalf, moved to dismiss the appeal on the ground that the same had become moot due to the fact that the judgment had been satisfied. The consideration for the assignment of the $82,778.75 judgment to Piller was only $10,000. Thereafter appellant Charlesworth filed a motion "for dismissal of appeal and action" alleging that Piller was merely the nominal owner of the judgment, Charlesworth's coappellant Drew being the real party in interest; further that if the appeal alone was dismissed, leaving the fraud judgment standing as against Charlesworth, the latter's real estate broker's license would probably be revoked on an order to show cause then pending. The District Court of Appeal denied both motions to dismiss, leaving the Charlesworth appeal to be "determined upon its merits", Metcalf v. Drew, 75 Cal.App.2d 711, 171 P.2d 488, 495, on the theory that Charlesworth had not acquiesced in the satisfaction of judgment, and that a mere dismissal of the appeal would amount to an affirmance of the judgment which would preclude the broker from defending against the charges of the Real Estate Commissioner. The merit of the Charlesworth appeal is the matter now under consideration.

According to the opening brief, "Appellant's attack on the finding is upon the failure of evidence to support it, and its failure to find upon the material issue, raised by the evidence, that the Trustee, having the means of knowledge, was possessed of that knowledge which he would have actually known had he investigated". In support of this contention appellant points to evidence tending to show that the trustee had been in the real estate business for 40 years; that Hagge was known "to be in the deal in some way", and that the broker Charlesworth had stated that Hagge was to be the builder who was to improve the property. It is urged that the above and similar circumstances were such as to advise the trustee that Hagge was an interested party and "of sufficiently grave a nature as to put a prudent man on his inquiry". In this connection it is to be noted that the trustee testified: " * * * so far as I am advised, I am dealing with one man (Drew). I have his check in my pocket. I have looked up his record. As far as I am concerned, he is amply good to carry out this deal providing he goes through with Hagge (the builder). Mr. Hagge will be tied into this deal because he is giving the lien and construction bond. I want this bond from him because he is going to do that work, he is going to do the street work and put in utilities and build houses". Further quoting from the trustee's testimony, appellant's brief points to the latter's statement that "When I found that Hagge was in the deal I was very much pleased. In fact, I don't think I would have gone through with this deal otherwise". The appellant then avers that "If the Trustee knew that Hagge was going to do the work outlined above he knew that Hagge had assumed the obligations of Drew under the trust deed". But this latter averment is clearly a non sequitur; the trustee's knowledge that Hagge was a builder who would be engaged in improving the vacant property carries with it no

suggestion that the builder was a secret purchaser or interested otherwise than as a builder. Nor does such knowledge tend to create a suspicion, or evidence a clue, that Drew and Charlesworth might be embarked upon a conspiracy involving fraud and concealment for the purpose of securing secret and unconscionable profit at the expense of the bankruptcy estate. Again it may be pointed out that both Drew and Charlesworth testified in bankruptcy court concerning the proposed sale to Drew but that apparently neither of these parties saw fit to mention the Hagge offer, the amount of which was twice that of the Drew offer submitted to the court.

[1, 2] The matter of constructive notice on the part of the trustee has received extended attention in appellant's brief. None of the cases cited, however, present sufficient analogy to the present situation to constitute authority for appellant's contentions. In West v. Great Western Power Co., 36 Cal.App.2d 403, 407, 97 P.2d 1014, is stated what appellant denominates as "the true rule to follow in cases of this character". Quoting from 46 C.J., pages 546, 547, the court in the West case said: "As to what will be a sufficiency of facts to excite inquiry no rule can be very well established. Each case depends upon its own facts and circumstances. * * * It may be premised that the means of knowledge must be available and of such character that a prudent man might be expected to take advantage of them. There must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter. * * * The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission". There can be no doubt that this is, as appellant says, the true rule. At page 411 of the same opinion, in 36 Cal.App.2d, at page 1019 of 97 P.2d occurs the following language quoted from Northwestern Portland Cement Co. v. Atlantic P. C. Co., 174 Cal. 308–312, 163 P. 47, particularly applicable to the present case: "'Whether a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact," and whether "by prosecuting such inquiry, he might have learned such fact" (Civ.Code, § 19), are themselves questions of fact to be determined by the jury or the trial court. * * * Findings of ultimate facts are binding upon appeal, not only where there is a direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing inferences.'" That such a situation is presented by the present record cannot well be questioned. That record contains substantial evidence supporting the trial court's findings of fraud and concealment, and under the usual rule in such cases, it is not the function of an appellate court to weigh the evidence.

"The merit of Appellant's complaint", quoting the opening brief, "lies not only in the attack on the finding as unsupported by the evidence but its silence upon whether or not the Trustee was put sufficiently upon his notice to have discovered the existence of Hagge's interest. The trial court ignored every circumstance that plainly pointed out to the trustee that some contract was in the offing". Appellant then cites Powell v. Johnson, 50 Cal.App.2d 680, 123 P.2d 875, and other cases holding that where a trial court renders judgment without making findings upon all material issues, the judgment cannot be sustained. Without disputing such rule, an examination of the findings fails to support appellant's contention as to its application in the instant case. The findings appear to cover all material issues in considerable detail, and in Paragraph XIV thereof, the trial court finds "That plaintiff had no knowledge of said offers or either of them or of any offer of H. H. Hagge and Lilly J. Hagge to purchase said property or of said contract of March 7, 1942 until on or about August 4, 1943".

[3, 4] In reference to the matter of damages, appellant argues two points: (1), that "The evidence is wholly insufficient to show in what manner the trustee was damaged by the alleged conspiracy"; and (2), that "The damages awarded in this case were based solely on the possibility that a third party would bid a certain

amount for the property involved and that the trustee would sell the same for that figure". There is merit in neither contention. What has already been said concerning the sufficiency of the evidence answers the first point,—namely, the record discloses substantial evidence to support the findings that by reason of the fraud and conspiracy of the defendants, the trustee and the bankruptcy estate suffered damage in the amount of $82,778.75. Nor does the record reveal anything to justify appellant's point that such damages were based solely, or at all, upon a possibility. On the contrary, the judgment was based upon a definite mathematical computation. The trial court found "That had plaintiff known the falsity of such representations and statements he would not have filed a petition for authority to sell or a petition for confirmation of sale (in the bankruptcy court) of said real estate to John Drew at any price below said sum of $174,270 (offered by Hagge)", and the trustee had so testified. It is quite true that "An award must be predicated on something more than mere possibilities", as quoted by appellant from Caspary v. Moore, 21 Cal.App.2d 694, 70 P.2d 224, 227, but the present case does not present a situation of that nature.

[5] It is further urged that "The Court erred in finding that a confidential relationship existed between the appellant and trustee". In reference to this point appellant avers that there was no written contract between the trustee and Charlesworth and therefore no relation of principal and broker existed; that Charlesworth was Drew's broker; that "there was a dual agency, of which Metcalf was advised"; and that "Since the trial court treated the oral contract hiring Appellant as one that obeyed the statute, the Trustee having sold his property, is estopped from insisting that a confidential relationship existed between himself and the Trustee." Charlesworth, it is claimed, "merely acted as a 'middleman' in bringing the minds of Drew and the Trustee together as to price. Under such a situation the authorities declare the rule to be that such agent may receive a commission from both parties and cannot be charged with receiving a secret profit", citing Carothers v. Caine, 38 Cal.App. 71, 175 P. 478. Appellant then suggests that "the Trustee was selling and Appellant a buyer of the property and not an agent"; therefore that Charlesworth did not owe the trustee "the duty of full disclosure", as found by the trial court. As hereinbefore indicated, there is substantial evidence supporting the findings. Moreover, the present contentions seem to ignore all evidence not in appellant's favor, together with the reasonable inferences to be drawn from facts disclosed by the record. Such contentions are, in any event, without merit in respect to the instant case.

Under the heading, "The evidence is insufficient to prove a conspiracy or any overt act committed in consummation thereof", appellant again argues that the trustee "was entirely lacking in that degree of diligence entitling him to claim damages", and avers that "His failure to investigate the particulars in Hagge's 'building contract' falls into the category of gross negligence". Since this point has already received attention herein, contrary to the present contention, it is only necessary to add that an approval of appellant's position would, in effect, place upon the trustee, almost an absolute burden of detecting fraud and conspiracy, and excuse the perpetrators thereof in the event that the nefarious scheme was not discovered prior to its consummation. Obviously, such is not the law.

The judgment and order appealed from are therefore affirmed.

YORK, P. J., and WHITE, J., concur.

78 Cal.App.2d 198

## ARTHUR v. LONDON GUARANTEE & ACCIDENT CO., Limited.

Civ. 15622.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1947.

**1. Insurance ⇐539(5)**

An unreasonable delay in serving notice of loss under an insurance policy removes the opportunity for prompt investigation and destroys the possibility of showing prejudice arising from delayed inquiry, and from such a situation prejudice must be presumed. Insurance Code, § 551.

**2. Insurance ⇐665(7)**

Where automobile public liability policy provided that written notice of loss should be given to insurer or its authorized agents "as soon as practicable," proof that notice was promptly given to broker who had obtained insurance for insured and that two photographs sent to broker were in possession of insurer's attorney at the trial of injured person and that numerous accident reports had been sent to such broker who had transmitted them to insurer without the latter's objecting was insufficient to show compliance with policy. Insurance Code, § 551.

**3. Insurance ⇐96**

An insurance broker who procured policy for insured was the agent of insured and not of insurer. Insurance Code, § 33.

**4. Insurance ⇐539(2)**

Where automobile public liability policy required the giving of notice of loss to insurer or its authorized agents "as soon as practicable," the forwarding of summons in action to insurer 11 months after the accident was not a compliance with the policy.

See Words and Phrases, Permanent Edition, for all other definitions of "As Soon as Practicable".

**5. Appeal and error ⇐882(3)**

An appellant cannot change the theory of his case after the failure of his strategy in the trial court.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Martin E. Arthur, doing business under the fictitious name and style of Arthur Brothers Circus, against London Guarantee and Accident Company, Ltd., for amount of judgment obtained against plaintiff who carried liability insurance with the defendant. From a judgment notwithstanding the verdict, the plaintiff appeals.

Affirmed.

Lee Combs, Wallace B. Scales and Robert W. McIntyre, all of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

MOORE, Presiding Judge.

Sometime prior to June 6, 1943, respondent issued its policy of insurance agreeing to indemnify appellant against liability to third parties arising out of the operation of a fleet of trucks and trailers. Such insurance was to be effective only in the event that notice and proof of loss be served on respondent or its general agent as soon as practicable. On the last named date one of the trucks of appellant collided with an automobile belonging to one Byerly. The agents of appellant promptly took photographs of the scene of the accident, made a report of it and mailed it to Peter N. Williams, the broker who had solicited the insurance from appellant.

Thereafter in an action by Byerly against appellant the latter was defended by respondent with the stipulation that respondent did not by its action waive its rights arising out of the neglect of appellant to give it notice of the accident as required by the policy. The lawsuit resulted in a judgment against appellant in the sum of $2,465 which was subsequently collected from him. The present action was brought to recover the amount so paid on account of that judgment.

After the court had denied a motion for a nonsuit and for a directed verdict the jury returned a verdict for plaintiff. However, defendant's motion for judgment notwithstanding the verdict was granted and

from the ensuing judgment the matter was transferred to this court.

The sole issue involved on this appeal is whether there was such evidence of notice of the accident served upon respondent as is required by the terms of the policy. Appellant alleged in his complaint that he "gave notice of said loss and damage to defendants, and each and all of them, and informed them concerning the collision or accident referred to." This was denied by respondent.

In his opening statement to the jury appellant's counsel declared in substance as follows: Immediately after the accident appellant's agents took pictures at the scene of the collision, made a report of it and sent this material to the agent of defendant as required by the policy. In answer to such statement counsel for respondent stated substantially: The accident happened June 6, 1943, but it was not reported until May 6, 1944. The first and only notice that defendant received with reference to this accident was when Mr. Combs, acting then for plaintiff, sent the summons and complaint in the action of Byerly against Arthur into the Los Angeles office of defendant.

The policy provides: "Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the names and addresses of the injured and of available witnesses."

Section 551 of the Insurance Code provides as follows: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."

[1] An unreasonable delay in serving notice of a loss under an insurance policy removes the opportunity for prompt investigation and destroys the possibility of showing prejudice arising from delayed inquiry, and from such a situation prejudice must be presumed. Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal.2d 81, 87, 53 P.2d 155; Burbank v. National Casualty Co., 43 Cal.App.2d 773, 781, 111 P.2d 740. Delays of 11 months in giving notice, Distributors Packing Co. v. Pacific Indemnity Co., 21 Cal.App.2d 505, 508, 70 P.2d 253, of five months, Brown Materials Co., Ltd. v. Pacific Automobile Insurance Company, 52 Cal.App.2d 760, 127 P.2d 51, of three and a half months, Purefoy v. Pacific Automobile, supra, and of 91 days, Burbank v. National Casualty Co., supra, have been held sufficient to defeat an action for recovery on insurance policies. In the Burbank case it was said at page 781 of 43 Cal.App.2d, at page 745 of 111 P.2d, that "the time which elapsed, before notice was given, exceeded by twenty days the time allowed by statute," and for that reason held that the plaintiff could not recover.

In the instant case respondent established by the witness Cornell, superintendent of claims, that as a result of the long delay in receiving notice of the loss respondent was unable to make an effective investigation of the accident and was thereby prevented from discovering the two men who were riding with the driver at the time of the collision.

Appellant attempts to overcome the rule laid down by section 551, supra, and the requirement of the insurance policy by his proof that notice of the accident was promptly given to Williams, and contends that there was substantial evidence to the effect that Williams was respondent's agent and therefore that appellant was entitled to have the question of service of the notice of the accident determined by the jury.

The only evidence received from which appellant argues that Williams' agency was established was the following: (1) Testimony of appellant that he had forwarded photographs taken at the scene with a report of the collision to Williams and that such photographs were in the possession of respondent's counsel at the trial of Byerly v. Arthur; (2) stipulation that numerous accident reports had been

sent to Williams and that he had transmitted them to respondent without the latter's objecting.

[2-4] Such evidence does not constitute that character of proof which will satisfy the condition specified in the policy with respect to giving notice in writing of the occurrence of an accident as soon as practicable. Neither does it show that any notice sent contained information respecting the time, place and circumstances of the accident, or the names and addresses of the available witnesses, nor does it comply with the time specified in section 551, supra. There was no proof that the photographs in possession of respondent's counsel at the trial of the damage suit were the identical pictures which appellant's agent claimed to have mailed to Williams. At the oral argument one of appellant's counsel stated that two sets of the photographs had been taken. In view of the presumption that one takes ordinary care of his own concern (Code Civil Proc., 1963, subd. 4), and since respondent was in duty bound to defend the Byerly action, it cannot be presumed that respondent ever received the photographs mailed by one of appellant's employees to Mr. Williams. No valid excuse appears for appellant's failure to send the report of the accident directly to the general agents of the insurer whose address was printed on the policy. The diligence displayed by respondent on former occasions in promptly acting upon notice received from appellant's agent Williams instead of waiting for a notice directly from the office of appellant does not serve now as an excuse for appellant's failure promptly to send a notice to respondent. He had a written contract for the guidance of his conduct in case of accident, and the peril of engaging his broker to forward the notice was a risk he assumed. As a broker Williams was the agent of the insured and not of the insurer. Insurance Code, sec. 33; Detroit Trust Company v. Transcontinental Insurance Company of New York, 105 Cal.App. 395, 398, 287 P. 535; Strangio v. Consolidated Indemnity & Ins. Co., 9 Cir., 66 F.2d 330, 335; A. Davis & Son, Ltd. v. Russian Transport & Insurance Co., 182 App.Div. 668, 670, 671, 169 N.Y.S. 960, 962. Not only is the insured required by specific terms of the policy to give notice of loss to the insurer, but he must be prompt. Neither the giving of immediate notice by the insured to his broker nor the forwarding of the summons in the action on the accident to the insurer eleven months thereafter is a compliance with the policy. Pateras v. Standard Accident Ins. Co., 37 Ohio App. 383, 174 N.E. 620, 621; Gerber v. Fletcher, 108 Pa.Super. 226, 164 A. 135, 136. Not even a prompt verbal notice is compliance. Ermentraut v. Girard Fire & Marine Ins. Co. of Philadelphia, 63 Minn. 305, 65 N.W. 635, 637, 30 L.R.A. 346, 56 Am.St.Rep. 481.

The purpose of the notice is to enable the insurer promptly to investigate the circumstances of the accident as the means of avoiding detriment to itself. It was obliged to defend any action covered by the policy when advised of an accident in the manner specified. Certainly a notice not addressed to the office of the insurer or its general agent but to a person who owes no duty to communicate to the carrier the contents of such notice cannot with safety be relied upon as a means of enabling the insurer to make the investigation essential to the preparation of a defense in an accident case. The training of neither a lawyer nor an insurance adjuster is essential to an understanding of the need of diligence in preparing such a defense.

[5] Moreover, the claim that appellant complied with the conditions of the policy by sending a notice of the accident to his broker is defeated by his conduct of this litigation. Neither the complaint nor the opening statement of counsel suggested appellant's reliance upon a custom that had lulled him into a sense of security. He alleged that Arthur gave the notice required by the policy and he stated to the jury that he would prove that plaintiff had "sent this matter to the representative and agent as required under the policy," and that "ample and due notice was given under the terms of that policy." It is fundamental that an appellant cannot change the theory of his case after the failure of his strategy in the trial court. Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715; Coy v. E. F. Hutton & Co., 44 Cal.App.2d 386, 391, 112 P.2d 639.

The judgment and the order granting the motion for judgment non obstante veredicto are affirmed.

McCOMB and WILSON, JJ., concur.




78 Cal.App.2d 104

**ODELL v. LUTZ et al.**

**Civ. 15307.**

District Court of Appeal, Second District, Division 3, California.

Feb. 14, 1947.

**1. Parent and child ⇐2(1)**

One of the natural rights incident to parenthood is the right to the care and custody of a minor child.

**2. Parent and child ⇐2(1)**

The rights of parenthood are not absolute and are subject to the superior right of the state to intervene and protect the child against the use of parental authority, but the state may not constitutionally interfere with the natural liberty of parents to direct the upbringing of their children.

**3. Adoption ⇐20**
**Parent and child ⇐2(1)**

Father and adoptive mother of eight-year-old girl could not be compelled to permit maternal grandmother to visit the minor child at reasonable times. Civ.Code, § 228.

**4. Trusts ⇐171**

Maternal grandmother, as trustee of a trust for the benefit of minor granddaughter, was not by virtue of the trusteeship entitled to right to visit minor at reasonable times against wishes of father and adoptive mother of child, where right to visit the minor was not necessary for the proper administration of the trust estate. Civ. Code, § 228.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Kittie Odell, individually and as trustee under the trust created by the will of M. W. Odell, deceased, against Milton C. Lutz, Jr., Rachel Lutz, and Wilma Jean Lutz to determine whether plaintiff had the right to visit her eight-year-old granddaughter at reasonable times. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

George E. Atkinson, Jr., of Hynes, for appellant.

Starkey & Starkey, William E Starkey, and Josephine K. Starkey, all of Whittier, for respondents.

WOOD, Justice.

This in an action in declaratory relief to determine whether plaintiff has the right to visit her 8 year old granddaughter at reasonable times. Judgment was in favor of defendants (the parents and the minor child), and the plaintiff appeals therefrom.

Plaintiff's daughter, the mother of the child, is deceased. The child's father remarried, and his wife adopted the child. There is no dispute between the father and his wife as to the custody of the child, or any dispute at all between them, and it was stipulated at the trial that they are fit and proper persons to have custody of the child. It was also stipulated that the grandmother is a fit and proper person. No question of custody is involved. The only question is whether the grandmother is entitled to an order compelling the parents to permit her to visit the child at reasonable times.

The child is the only living descendant of the plaintiff, and is also the sole beneficiary of a trust created by plaintiff's deceased husband. Plaintiff is the trustee of the trust. The trust estate is of the approximate value of $30,000, and the corpus and income of the trust are not payable to the beneficiary until she arrives at the age of 25 years.

Appellant contends that, as the maternal grandmother, she has the right to visit the minor child at reasonable times.

[1-3] Adoptive parents occupy the same position as the natural parents, with all the rights and duties of that relationship. Civ. Code, § 228. One of the natural rights

incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child. In re White, 54 Cal.App.2d 637, 640, 129 P. 2d 706. Although the rights of parenthood are not absolute, but subject to the superior right of the state to intervene and protect the child against abuse of parental authority, the state may not constitutionally interfere with the natural liberty of parents to direct the upbringing of their children. "The judicial power of the state, exercised through its courts, is concerned mainly with the *custody* of the child, which, under appropriate laws, may be brought under a court's supervision by guardianship proceedings, proceedings directly affecting the custody of the child, or suits for divorce or separation." (Italics added.) 39 Am.Jur. 603. As shown above, there is no question in this case of custody, guardianship, or harmony between the parents. The supremacy of the mother and father in their own home in regard to the control of their children is generally recognized. "It is said that the natural rights of a father * * * are greater than those which any guardian can have. * * * The legal obligations of parenthood include the duties of support, of care and protection, and of education. As compensation therefor, the law recognizes certain rights in the parent. * * * So fundamental are the rights of parenthood that infringements thereof have been held to constitute an encroachment on the personal liberty of the parent forbidden by the Constitution. * * *" 39 Am.Jur. 593, 594.

In the case of Robertson v. Robertson, 72 Cal.App.2d 129, 164 P.2d 52, the divorced parents each had been given custody of a minor child for a certain part of each year, and the father sought and obtained an order of the trial court authorizing him to place the child in the care of the paternal grandparents during the period he was entitled to custody while he was in military service. In reversing that order, the court stated, 72 Cal.App.2d at page 137, 164 P.2d at page 57: "Their [grandparents] right, if it can be called that, is no different from that of any third person or stranger." The same rule would apply to the right of visitation by a grandparent where the parents have custody, and there is no question as to their fitness or ability to care for the child. There is nothing in the record which would indicate that the association of the plaintiff and her grandchild would be anything but beneficial to the child. However, the court does not have the power to compel the parents to allow the grandmother the right of visitation merely because the relationship is that of grandparent.

In a similar case, Succession of Reiss, 1894, 46 La.Ann. 347, 15 So. 151, 25 L.R.A. 798, the court discussed various reasons why the jurisdiction of the court did not extend to granting such a privilege. In that case the maternal grandmother sought to compel the father, a widower, to send two minor grandchildren to visit her. Judgment was in favor of the grandmother, and it was ordered that the father send the children to visit the grandmother at certain times, and also that the grandmother should visit the children at the father's home at certain times. In annulling the judgment and dismissing the order, the Supreme Court of Louisiana stated, 46 La.Ann. at page 352, 15 So. at page 152, 25 L.R.A. 798: "While we appreciate the affection that moves her [the grandmother] to seek the occasional company of the offspring of her daughter, this court's jurisdiction does not include the cause pleaded. The issue is not incidental to any other cause. However disinclined we are to discountenance causes of action such as the one under consideration—for they are inspired by a true and commendable impulse,—we find no authority in law to entertain jurisdiction of the issue presented. * * * In truth, the ascendants have certain rights that the law, in accord with nature, gives them; but only when the father and mother are dead, or are incapable of manifesting their will. During the existence of the father and mother, the law properly accords them [the ascendants] no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; even more, it would injuriously hinder proper paternal authority by dividing it. * * * Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and unceasing, but, if there is a conflict, the

father alone or the mother should be the judge. The law gives no right of action to the grandparents. The father may have good reasons to avoid all contact between his children and their grandparents * * *. He owes no account to any one for his motives."

[4] Appellant also contends that, as trustee of the trust for the benefit of the minor child, she has the right of visitation. This contention is not sustained. As stated above, the child is not to receive the corpus of the trust, or any income therefrom, until she is 25 years of age, and, until that time, she is not entitled to any amounts for support, maintenance or education. The appellant, as such trustee, has the management and control of the trust estate, but the right to visit the beneficiary is not necessary for the proper administration of such an estate.

The judgment is affirmed.

DESMOND, P.J., and SHINN, J.,concur.




78 Cal.App.2d 275

**TSANG v. KAN.**

**Civ. 13241.**

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1947.

Hearing Denied April 28, 1947.

**1. Army and navy ⇐51**

The re-employment provisions of the Selective Service Act are designed to enable a service man to be restored to the position he held before entering the armed services. Selective Training and Service Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 301 et seq.

**2. Army and navy ⇐51**

Evidence authorized finding that soldier was offered back his old position at same salary within three months after his discharge from army, and thereby warranted a judgment denying soldier's demand for damages for failure to re-employ him. Selective Training and Service Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 301 et seq.

**3. Contracts ⇐94(1)**

The statutory definition of fraud as a promise made without any intention of performing it relates to the freedom of consent of parties to a contract, and such fraud may be the basis of a defense to a suit on an executory contract or it may be the basis of an action for rescission of a contract. Civ.Code, § 1572, subd. 4.

**4. Fraud ⇐25**

The element of damage must be established to recover for fraudulent deceit. Civ.Code, § 1709; § 1710, subd. 4.

**5. Fraud ⇐25**

Where co-manager of restaurant decided to enlist in army before mentioning the matter to manager, even if manager, when appraised of co-manager's plan, promised to take co-manager back at same salary after his discharge from army without intending to do so, co-manager was not damaged thereby because not induced by such promise to alter his position, and he could not recover for fraudulent deceit. Civ.Code, § 1709; § 1710, subd. 4.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Ernest Tsang against John Kan for declaratory relief, wherein defendant cross-complained. From an adverse judgment, defendant appeals.

Affirmed.

Sidney A. Romer, Alden Ames, and Hauerken, Ames & St. Clair, all of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant and cross-complainant, John Kan, from a judgment and decree in an action for declaratory relief in which the trial court adjudicated that he is a limited partner in a certain restaurant business to the extent of 1,000/9,700

and has no right to be employed by the corporation originally operating said business; its successor, a partnership, or the plaintiff, Ernest Tsang, the general partner and manager of the partnership. For convenience, the plaintiff and cross-defendant will be referred to as Tsang, and the defendant and cross-complainant as Kan.

On September 28, 1939, a restaurant business was incorporated under the laws of the State of California as the Cathay House, Inc. Kan and one Dr. Lee are the originators of the enterprise. Stock in the corporation was sold to a number of Chinese, including Tsang, who ultimately paid in about $5,500 of the $9,700 paid in capital. George Chew was the next largest stockholder, having paid $1,500. Kan and his wife together contributed only $1,100. Tsang became president of the corporation and Kan was made secretary. They received salaries of $300 a month, which were increased to $500 a month. In 1941 Kan ceased to be secretary of the corporation but continued as a director. On July 23, 1943, he enlisted in the armed forces of the United States and left San Francisco immediately. October 1, 1943, a limited partnership was created with Tsang as general partner and the other stockholders, including Kan and his wife, as limited partners—it being arranged that the partnership percentages as established in the articles of co-partnership were the same as the percentages of ownership of stock in the corporation. Kan's wife signed her husband's name to the certificate of limited partnership upon the advice of Kan's attorney. Tsang secured a written contract of employment from the partnership for $750 a month commencing October 1, 1943, for the duration of the agreement of limited partnership. The minutes of the corporation reveal that the corporation assets were transferred to the limited partnership. The corporation was not dissolved. Kan was honorably discharged November 26, 1943.

October 21, 1944, Tsang filed a complaint for declaratory relief alleging that Kan made claims that Tsang individually and/or as president and general manager of the corporation and/or as general partner was obligated to employ Kan at Cathay House, and praying for a judgment and decree declaring and determining the rights and duties of the parties. Kan's answer admitted that there was a controversy between the parties and referred to his cross-complaint for the particulars of his claims. The first cause of action pleaded in the cross-complaint alleged that before Kan enlisted, Tsang agreed that upon Kan's return Kan should be restored to the position of co-manager of Cathay House on an equal basis with Tsang, and that since Tsang's salary was increased to $750 a month, he was entitled to be employed at $750 a month by virtue of the Selective Training and Service Act of 1940, as amended, Tit. 50, U.S.C. A.Appendix, § 301 et. seq., but that Tsang refused to employ him either at $750 or $500 a month; he alleged that he suffered damages in the sum of $750 per month for twelve months to the date of the filing of the cross-complaint or a total of $9,000, less what he has been able to earn, namely, $1,130, or an actual damage of $7,870.

The second cause of action pleaded in the cross-complaint alleged that Tsang deliberately promised to take Kan back after his return from military service, without any intention of performing such promise; that Tsang caused the corporation's business to be transferred to a limited partnership with himself as sole general partner, knowing that a limited partner could not be employed in the partnership without changing the relationship of the partners, which Tsang had no intention of permitting; that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership; and that Kan suffered general damages in the sum of $25,000 by reason of Tsang's fraud in depriving Kan of his employment.

The trial court found that when Kan went into the army he was getting $500 a month with no agreement, oral or written, for the continuation of his employment or for receiving a different rate of compensation in the future, and that within three months of his return he was offered the same position on the same basis, but he refused to accept the same and never offered nor was willing to return to said position. The trial court evidently believed Tsang's testimony, a portion of which follows:

"Q. * * * did Mr. Kan discuss with you the possibility or desirability of his returning to the Cathay House. A. He did.

"Q. And did you tell him one way or the other whether he would be acceptable as an employee? A. I did, on numerous occasions.

"Q. And what did you tell him in that regard? A. I told him that the position that he occupied formerly, at the same rate of salary, was open to him. * * * As I recall it was the first day of Mr. Kan's return to San Francisco after his discharge. I was very surprised to see him that day. He came into the Cathay House—I had no knowledge that he was coming in or was on furlough, or discharged. He came in to me, and he said, 'How about a job.' I said, 'O.K. Come back to work.' He said he first would like a vacation of about two weeks, to which I agreed. On or about December 15th, 1943, Mr. Kan and I had lunch * * * where he and I discussed—no one else was present—his return to the Cathay House. I informed him his position was open at $500 a month. He stated that he wanted $750 a month. I informed him that I had no power to give him $750 a month, and that my salary at that rate was set by the stockholders; but I felt I could offer him his $500 a month and I informed him if he insisted upon $750 a month I would have to consult the other stockholders, or one of the majority stockholders of the firm, which was Mr. George Chew. So we agreed to talk it over later, pending any conversation we might have had with Mr. George Chew concerning the matter. Mr. Kan came back to see me several days later and asked me if I had seen Mr. Chew, and I had not, because Mr. Chew was out of town. So I asked Mr. Kan, why don't you go down and see Mr. Chew. He might be back. He went down to see Mr. Chew, and came back about three quarters of an hour later and asked me what this was all about, was I trying to give him a run-around, or what. I said, what did Mr. Chew say? And Mr. Kan informed me Mr. Chew did not agree to give him $750 a month, but was agreeable to him coming back to work at his former salary."

That Kan refused to return to his "same position on the same basis," is further seen in the testimony of Tsang's attorney to the effect that Kan refused to return to the Cathay House without a written contract covering several years' employment, although he had never had such a contract before he left to serve in the army.

If the parties had entered into a contract under the terms of which Tsang was bound to take Kan back as co-manager after Kan returned from the army, Kan would be entitled to enforce such contract. Since the trial court found that Tsang offered to take Kan back, Tsang cannot be held to have breached any such contract. The question then arises, do the provisions of the Selective Training and Service Act of 1940 aid Kan?

[1] Kan presents certain citations to the effect that the Selective Training and Service Act is to be construed liberally; that every consideration should be given to a serviceman; that employees often include those in superior positions. It is not necessary to lengthen this opinion by commenting upon each of the cited cases. The re-employment provisions of the Act, which are relied upon by Kan, are designed to enable a serviceman to be restored to the position he held before entering the armed forces. In the present case Kan does not seek reinstatement, but seeks damages from Tsang.

[2] Kan contends that Tsang's terms that Kan sign a release, sign over his stock in Cathay House to his wife, and come back as an employee, violated the Selective Training and Service Act. The trial court's finding that Tsang offered to restore Kan to his same position indicates that the trial court considered that these "terms" did not alter the position which Kan had held before his enlistment. As to the matter of a release, Tsang's attorney testified that at a meeting held in his office shortly before this action was commenced he said "I thought it would be well for us to have some sort of a document—let's call it a mutual release, where John (Kan) agrees that he starts from scratch. * * * I have had experience in somewhat similar matters in the past, where after the lapse of time that people begin to imagine they have rights which they never thought they did before, so I

said, 'Mr.Kan, have you any claims against Mr. Tsang of any kind—do you claim that you have got any right, any contract, or are there any agreements that have not been mentioned;' and he said absolutely none. I asked the same question of Mr. Tsang, and he gave the same answer." Such being the situation, the "release" had nothing to do with the Selective Training and Service Act or any rights Kan might have had thereunder. Tsang's request that Kan sign over his stock to his wife was evidently the result of *his* conception of the law of limited partnerships—that a limited partner could not manage. The last requirement was explained to Kan by Tsang's attorney as follows: "* * * you understand that if you are taken back that you will be an employee * * * and if your services are not satisfactory * * * the employer has the right to terminate your employment." The trial court found that during the time that Kan was an officer and employee of Cathay House, Inc., his terms of office and employment were at the pleasure of the Board of Directors.

The trial court's finding that "Within three months following [date of discharge] plaintiff [Tsang] and said partnership offered to immediately restore defendant [Kan] to the same position which he had with the corporation * * * but defendant refused to accept the same," being supported by evidence, justifies an affirmance of the judgment against Kan on the first count of his cross-complaint.

The trial court found against Kan on the second count of his cross-complaint. Specific findings were made that Kan had consented to the formation of the partnership and that it was not true that Tsang had no intention of permitting Kan to participate in the partnership. These findings are not challenged.

[3] Kan urges that the evidence supported the allegation that Tsang promised to take Kan back after his return from military service without any intention of performing such promise, and hence that recovery should have been granted on the second count. Kan relies upon Civil Code sec. 1572, subd. 4, which describes fraud as "A promise made without any intention of performing it," within the meaning of the chapter in which that section appears. Said chapter relates to the freedom of consent of the parties to a contract. Harlow v. American Equitable Assur. Co., 87 Cal. App. 28, 32, 261 P. 499. Such fraud may be the basis of defense to a suit on an executory contract and it may also be the basis of an action for rescission of a contract. Wilson v. Rigali & Veselich, 138 Cal.App 760, 765, 33 P.2d 455.

[4, 5] In the present action Kan seeks to recover damages for what is described in the Civil Code as "fraudulent deceit." The controlling sections are section 1709, which provides that "One who willfully deprives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," and section 1710, which provides that a deceit within the meaning of the foregoing section is "4. A promise, made without any intention of performing it." The element of damage must be established to recover under these provisions. Munson v. Fishburn, 183 Cal. 206, 220, 190 P. 808; Gerini v. Pacific Employers Ins. Co., 27 Cal.App.2d 52, 80 P.2d 499. In the language of Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 571, 126 P. 351, 355, 42 L.R.A.,N.S., 125, "It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." Assuming that at the time of Kan's enlistment Tsang promised to take Kan back without intending to do so, it is difficult to see that Kan was damaged thereby. It nowhere appears that Kan joined the army because of any such promise. Kan had made up his mind to enlist before he ever spoke to Tsang about it.

The allegation that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership, is totally unsupported by the evidence. On the contrary, the evidence establishes that she acted upon the advice of Kan's attorney.

The judgment and decree is affirmed.

PETERS, P. J., and BRAY, J., concur.

78 Cal.App.2d 308

## CROOK v. DEPARTMENT OF EMPLOYMENT OF CALIFORNIA et al.

Civ. 15298.

District Court of Appeal, Second District, Division 3, California.

Feb. 27, 1947.

**Taxation ⇐59**

Testator's interest in partnership vested, subject to administration, in widow as sole beneficiary under will immediately upon his death and entry of decree of distribution did not change the entity of partnership so as to authorize additional assessment of unemployment insurance contributions against partnership on wages paid same employees during balance of year after entry of decree on theory that decree effected a change of employer within statute limiting contributions of each employer to stated percentage of $3000 or less of wages earned in any calendar year by each employee. Probate Code, § 300; Gen.Laws, Act 8780d, §§ 8.5, 9(a), 38.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Wayne D. Crook against Department of Employment of the State of California and California Employment Commission for refund of unemployment insurance contributions paid under protest. From a judgment ordering refund, the California Employment Stabilization Commission appeals.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., Clarence A. Linn of San Francisco, and Doris H. Maier, of Sacramento, Deputies Atty. Gen., for appellants.

Hervey & Hervey, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

The trial court, by its judgment in this case, ordered a refund to plaintiff in the sum of $350.09 which in behalf of himself and Bertha A Crook he had paid under protest as unemployment insurance contributions (and interest thereon) for the period August 19, 1941 to September 30, 1942. The California Employment Stabilization Commission takes this appeal as a party directly interested and claims that the amount collected was properly due under the provisions of the California Unemployment Insurance Act. Gen.Laws, Act 8780d. As a basis for this claim the appellant cites certain sections of the Act, including Section 9 (a), Section 8.5 and Section 38. Section 9 (a) defined an "Employer" as "Any employing unit, which * * * has within the current calendar year or had within the preceding calendar year in employment four or more individuals * * *". Section 8.5 provides that an " 'Employing unit,' as used in this act, means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this act." Section 38 provided that every employer should pay into the unemployment fund contributions equal to certain fixed amounts: "the contributions required to be paid by every employer * * * shall be payable only upon $3,000 or less of wages earned in any calendar year by any worker employed by such employer."

It is contended by appellant that under these sections the commission was entitled to levy the questioned assessment on the ground that three different entities are involved as employers. The first of these is described by appellant as "Crook Company, a partnership, prior to February 13, 1940, composed of E. I. Crook and Wayne D. Crook"; the second, as "Wayne D. Crook, subsequent to February 13, 1940, the personal representative of E. I. Crook, deceased"; the third, as "Crook Company, a partnership, subsequent to order of distribution in the estate of E. I. Crook, deceased, dated August 18, 1941, composed of

Wayne D. Crook and Bertha A. Crook, distributee of the estate of E. I. Crook, deceased." Upon this theory of succession it is argued that a change of entity in the employing unit took place when E. I. Crook died on February 13, 1940, and also when the services of Wayne D. Crook, as his executor, were terminated on August 19, 1941, the court at the same time ordering distribution of the entire estate of E. I. Crook to his widow. The contrary claim of the respondent is that there was only one change of entity during the period involved, namely, when the death of E. I. Crook occurred.

It is assumed by both parties that the limitation of contributions by employers to certain percentages of $3,000 or less of wages earned in any calendar year by a worker does not apply, if during the year there is a change of employers or, in the present case, a change of entity, which, it is assumed, would be a change of employers. Respondent does not question the right of appellant to make an assessment against each separate employer at the statutory rate upon wages paid by such employer up to the sum of $3,000. Appellant's position is stated as follows: "In assessing the additional contributions on the remuneration received by the employees of Crook Company, it was appellant's theory that each change in the composition of the partnership with the resulting change in the operation thereof constituted a new entity for purposes of the Unemployment Insurance Act and the amounts received by the respondent's employees were not wages received from any single employer within the meaning of Section 38(c) and were therefore taxable." The controversy which was presented at the trial and is presented here relates solely to the assessment for the period commencing with the distribution of the estate to Bertha A. Crook.

The conflict between these two positions with reference to this period may be noted in a consideration of two documents which appear in the record, namely, a stipulation of facts and the protest which Wayne D. Crook filed.

From the written stipulation entered into by the parties and filed with the court it appears "That prior to the thirteenth day of February, 1940, Crook Company was a copartnership owned in equal shares and operated by E. I. Crook and Wayne D. Crook; that E. I. Crook died on the thirteenth day of February, 1940, leaving a will, which after due and lawful proceedings in the Superior Court of the State of California in and for the County of Los Angeles was admitted to probate under Probate No. 192779; that thereafter said Wayne D. Crook was appointed executor of said will and as such executor for the period from approximately March 26, 1940, to August 18, 1941, carried on the business of said Crook Company under court order; that on or about the 18th day of August, 1941, a final decree of distribution was signed in said estate proceedings distributing all of the assets of the estate of E. I. Crook including an undivided half interest of said estate in said Crook Company to Bertha A. Crook, the widow of said decedent. * * * That upon the death of E. I. Crook, as aforesaid, the defendants determined that there was a change of entity in said Crook Company by reason of said death and it is stipulated by counsel for plaintiff that such determination was and is correct. * * * That a determination was made by the said defendants that by reason of the distribution of the assets of the estate of E. I. Crook and the termination of the court order allowing Wayne D. Crook as executor to carry on the business of the estate on the 18th day of August, 1941, there was a change of entity in said Crook Company; that in this determination plaintiff does not acquiesce." It further appears from the stipulation that the defendants, acting upon the last mentioned determination, levied and collected an assessment against plaintiff and Bertha A. Crook for an additional employer's contribution claimed to be due for the period August 19, 1941 to September 30, 1942 in the amount of $307.49 and collected also the sum of $42.60, constituting interest on the larger sum, and making a total of $350.09.

The protest against the assessment, copy of which is attached to plaintiff's complaint, was signed and sworn to on March 1, 1943, by "Wayne D. Crook, doing business as Crook Company," and in the body thereof

it is stated (Paragraph I) that ever since October 25, 1942, he has been the sole owner of that company. "II. That for the period from the 13th day of February, 1940, to the said 25th day of October, 1942, said Crook Company was a co-partnership composed of and owned by Wayne D. Crook and Bertha A. Crook. * * * V. That Bertha A. Crook died on the 25th day of October, 1942, leaving a will which was duly admitted to probate in the Superior Court of the State of California in and for the County of Los Angeles, and by the terms of which said will all her property was bequeathed and devised to Wayne D. Crook. VI. That, for grounds of protest to the payment of said assessment and interest thereon, the said Wayne D. Crook specifies: (a) That said assessment has been levied by the Department of Employment on the ground that at the time of the distribution of the assets constituting the estate of E. I. Crook, deceased, namely: on the 19th day of August, 1941, there was a change of ownership of the said business being conducted under the name of Crook Company; that such ground of assessment is erroneous and unwarranted and without basis in law, in that there was no change of ownership in said business at said time. (b) That changes of ownership occurred in the said business being conducted under the name of Crook Company only at the respective dates of death of E. I. Crook and Bertha A. Crook."

We notice particularly paragraph II of this protest in which the affiant stated that "for the period from the 13th day of February, 1940, to the said 25th day of October, 1942, said Crook Company was a co-partnership composed of and owned by Wayne D. Crook and Bertha A. Crook." It is apparent from this statement, which is nowhere contradicted and which presumably is reflected in Wayne's account in the probate proceedings, that immediately upon his brother's death, he, as surviving partner, took into partnership the widow of E. I. Crook, sole beneficiary of his will. This is contrary to the contention of appellant that the third employer or employing unit consisted of a partnership which came into existence "subsequent to order of distribution in the estate of E. I. Crook, deceased," and gives support to the argument of respondent that "Bertha A. Crook was the vested owner of said one-half interest in Crook Company forthwith upon the death of E. I. Crook. The only effect of the decree of distribution in said estate was to terminate the possession of the executor and to terminate the control of the Superior Court for the purpose of administration. There was no change in the actual business itself or in the relationship of the employees of the business to the employer."

In stating that "there was no change of ownership in said business" at the time distribution of E. I. Crook's estate was decreed, respondent relies upon section 300 of the Probate Code, reading as follows: "Title to decedent's estate: Possession. When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code." This section undoubtedly furnished the basis for the statement in Noble v. Beach, 1942, 21 Cal.2d 91, 130 P.2d 426, 429 that "It is well settled that the estate of a decedent vests, subject to administration, in his heirs or devisees and legatees immediately upon his death * * *." In the earlier case, In re Estate of Yorba, 1917, 176 Cal. 166, at page 169, 167 P. 854, at page 855, the court says: "Under our system of law, the property of a decedent passes, upon his death, to his heirs or devisees. They take at once by inheritance, or by the terms of the will. Their title does not originate in the decree of distribution * * *."

As already noted, respondent does not question the validity of the assessment that was made following the death of E. I. Crook, when his widow became vested with his interest in the business. We are in

agreement with the trial court that no further change of entity occurred when the decree of distribution was entered, as recognition of Bertha A. Crook's title, and that the assessment which followed that event was not legal.

In the light of authorities last quoted and under the circumstances of this case it would appear that to sanction the collection of this additional assessment would come perilously close to approving the principle of double taxation.

The judgment is affirmed.

SHINN and WOOD, JJ., concur.




78 Cal.App.2d 346

**BOYD et al. v. THEETGEE et al.**

**Civ. 3525.**

**District Court of Appeal, Fourth District, California.**

**March 3, 1947.**

**1. Automobiles ⇐245(60)**

In action by motorist and guest for damages resulting from collision with trailer attached to oil-tank truck going in opposite direction, proximate cause of collision was for jury.

**2. Appeal and error ⇐1060(1), 1064(1) Trial ⇐120(3), 234(8)**

Where case was close on the facts and it had been stipulated that driver involved in collision was not in the state, and evidence not particularly favorable to plaintiffs as to what truck driver had said shortly after the collision had been excluded, repeated references in argument to jury to exclusion on objection of defendants, with insinuation that they had suppressed the evidence, and instruction that jury should view with distrust less satisfactory evidence when party might have produced stronger evidence, constituted prejudicial error. Vehicle Code, § 402(c).

**3. Evidence ⇐77(5)**

No duty rested upon defendants to produce as a witness truck driver involved in collision.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Ruby Boyd and E. J. Andrews against H. B. Theetgee, Willard Johnson, doing business as Willard Transportation Company, Krieger Oil Company of California, and Woodrow G. Krieger, general partner, and others for damages resulting from motor vehicle collision. From judgment for $10,000 for first plaintiff and $1,000 for second plaintiff against all the defendants except H. B. Theetgee, who was not served with process, such other defendants appeal.

Judgment reversed and cause remanded for a new trial.

Borton, Petrini, Conron & Borton and Mack, Werdel & Bianco, all of Bakersfield, for appellants.

West & Vizzard, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile collision which occurred on a paved highway about two miles west of Wasco.

On the evening of February 6, 1944, the two plaintiffs had been at a party at a house two and one half miles west of Wasco. There was some drinking there although the plaintiffs denied having participated therein. Some sort of a fight developed, so at about 2:30 or 3 o'clock on the morning of February 7, the plaintiffs started to return to Wasco. Andrews was driving his Ford car and Mrs. Boyd was his passenger. When they had gone about half a mile they met an oil tank truck and trailer which was proceeding west. The Ford car successfully passed the truck but collided with the left rear portion of this trailer in such a manner that the rear wheels and axle of the trailer came off, the bolts holding this assembly to the trailer frame having been sheared or broken. The rear end of the trailer dropped to the pavement and the

Ford was overturned, coming to rest with its front end pointing in a northeasterly direction and with its front wheels just over on the north side of the center line of the highway. The truck proceeded on for about three-quarters of a mile where it was stopped on the north shoulder of the highway.

It was the theory of the plaintiffs that this truck and trailer had been traveling along the center of the highway straddling the white line; that as their car approached, the driver of the truck pulled over into his right lane; that because of the length of the truck and trailer the rear end of the trailer did not get back into the proper lane; and that the plaintiffs' car, traveling about two feet from the center line on its proper side, passed the truck but collided with the rear end of the trailer. The defendants' theory was that the truck and trailer were at all times traveling on the proper side of the road; that the plaintiffs' car came over on its wrong side of the road and struck the trailer just forward of its rear wheel assembly; and that this resulted in overturning the Ford and tearing the rear wheel assembly from the trailer. They further contended that Andrews was intoxicated at the time and that Mrs. Boyd had not only been drinking, but was guilty of contributory negligence in riding with such a driver.

Theetgee, the driver of the truck and trailer, was never served and did not appear at the trial. It was stipulated that he was out of the state and could not be served in this state. The jury found in favor of the plaintiffs, awarding Andrews $1000 and Mrs. Boyd $10,000. Judgment was entered accordingly and the defendants, other than Theetgee, have appealed.

It is first contended that it must be held, as a matter of law, that the negligence of Andrews was the sole proximate cause of the collision. This is based on portions of the testimony given by the two respondents, and on the conditions and marks found on the scene after the accident.

While Andrews testified that when the truck was a quarter of a mile ahead it seemed to be swerving both ways and "it seemed like the truck was up in the middle of the road," he also testified that when he first observed this he himself "got over eight feet" in order to protect himself; that it seemed to him the truck then pulled over to its own side of the road; that he could not say that the truck ever crossed the center line after that; that the truck got back on its side of the road before he got close to it; and that he then started "edging over" as he approached. Mrs. Boyd testified that when they were between 25 and 50 yards away from the truck the truck was half-way over the center line, that line being in the center of the truck; that Andrews' car was traveling about 2½ or 3 feet to the right of the center line; that Andrews moved over to the right; that their car was around 4½ or 5 feet from the center line when they passed the front end of the truck; that Andrews then began to pull over slightly to the left; and that the collision occurred before he had moved over more than a foot or so.

Two officers testified that after the accident they found two marks on the north half of the pavement, extending from a point about six or eight feet from the overturned Ford along the highway in a westerly direction and leading to where the truck was parked, about three-quarters of a mile away. These marks were three feet eleven inches apart, and it is obvious from the testimony and from a photograph introduced in evidence that they were caused by the rear end of the trailer dragging on the pavement. These marks ran in a straight line from the point of beginning and the nearest of these lines was three feet to the north of the center line.

[1] It is argued that the fact that these lines were straight from the point of beginning shows that the trailer was on its right side of the center line when the collision occurred, and that since the loose wheel assembly and all marks on the pavement were to the north of the center line, the physical facts demonstrate that any testimony to the effect that the collision occurred when part of the trailer was south of the center line could not be true. These physical facts could not be held to be controlling, as a matter of law. There was

a split second after the wheels were knocked from under the rear of the trailer before the trailer frame would hit the pavement. If the rear wheels of the trailer were over the center line when the collision occurred, the force of a blow that was strong enough to completely detach the rear wheel assembly of the trailer might well force the rear end of the trailer toward the north so that when it fell it would be in the position indicated by the beginning of these marks. While the respondents' testimony was somewhat conflicting and in some respects questionable, the question as presented was one of fact and it cannot be held that the evidence is not sufficient to sustain the implied finding made by the jury.

It is next contended that error appears in an instruction given by the court, taken in connection with statements made by one of respondents' counsel in his argument to the jury, in referring to matters which had been excluded from evidence, and which amounted to a charge that the appellants had suppressed evidence.

[2, 3] The driver of the truck and trailer, Theetgee, was not served and was not present at the trial. In order to meet the requirements of section 402(c) of the Vehicle Code the respondents had asked for, and obtained, a stipulation that Theetgee was out of the state and could not be served within the state. When one of the officers was on the stand he was asked about a conversation he had had with Theetgee at the scene of the accident shortly after it occurred. An objection was made and sustained on the ground that anything Theetgee may have said was self-serving, hearsay and not binding on the appearing defendants. In the absence of the jury, counsel for the respondents made an offer of proof offering to prove that at that time Theetgee had stated to this officer that he did not know that he had hit anybody, that he drove on about three-quarters of a mile without knowing he had lost his wheels, and that he then saw fire flying up at the back of his vehicle whereupon he stopped and found that the rear wheels were gone. Thereafter, while the other officer was on the stand he was asked to state the conversation he had had with Theetgee. An objection was made and sustained, and counsel for the respondents then said: "We will make the same offer of proof for the record as we made for the former witness." This was in the presence of the jury but the jury was not informed as to the nature of this offer of proof.

During his closing argument to the jury one of respondents' counsel stated: "We tried to give you that story" (referring to what Theetgee had told the officer that morning at the scene of the accident). Counsel for appellants then cited this as prejudicial error, whereupon counsel for the respondents said: "I have a right to assume and the law of the courts of the State of California will support me." This was cited as prejudicial error on the ground that counsel had no right to speculate on evidence that had been excluded. The court then remarked "That is right, any evidence that is ruled out is not to be considered by the jury under any consideration." Counsel for the respondents then said: "Your Honor Please, without stating what the contents of that is, if evidence was available and it was not produced the law holds that the jury may consider as against the party that would have produced it. That is all I am making this statement for." The court then said: "All right." Counsel for the respondents then said: "They could have produced the statement." This was cited as prejudicial error but no ruling was made. Counsel for the respondents then said: "I am not, Your Honor Please, going to, by innuendo, try to get to the jury what were the contents of the statement that was ruled out, I am simply saying this, whatever it was, they could have had it here. When I offered it they chose not to have it in. They now can't say we are unfortunate we can't get the man here to testify." This was assigned as prejudicial error and the court said: "All right—proceed."

With this background the court gave the following instruction:

"You are instructed that if and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was pro-

duced on a material point, you should view with distrust any weaker and less satisfactory evidence offered by such party on that point."

There was no evidence of any other matter or incident to which this instruction could have referred, and it could be applicable only to the reference to this excluded evidence as above summarized. It has been held prejudicial error for counsel to refer to the contents of written documents which have been excluded from evidence. Cordi v. Garcia, 39 Cal.App.2d 189, 102 P.2d 820; Baroni v. Rosenberg, 209 Cal. 4, 284 P.1111. In speaking of the matters excluded from evidence and thus referred to the court, in the first of these cases, said: "The jury may have secured the impression from the argument that they were much more favorable to the plaintiff than the facts would warrant." In the second of these cases, it is said: "Although the court admonished the jury to disregard it, the harm, if any, was already done and it had no power to wipe away the false concept of the situation imprinted upon their minds. The remark was properly assigned as misconduct and, despite the admonition, was, in our opinion, prejudicial."

No duty rested upon the appellants to produce this witness. Keena v. United Railroads, 197 Cal. 148, 239 P. 1061. Moreover, it had been stipulated, at the request of the respondents, that this witness was not within the state. It appears from the offer of proof that the excluded evidence was not particularly favorable to the respondents, and it certainly was not an admission of negligence on the part of the driver. That offer of proof was not heard by the jury. Later, they heard the fact referred to that an offer of proof had been made, but they had no knowledge of what statements were supposed to have been made by the driver. In his argument to the jury counsel referred to this rejected testimony several times and in a manner which would naturally give the impression that this evidence, if it had been admitted, would have been most illuminating. This was accompanied by a very strong insinuation that the appellants had suppressed this evidence, and that the respondents had attempted to get the full facts before the jury. The jury would naturally believe that the excluded evidence was much more favorable to the respondents than the facts would warrant. While the trial judge first instructed the jury that they were not to consider any evidence which had been excluded, he later said "All right" when counsel stated that it was the law that if available evidence was not produced the jury might hold this against the party that might have produced it. And, still later, when counsel repeated his charge that evidence had been suppressed and when this was assigned as prejudicial error, the judge remarked "all right—proceed."

The respondents argue that this repeated reference to the excluded evidence was a justifiable reply to an argument made "by innuendo" to the effect that the appellants regretted that the driver of the truck was not available. The record does not show that any such argument was made. If it was, it could have been answered in a proper manner, and it would in no way excuse the reference to rejected evidence, and the improper charge of suppressing evidence, which followed.

This was a close case in which the evidence, while sufficient to support the verdict, was far from satisfactory. The remarks made were decidedly improper, and the effect of any admonition to disregard rejected evidence was destroyed by the court's apparent approval of what followed. Not only were the matters complained of such as to create a wrong impression on the jury, but this effect would naturally be increased, and the error emphasized and given added weight, by the above quoted instruction given by the court. We think it must be said here as was said in Weaver v. Shell Co., 13 Cal.App.2d 643, 57 P.2d 571, 574: "When all of these incidents are noted and read together, it clearly appears that the rights of the defendants were greatly prejudiced and that it cannot be said they had a fair trial."

The appellants also contend that the respondents were guilty of prejudicial misconduct in bringing out a purported offer of compromise, while one of the respondents was on the stand. This matter was handled in an unfair manner whether or not it is sufficient, in itself, to justify a reversal.

It is also contended that the damages awarded to each respondent are excessive. They were exceedingly liberal and the record indicates that they might well have been reduced by the trial judge, but the record is such that the amounts allowed could not be disturbed by an appellate court.

The judgment is reversed and the cause is remanded for a new trial.

MARKS and GRIFFIN, JJ., concur.




78 Cal.App.2d 445

**NIEGEL et al. v. GEORGETOWN DIVIDE WATER CO., Limited.**

**Civ. 7331.**

**District Court of Appeal, Third District, California.**

**March 7, 1947.**

Hearing Denied May 1, 1947.

**1. Estoppel ⇐3(3)**

In suit by landowners against water company for alleged negligent maintenance of a ditch allegation in answer that, by reason of continual seepage, it had acquired a prescriptive right to permit seepage, if considered as an admission that seepage existed, did not estop company from relying on its denial in another portion of the answer that there was seepage, under statute permitting inconsistent defenses. Code Civ.Proc. § 441; Const. art. 1, § 14.

**2. Appeal and error ⇐882(3)**

Plaintiffs could not urge on appeal for the first time that they were entitled to damages on ground of absolute liability, where case was tried on theory that defendant's liability depended on a showing of negligence.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Suit by Rudolph Niegel and Ora Niegel against the Georgetown Divide Water Company, Ltd., for injunctive relief and damages for the alleged negligent maintenance of a ditch, a portion of which crossed plaintiffs' land. From judgment for defendant, the plaintiffs appeal.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellants.

T. L. Chamberlain, of Auburn, for respondent.

PEEK, Justice.

Plaintiffs by their complaint sought injunctive relief and damages against defendant for the alleged negligent maintenance of a ditch, a portion of which crosses plaintiffs' land. Defendant, a public utility, supplying water for public purposes in the vicinity of Georgetown, El Dorado county, answered, admitting the ownership and maintenance of said ditch under rights acquired by its predecessors in interest between the years 1850 and 1870, prior to the time of issuance of the patent from the United States for the land now occupied by plaintiffs, and denied any negligence whatever in the maintenance of said ditch. As a separate affirmative defense, defendant alleged that by reason of the continual seepage that has taken place periodically ever since the ditch was constructed, it had acquired a prescriptive right to permit the same.

The trial court in effect found against plaintiffs' charge of negligence on the part of the defendant in causing or permitting the seepage complained of, and also found against defendant's claim of a prescriptive right to cause or permit such seepage, and gave judgment for defendant.

On this appeal which is on the judgment roll alone, plaintiffs contend that, inasmuch as the seepage of water to and upon plaintiffs' land is admitted by the answer, the finding or findings contrary thereto must be disregarded, and therefore plaintiffs have established a case for a recovery under section 14 of Article I of the Constitution, which gives a right of compensation to one whose property has been damaged for public use, irrespective of proof of negligence on the part of the taker.

[1] There appear to be two answers to this contention. The first is that the admission (if it be one) contained in one part of the answer, namely, that portion devoted to the special defense of prescription, does not estop defendant from relying on its denial in the other portion. Our code system of pleading permits inconsistent defenses. C.C.P. sec. 441. This long has been the established rule in this state. Under it a defendant may set forth as many defenses as he may have. The fact that such defenses are inconsistent is immaterial. Thus a denial in one defense is not affected or waived by setting up inconsistent affirmative matter in another. 21 Cal.Jur., p. 134, § 90.

A situation quite comparable to the present controversy, particularly in view of the contentions of the parties, was present in the case of L. Mini Estate Co. v. Walsh, 4 Cal.2d 249, 48 P.2d 666. There, as in the present case, the trial court found against the plaintiffs on the question of damage and against the defendant on the issue raised by the affirmative allegations of prescription. On appeal, likewise, on the judgment roll, it was held that there was no merit to the contentions of the plaintiffs that the findings were uncertain, contradictory or insufficient to support the judgment.

Paraphrasing the language found in 4 Cal.2d at page 255, 148 P.2d 666, of that opinion we may say that by their complaint the plaintiffs herein tendered only the issue of a negligent maintenance of the ditch and prayed for an injunction and damages. On this issue the defendant joined. Findings on such issues were against the plaintiffs and judgment was entered accordingly. The plaintiffs could not require more. The fact that the defendant alleged a prescriptive right as a separate defense did not constitute an admission of wrongful seepage. It follows that the finding herein based on the material issue raised by the denial is sufficient to support the judgment.

[2] The other answer is that no cause of action based on absolute liability irrespective of negligence was put in issue by the pleadings or suggested by the findings. It is apparent from the record that the theory on which the case was tried was that defendant's liability depended upon a showing of negligence, and under general principles the plaintiffs will not be heard to urge a different theory for the first time on appeal. 2 Cal.Jur., p. 239, § 69. The same rule applies where the appeal is on the judgment roll. Peck v. Noee, 154 Cal. 351, 354, 97 P. 865.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.




78 Cal.App.2d 421

**YUBA RIVER SAND CO. v. CITY OF MARYSVILLE et al.**

**Civ. 7275.**

District Court of Appeal, Third District, California.

March 6, 1947.

**1. Landlord and tenant ⇐63(3)**

Generally a lessee of land may not ordinarily deny his landlord's title without first surrendering possession of the property.

**2. Landlord and tenant ⇐63(2)**

When a landlord not only seeks possession of real property, but also attempts to quiet title thereto as against tenant, either by cross-complaint or otherwise, tenant is not estopped from denying landlord's title but he may set up and establish any superior title which he may have acquired.

**3. Estoppel ⇐33**

Defendants in action to quiet title, by affirmatively asserting by way of cross-complaint, title to part of the land involved and asking title to be quieted in them, waived their right to rely on plea that plaintiff had acquired possession of the land as lessee of defendants and was therefore estopped from denying defendants' title.

**4. Adverse possession ⇐114(1)**

Evidence was insufficient to support finding that plaintiff had acquired title to one-half of one of the two lots involved in quiet title action by adverse possession.

**5. Adverse possession ⇐13**

"Adverse possession" must be hostile to the true title; it must be actual, open, notorious, continuous, uninterrupted and exclusive with a claim of right and payment of taxes for the statutory period.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

**6. Adverse possession ⇐31**

In order to establish adverse possession, true owner must have actual knowledge of the hostile claim or such constructive notice as would place him on inquiry.

**7. Adverse possession ⇐114(1)**

Burden is on one who claims by adverse possession to prove all the essential elements by clear and satisfactory evidence.

**8. Adverse possession ⇐85(5)**

A quitclaim deed may furnish some evidence of color of title tending to show hostility of possession.

**9. Adverse possession ⇐70**

"Color of title", as regards adverse possession, merely means a semblance of title as distinguished from paramount or actual title.

See Words and Phrases, Permanent Edition, for all other definitions of "Color of Title".

**10. Adverse possession ⇐85(1)**

In absence of evidence to refute presumption that quitclaim deed is founded on some record title, it may furnish a prima facie showing of "color of title" indicating hostility of possession.

**11. Adverse possession ⇐85(5)**

Quitclaim deed relied upon by plaintiff failed to furnish substantial evidence of hostility of plaintiff's possession, where evidence showed that heirs of deceased person who executed the quitclaim deed had no title because the deceased had no title to the property.

**12. Executors and administrators ⇐130(2)**

An administrator of estate of a decedent was authorized to maintain an action in behalf of heirs of the deceased person for possession of land. Probate Code, § 573.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Suit by Yuba River Sand Company against City of Marysville, Joe Foo, as administrator of the Estate of Ju Duck, also known as Juck Duck, deceased, Joe Foo, as administrator of the estate of Ju Sing, deceased, and others, to quiet title to real property, wherein Joe Foo, both as administrator of estate of Ju Duck, also known as Juck Duck, deceased, and as administrator of the estate of Ju Sing, deceased, filed a cross-complaint. From judgment entered, both the plaintiff and the defendant who filed the cross-complaint appeal.

Judgment affirmed in part, and reversed in part.

Rich, Weis, Carlin & Fuidge, of Marysville, for appellants.

Richard Belcher and Lingenfelter & Powell, all of Marysville, for respondents.

PER CURIAM.

In this suit to quiet title to real property the plaintiff has appealed from that portion of the decree which awards to the defendant and cross-complainant, Joe Foo, as administrator, the possession of the east one-quarter of Lot One of the property involved. Said defendant has also appealed from that other portion of the decree which quiets title in plaintiff, by adverse possession, to the west one-half of the east one-half of said Lot One. The balance of the property, to which title was quieted in plaintiff, is not involved on this appeal. It is conceded that the City of Marysville claims no interest in the land.

By an amended complaint which was filed July 26, 1944, the plaintiff sought to quiet title by adverse possession to designated portions of Lots One and Two, Block One, Range "B" in Marysville, Yuba County,

California, according to the official map thereof on file in the County Recorder's Office. By order of court, Joe Foo, as administrator of the estates of Juck Duck and Ju Sing, deceased, appeared and answered the complaint. The other defendants made no appearance. The answer denies the material allegations of the complaint, and affirmatively pleads an estoppel against plaintiff to deny its landlord's title to the east half of said Lot One, alleging that plaintiff took and held possession thereof under five successive leases from defendants and their predecessors in title, the true owners thereof from April 30, 1913, to May 1, 1940, and not otherwise, the last ten year lease having been executed by said Joe Foo and his wife, in behalf of himself and his brothers and sisters, the owners of said land. At the same time the said Joe Foo, as administrator, also filed a cross-complaint alleging that for ten years immediately prior to the commencement of this action said defendants owned and occupied the east half of Lot One subject only to said lease to plaintiff. Said defendants ask for possession of the property and for a decree quieting title in them to the east half of said lot. Plaintiff denied the allegations of the cross-complaint.

After trial the court adopted findings determining that, for twenty years prior to the commencement of this action, the plaintiff owned and was in actual adverse possession of all of the property described in the complaint, except the east one-half of the east one-half of said Lot One, and for more than five years immediately prior thereto plaintiff paid all taxes thereon; that Joe Foo was duly appointed as administrator of the estates of Juck Duck and Ju Sing, deceased, and as such he was substituted, by order of court, as a party defendant in this action; that, by a decree of distribution which was rendered in the estate of P. George, deceased, dated June 26, 1897, whatever interest said estate had in Lot One was conveyed to the heirs of said deceased, *but that said deceased had no title to any part thereof*, and that thereafter the heirs and successors in interest of P. George, deceased, quitclaimed to plaintiff, on June 28, 1928, whatever interest they had in said lot; that on October 28, 1875, one Dave Knight quitclaimed the east quarter of Lot One to Ah Chuck, who, on November 30, 1904, deeded to Juck Duck and his brother Ju Sing said Lot One; that Ju Sing died in 1906, leaving as his sole heir his brother Juck Duck, who thereafter occupied and exercised sole dominion over said Lot One until 1915, when he also died, leaving as his heirs a wife and seven children, including his sons, Joe Waugh and said administrator, Joe Foo; that on June 28, 1928, the plaintiff acquired title by quitclaim deed to the west one-half of the east one-half of said Lot One, ever since which time it held possession thereof adversely to the defendants with a claim of ownership thereof, and that it paid all taxes thereon for five years next preceding the commencement of this action; that from April 30, 1930, to May 1, 1940, plaintiff held possession of said east one-quarter of Lot One, as lessee under five successive leases executed by the asserted owners, the last of which leases expired on the last mentioned date, but that plaintiff continues to hold possession of said land. As conclusions of law the court found that plaintiff is the owner and entitled to possession of all the property described in the complaint, except the east one-half of the east one-half of said Lot One. The court further found that the defendant, Joe Foo, as administrator of the estates of Juck Duck and Ju Sing, deceased, is entitled to immediate possession of the east one-quarter of said Lot One, and that plaintiff has no right, title or interest therein. Judgment was rendered accordingly, quieting title in plaintiff to all of the property described, except the east one-quarter of said Lot One, and that the defendant, Joe Foo, as administrator of said estates is entitled to immediate possession of the east one-quarter of said Lot One, and that plaintiff has no right, title or estate therein, and no right to the possession thereof.

On appeal the plaintiff contends that the findings and judgment for the defendant Joe Foo, as administrator of the estates of Juck Duck and Ju Sing, deceased, awarding to him, as such administrator, immediate possession of the east one quarter of said Lot One is not supported by the evidence, and that the court erred in failing

to find and determine that said east one-quarter of Lot One was acquired by plaintiff by adverse possession.

At the trial, over repeated objections by the defendants that plaintiff was estopped from denying its landlord's title to the lot in question, since it acquired and held possession thereof as lessee of the defendants, evidence was received for the purpose of proving that plaintiff acquired title thereto by adverse possession, founded on a quitclaim deed, as a color of title.

[1] We think the court did not err in receiving that evidence. The defendant waived that rule of estoppel by affirmatively alleging in a cross-complaint the ownership and right of possession of said land, and asking that title thereto be quieted in him. It is true that a lessee of land may not ordinarily deny his landlord's title without first surrendering possession of the property. But the present case appears to come within a well known exception to that general rule.

[2] It is the established rule in California and in other jurisdictions that when a landlord not only seeks possession of real property, but also attempts to quiet title thereto as against the tenant, either by cross-complaint or otherwise, the tenant is not estopped from denying the landlord's title, but he may, under such circumstances, set up and establish any superior title which he may have acquired. Collier v. Johnson, 79 Cal.App. 322, 249 P. 217; Hambey v. Wise, 181 Cal. 286, 184 P. 9; San Juan Gold Co. v. San Juan Ridge Mutual Water Ass'n, 34 Cal.App.2d 159, 168, 93 P.2d 582; 35 C.J. 1233, sec. 575; 32 Am.Jur. 127, sec. 125; 89 A.L.R. p. 1295, note. In 32 American Jurisprudence, at page 128, the rule applicable to the situation in this case is concisely stated as follows: "Notwithstanding the general rule that a tenant in possession cannot maintain a suit against a landlord to litigate title, it has been held, in view of the rule stated above, that where, in such an action, the landlord files a cross complaint asking that title be quieted in him, the tenant is not estopped from disputing that title and showing title in himself."

In the case of Franklin v. Merida, 35 Cal. 558, 95 Am.Dec. 129, quoting with approval from the case of Tewksbury v. Magraff, 33 Cal. 237, the reason for the exception to the general rule that a tenant may not dispute the title of his landlord, is tersely stated at page 568 of 35 Cal. as follows: "'It [the estoppel] was designed merely as a shield for the protection of the landlord, and not as a sword for the destruction of the tenant.'"

The California authorities recognize, as exceptions to the general rule, that when the landlord affirmatively sets up title in himself which he seeks to quiet, or when the tenant secures possession of the land before he accepts a lease which has expired, or when the lease is executed by fraud or misapprehension of the actual title, the tenant is not estopped from establishing his own title, even though it would otherwise amount to a denial of his landlord's title. Tewksbury v. Magraff, 33 Cal. 237; Davis v. McGrew, 82 Cal. 135, 23 P. 41; Oneto v. Restano, 89 Cal. 63, 26 P. 788; Pacific Mut. Life Ins. Co. of California v. Stroup, 63 Cal. 150; Kearney Inv. Co. v. Golden Gate Ferry Co., 198 Cal. 560, 246 P. 322.

The foregoing exception to the general rule is stated in the Tewksbury case, supra, as follows:

"* * * The estoppel rests upon considerations of public policy which, for obvious reasons, would be defeated in its purpose *if one who has been put in possession of land by another should be allowed to controvert the title of the latter* without restoring him to as good a condition as he was in before he parted with the possession. (Glen v. Gibson, 9 Barb. [N.Y. 634], 638.)

"This general rule is, however, subject to several exceptions. * * * So *if the tenant did not take possession under the lease, but was in possession at the time he took his lease, he may dispute the landlord's title* without first surrendering the possession; for not having received the possession from him, he is under no moral or legal obligation to restore it before adopting a hostile attitude, and he may have attorned, by mistake, to one who had no title." (Italics added.)

[3] We conclude that, in this case, the defendants waived their right to rely on the

plea of estoppel, by affirmatively asserting title to the east one-half of Lot One and by asking that title thereto be quieted in them.

The only controversy in this case is over the title to the east one-half of Lot One. The balance of the property described in the complaint is not in dispute.

The original complaint was filed in this case July 3, 1940. We are of the opinion the evidence fails to support the finding of the court that plaintiff and its predecessor in title had been in actual, exclusive and *adverse possession* of the east one-half of Lot One, continuously for more than twenty years next prior to the filing of the complaint or that it had been in adverse possession for any period of time. The plaintiff concedes in its opening brief that "None of the parties to this action have any record title to any part of this property." The evidence fails to show adverse possession in plaintiff to the east one-half of Lot One. It follows that the judgment quieting title to the west half of the east half of Lot One is not supported by the evidence.

The only record title to the east half of Lot One, claimed by plaintiff, consisted of a quitclaim deed executed to it by the three three surviving children of P. George, deceased, June 29, 1928. It does appear that the estate of P. George was distributed to the three children of said deceased, June 26, 1897. But Ray Phillips, Manager of the Yuba Title Guarantee Company, who examined the records for title to that property, testified as a witness for plaintiff, that "said P. George had no record title or interest in or to said lot one." The court found that "At the date of the death of said deceased [P. George], he had no title in or to any part or portion of said property and neither did his estate acquire any title to it." Indeed it is not contended that P. George ever had title to any of said property. The quitclaim deed was therefore absolutely valueless. Moreover, the plaintiff recognized the fact that it acquired no title by that quitclaim deed, for on December 13th of the following year, it executed, as lessee, a written ten year lease with the defendant, Joe Foo, covering the east half of Lot One, in consideration of the sum of $650 rental for each year, which it paid without any claim of title, or protest to the end of that term. Plaintiff had no record title as it concedes.

The record refutes the plaintiff's claim of adverse possession of the east half of Lot One. Plaintiff was incorporated in 1915, and engaged in the business of producing and marketing crushed rock and gravel. From April 30, 1913, to May 1, 1940, it occupied the east half of Lot One under five successive leases from the purported owners thereof, paying the stipulated rent therefor. The plaintiff constructed on the premises buildings and valuable improvements. The first two leases provided that plaintiff might remove all such improvements within ninety days from the expiration of such leases. The last lease, executed by the defendant Joe Foo December 13, 1929, provided that plaintiff should pay all taxes levied an account of the buildings, equipment and improvements. Moreover, at the time of the expiration of the last lease, in May, 1940, the plaintiff, through its agents, went to Joe Foo, now the administrator of the estates of Juck Duck and Ju Sing, deceased, and offered to buy the land for $2,500, which offer was refused. Mr. W. T. Ellis, the Vice-President and Manager of the corporation, testified that "We made a proposal to buy it." The defendant, Joe Foo, testified that when the last payment of rent was made in 1940, Mr. Ellis asked him if they wanted to renew the lease; that when Foo told him they did want to renew it, Mr. Ellis said they could not afford to pay $650 rental per year, but that the corporation would renew the lease for ten years more at $300 rental per year, and he then offered to purchase it for $2,500. The offer to buy the property was refused. Foo told him they would not rent it for $300 per year, but that they would accept $500 per year. The lease was not renewed. Within about two months thereafter this suit was commenced.

It is true that the property in question was assessed to plaintiff and that it paid taxes thereon for more than five years immediately preceding the commencement of this action. But the property was also as-

sessed to the defendants and their predecessors who have paid taxes thereon ever since 1898, with the exception that the records show an occasional omission in either the description or the receipt of taxes. The City Assessor of Marysville testified that from 1930 to 1939 Lot One was assessed both to Joe Waugh, the son of Juck Duck, deceased, and to the plaintiff. He said that it was a double assessment. When asked how the "change in the assessment roll there in 1929" occurred, he replied, "It is my recollection that Mr. Ellis [the manager of plaintiff corporation] wanted to have me change it."

The record shows that the Chinese, Juck Duck, was also sometimes called Ju Duck, and Joe Bong and Joe Hin. He had a wife, named Loo She, three sons and four daughters. He also had one unmarried brother, named Ju Sing, who was assumed to have died during the earthquake at San Francisco in 1906. Ju Sing left surviving him neither a wife nor heirs other than Juck Duck, his only brother. Joe Foo, the son of Juck Duck, was appointed administrator of his uncle's estate. The title to the east one-half of Lot One, in 1861, was in Jacob Myers. March 5, 1867, it was conveyed on sale for delinquent taxes, by sheriff's deed, to C. C. Samueio. From that date there is a lapse of record title until October 28, 1870, when the east one-quarter of Lot One was conveyed by David Knight to Ah Chuck. November 15, 1904, the east half of that lot was deeded by Ah Chuck to the brothers Ju Duck and Ju Sing. It does not appear how Ah Chuck acquired title to the other one-quarter interest. The two brothers, Juck Duck and Ju Sing, conducted a laundry as partners on the property in question from 1904 to 1906, when Ju Sing died, and his brother Juck Duck continued to operate that business. Juck Duck executed the first lease of a part of that lot to the plaintiff April 30, 1913. Juck Duck died in 1915 and his son, Joe Waugh, was appointed administrator of his estate. The second lease of the land in 1917, the third lease in 1920 and the fourth lease in 1924 were executed by Joe Waugh to the plaintiff. The last three leases covered all of Lot One. The estate of Juck Duck was distributed to his wife Loo She, and to his three sons and four daughters. The wife transferred her interest to her children.

Upon proceedings duly had the defendant Joe Foo was appointed as administrator of the estate of Juck Duck, deceased, and of the estate of Ju Sing, deceased, and said administrator was subsequently made a party defendant, and appeared and answered the amended complaint in behalf of said estates.

[4-11] From the foregoing evidence, assuming from the pleadings in this case that the defendants waived their right to assert that plaintiff was estopped from denying its landlord's title to the disputed portion of the land in question, and that plaintiff was entitled to show whatever adverse title it possessed, we conclude that there is no substantial evidence of adverse title in plaintiff to the east half of Lot One, and that the court erred in determining that title to the west half of the east half of that lot is in plaintiff by adverse possession or otherwise. Adverse possession must be hostile to the true title. It must be actual, open, notorious, continuous, uninterrupted and exclusive, with a claim of right and the payment of taxes for the statutory period. Sheehan v. All Persons, etc., 80 Cal.App. 393, 401, 252 P. 337; 2 C.J.S. Adverse Possession, § 8, p. 520. The true owner must have actual knowledge of the hostile claim or such constructive notice as would place him on inquiry. 2 C.J.S., Adverse Possession, § 45 p. 558. The burden is on one who claims by adverse possession to prove all the essential elements by clear and satisfactory evidence. Brown v. Bachelder, 214 Cal. 753, 757, 7 P.2d 1027; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; 1 Cal.Jur. 636, § 95; 2 C.J.S. Adverse Possession, § 214, p. 814. A quitclaim deed may furnish some evidence of a color of title tending to show hostility of possession. 2 C.J.S. Adverse Possession § 60b (2), c., p. 580. Color of title merely means a semblance of title as distinguished from paramount or actual title. 2 C.J.S. Adverse Possession, § 60 b (2), p. 580. Naturally, the value of a quitclaim deed depends upon the record title upon which it is founded. In the absence of evidence to refute the presumption that it is founded on some record title, it may

furnish a prima facie showing of color of title indicating hostility of possession. But when the evidence shows, as it does in the present case, that the heirs of a deceased person who executed the quitclaim deed, had no title because the deceased had no title to the property, it furnishes no substantial evidence of hostility of possession. Under such circumstances it has been held that a quitclaim deed is valueless and ineffectual as evidence of adverse hostility of possession. Woods v. Banks, 14 N.H. 101. We are convinced the quitclaim deed upon which the plaintiff in this case relies as evidence of color of title and of hostility of possession, was adequately rebutted by evidence to the contrary. The record shows that for fifteen years prior to acquiring that deed the plaintiff recognized the rights of the owners of the land by contracting with them as lessee in four successive leases, and by renewing its lease with the defendants Joe Foo and Leta Foo, almost immediately after receiving that quitclaim deed, for ten years more at the stipulated rental of $650 per year, which rent was paid to the end of that term without protest and without calling the attention of the lessors to its claim of title by quitclaim deed or otherwise. The last lease refutes the claim of hostility of possession and of adverse title. It was a recognition of the true owner's claim of rights and title. It reserved an option for plaintiff to buy the land from the lessors for $4,500 at any time during the term of the lease. Plaintiff also covenanted to pay all taxes levied or assessed on the buildings or improvements which it had constructed on the property. The lease provided that plaintiff would not "remove earth sand or materials forming or constituting a part of said premises." All of those stipulations are inconsistent with a claim of adverse possession on the part of plaintiff.

For the foregoing reasons we conclude that the record is devoid of evidence to support the findings and judgment quieting title in plaintiff to the west half of the east half of Lot One of Block One, Range "B" in Marysville, as decreed by the court.

For the reasons heretofore stated we are also of the opinion the findings and judgment granting the defendant and cross-complainant Joe Foo, as administrator of the estates of Juck Duck, deceased, and Ju Sing, deceased, the right of immediate possession of the east one-quarter of Lot One of the property described in the complaint, are adequately supported by the evidence, and that the said Joe Foo, as administrator of the estates of Juck Duck and Ju Sing, deceased, is, for the same reasons, entitled to judgment for possession of the west one-half of the east one-half of said Lot One. In spite of the fact that defendants' chain of title to the entire east half of Lot One is not complete, their title, as against the plaintiff, who was their lessee and is wrongfully withholding possession after the termination of the lease, entitles them to possession of the east one-half of that lot. Certainly the plaintiff has shown no right which entitles it to retain possession.

[12] The defendant, Joe Foo, as administrator, was authorized to maintain the action in behalf of the heirs of the deceased persons for possession of the land. A suit for possession of real property may be maintained for or against an executor or an administrator in all cases in which the testator or intestate would have been proper parties. Probate Code, § 573; 9 Cal.Jur. 1038, § 47; Emeric v. Penniman, 26 Cal. 119.

The judgment quieting title in plaintiff by adverse possession to the west one-half of the east one-half of Lot One is reversed, and the court is directed to render judgment for the defendants and cross-complainants awarding defendant Joe Foo, as administrator, the right of immediate possession thereof.

The judgment in favor of defendants awarding the defendant and cross-complainant, Joe Foo, as administrator, immediate possession of the east one-half of the east one-half of Lot One is affirmed.

The respondent and appellant, Joe Foo, as administrator, may recover costs on these appeals.

78 Cal.App.2d 294

**Ex parte BURNS et al.**

**Cr. 2440.**

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1947.

Hearing Denied March 27, 1947.

**1. Criminal law ⇐290**

The right to interpose a plea of once in jeopardy is a personal privilege, of which a defendant may, or may not, avail himself.

**2. Criminal law ⇐292(1)**

If statute prescribing with particularity how plea of once in jeopardy must be specially pleaded is not substantially followed, the plea is ineffectual. Pen.Code, §§ 1016, 1017, subs. 3, 4.

**3. Criminal law ⇐204**

If no evidence is offered in support of a plea of once in jeopardy, the defense is waived.

**4. Criminal law ⇐912½**

The defense of former jeopardy cannot be raised for the first time on a motion for a new trial.

**5. Habeas corpus ⇐3, 4**

Generally, a writ of habeas corpus cannot be used to correct error nor be employed where there is a remedy by appeal or other direct attack, but in exceptional cases it may be issued even though other remedies might have been available.

**6. Habeas corpus ⇐4**

Habeas corpus was not available to those who had been convicted of conspiracy to commit abortions and of practicing medicine without a certificate, and whose appeals from such convictions were pending, to test question of former acquittal and jeopardy arising because of the dismissal of a juror in the prosecutions. Pen.Code, §§ 182, 274, 1016, 1017, subds. 3, 4; Business and Professions Code, § 2141.

**7. Bail ⇐44**

Where question whether defendants' plea of once in jeopardy in prosecutions for conspiracy to commit abortions and for practicing medicine without a certificate, because of court's dismissal of a juror because juror stood accused by information then pending in the same department of the court of a felony, was debatable, defendants were entitled to bail pending decision on appeal by them from convictions. Pen.Code, §§ 182, 274, 1016, 1017, subds. 3, 4; Business and Professions Code, § 2141.

Proceeding in the matter of the application of Inez L. Burns, Mabel Spaulding, Myrtle Ramsay, Joesph Hoff, and Musette Briggs for writ of habeas corpus.

Petitioners held entitled to bail pending decision on appeal from convictions and, in other respects, writ discharged.

Walter McGovern and John R. Golden, both of San Francisco, for appellants.

Edmund G. Brown, Dist. Atty., and Thomas C. Lynch, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

This is a proceeding in habeas corpus.

The petitioners were accused by information of conspiracy to commit abortions (sections 182 and 274, Penal Code) and of practicing medicine without a certificate (section 2141, Business & Professions Code). There were two trials resulting in disagreements of the jury. The third trial resulted in the conviction on both charges of all five petitioners. Within a few days after sentence and commitment they filed the petition herein, based on the ground that in the last trial they were subjected to double jeopardy.

The trial opened on September 17, 1946, and just before the noon recess on the 19th a jury of twelve men and women, including the juror Thomas J. Furner, all of whom had been theretofore examined and passed by both sides, was sworn to try the case. At the opening of the afternoon session the court directed that two alternate jurors be selected, to which the defense objected on the ground that no necessity appeared therefor. Several prospective alternates were examined on their voir dire and after one had been seated

the court remarked that one alternate would be sufficient, to which counsel for the defense responded "All right, that is our stipulation."

The judge then called counsel into chambers and stated that after the jury had been impaneled and sworn his attention had been called to the fact that the juror Furner stood accused by an information then pending in the same department of the court, of a violation of section 480 of the Vehicle Code (hit and run, a felony) which fact neither he nor any of the counsel in the pending case had known at the time of Furner's voir dire examination. The judge stated that in his judgment this juror should not serve; that he purposed calling him in, and if he did not ask to be excused, the court would, in the exercise of its discretion, excuse him for cause and put the alternate in his place.

The defense objected, stating that a jury had been duly and regularly sworn to try the case; that the contemplated action could not be carried out legally; that the fact that Furner had been accused was not a ground for challenge for cause, and that if carried out the proposed action would result in a denial of the defendants' constitutional rights respecting double jeopardy. The defense stated, further, that if Furner were brought into chambers and questioned it would be intimidating the juror and would "possibly scare him into asking to be excused"; that the substitution of another juror would be denying the defendants their right to be tried by a jury of their own selection. The district attorney, when invited to comment, said nothing.

The juror was then called in and stated, in reply to the judge's question, that he was the same Thomas J. Furner against whom such information had been filed. The following transpired:

"The Court: * * * Do you feel, Mr. Furner, under the circumstances, that you would care to be excused?

"Juror Furner: It is entirely up to yourself, your Honor. I want to be fair about it. In fact, I discussed this with my attorney and he said as long as I wasn't objected to and as long as I answered the questions truthfully, I could.

"The Court: Well, of course, there is no reflection upon you whatsoever. I want you to understand that. It was not called to the attention of the Court, nor was it called to the attention of the attorneys. None of us knew anything about it. And, of course, you are presumed to be innocent on that charge. But in view of the fact that you have been informed against by the District Attorney and that that charge is now pending in this very Department, the thought has occurred to me that you might possibly wish to be excused. I will ask you again then if you wish to be discharged under those circumstances?

"Juror Furner: Well, if you think it is liable to cast reflection on anyone, it is perfectly all right with me if you wish to excuse me.

"Mr. McGovern: I am going to object, your Honor, on all of the grounds heretofore interposed.

"The Court: The record will show that, and the record will show that the Court in its discretion will excuse you, Mr. Furner. And you are to understand that there is no reflection upon you in that decision of mine. It is merely that I do not feel, in view of the fact that you have been informed against by the District Attorney, who is also prosecuting this case, that it would be fair to you or fair to anyone concerned to have you serve upon this case, and therefore you are discharged.

"Juror Furner: All right, sir.

"The Court: And the record will show for the cause heretofore stated by the Court.

"Mr. McGovern: To which we take an exception."

On returning to the courtroom the juror was formally excused and the alternate juror, named Lawrence A. Bailey, was sworn and seated in Furner's place.

Counsel then returned with the judge to chambers and moved that all five defendants be forthwith dismissed from all pending charges, on the ground that the

court had indicated it intended to try them by a jury other than that which was theretofore selected, constituting double jeopardy. The motion was denied. They then indicated also that a formal plea of former jeopardy would be entered later. In denying the motion to dismiss, the judge stated that in his opinion "no Constitutional guarantee, either state or federal, has been violated as far as each defendant is concerned; no witness has been sworn, and the Court in the exercise of its discretion, does not believe it proper to proceed with a jury of twelve people, one of whom is presently charged with the commission of a felony by the Prosecutor and by the same attorneys who are conducting the prosecution in the instant case. An alternate juror has been chosen in accordance with the provisions of the Code and upon the excusal of the Juror Furner, the alternate juror was substituted in his place in accordance with the Court's understanding of what the proper procedure to be followed is. And for those reasons the motion is denied."

The next day the following transpired:

"Mr. Golden: Now, if our understanding of what took place yesterday is correct, at that time Mr. McGovern requested permission to enter a plea of once in jeopardy, which would have the effect as though it was made at the time, and the Court granted that permission.

"The Court: Yes.

"Mr. Golden: Now, then, for the record, your Honor, I make the plea on behalf of the defendants that, in addition to the plea of not guilty on the part of each defendant, the defendants and each of them plead that they and each of them have been once in jeopardy for the offense charged, namely, conspiracy to commit abortions and conspiracy to practice medicine without a certificate, and that on yesterday, September the 19, 1946, in Department 11 of the Superior Court, of the City and County of San Francisco, State of California, in this very courtroom, a jury of twelve persons, consisting of eleven of the persons presently in the jury box, plus a juror by the name of Thomas J. Furner, were duly and regularly impaneled and sworn and charged with the defendants' deliverance in this case—.

"* * * Well, in any case, duly and regularly impaneled and sworn to try the case. And I ask that that plea be entered with the effect as though it were made immediately upon the happening of the proceedings of yesterday, when the juror was substituted for Mr. Furner.

"The Court: I suppose the procedure is for me to deny the plea.

"Mr. McGovern: Yes, but will the record show it was made?

"The Court: The plea will be denied and the record will show that the plea made by Mr. Golden was made on behalf of all the defendants and the record will further show that it was timely made."

The trial then went forward in the ordinary way, and the introduction of evidence, the arguments and the instructions consumed six trial days.

The court sentenced the women defendants to Tehachapi and Hoff to San Quentin, for the term prescribed by law. Notice of appeal was filed at once. A stay of execution was granted, but bail was denied, pending appeal. At the time the petition was filed herein the petitioners were confined in the county jail. The appeal is pending in this division, and the transcripts on appeal have been on file for several months.

The petitioners' position on this application is that jeopardy attached when the original twelve jurors were sworn; that when the juror Furner was removed from the box the "jury was destroyed as completely as if all twelve jurors were so removed" and when the juror Bailey joined the other eleven the defendants on trial faced a second jury, hence a second jeopardy.

The petitioners advance the following reasons why habeas corpus is available to them: "The instant Furner was removed the trial court was without jurisdiction to do anything except grant applicants' motion for dismissal. * * * All subsequent proceedings were null and void * * * the trial court lost jurisdiction over these applicants when the trial jury was des-

troyed by the removal of Furner. * * * It appears from the record itself that the trial court was without jurisdiction to render the very judgment under which these applicants were held in custody. We emphasize that the point raised here goes to the jurisdiction of the court to render the judgment and because the question is jurisdictional it is proper to test it by the writ of habeas corpus."

That, in substance, was the appellants' position in People v. Jackson et al., 24 Cal.App.2d 182, 74 P.2d 1085, 1087, where the defendants moved that their pleas of former jeopardy and acquittal be tried by the court and determined before a jury was impaneled in the second case. The motion was denied, the case went to trial with all the issues before the jury, and there was a conviction. On appeal the defendants contended, as these petitioners now contend, *that the judgment was null and void.* It was held that the court had not erred in pursuing the usual course and proceeding with the trial of all the issues at one time. The court said:

"Appellants concede that there is authority in this state which supports the action taken by the trial court in this case, i. e., submitting the issues raised by the special pleas to the same jury at the same time the issues presented by pleas of not guilty were submitted. That the concession thus made is proper and, further, that when such pleas have been entered and no evidence supporting them is produced, it is incumbent upon the trial court to instruct the jury to find for the prosecution on the issues raised by the special pleas is apparent from the decision in People v. Newell, 192 Cal. 659, 221 P. 622.

"Appellants nevertheless insist that the peculiar circumstances of this case are such that it was error for the trial court to proceed to trial on the issues presented by their pleas of not guilty in the face of their demand for a separate trial of the special pleas and of their objection to going to trial until the issues raised by their special pleas had been determined. The circumstances which appellants contend are proper to make the instant case an exception to the general rule announced in People v. Newell, supra, are fully set forth in Jackson v. Superior Court, [10 Cal.2d 350,] 74 P.2d 243, [113 A.L.R. 1422]. In passing it should be noted that the offenses here charged against appellants are different offenses than those alleged in the case last cited and that the decision therein is for this reason not applicable to the present situation. In our opinion, the circumstances upon which appellants rely are not sufficient to create an exception to the general rule heretofore stated. *We know of no rule requiring the trial of issues raised by the special pleas in advance of the regular trial.* The course of the proceedings was confined to the discretion of the trial court, and no abuse of such discretion is manifest from a refusal to grant a separate trial on the special pleas." (Emphasis added)

A petition for hearing was filed in the Supreme Court wherein it was argued that "* * * in the presence of a plea of 'once in jeopardy', a jury can not be *sworn* to try a defendant upon the issue raised by his plea of 'not guilty' until the issue raised by the special plea has been determined, for the moment such a jury is sworn, jeopardy has attached to the defendant, and if he has been previously in jeopardy, he has thereby been placed twice in jeopardy for the same offense with no possibility of availing himself of his constitutional guarantee against such procedure * * *." The petition was denied.

In Heike v. United States, 217 U.S. 423, 432, 30 S.Ct. 539, 542, 54 L.Ed. 821, the court said: "The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment. * * *

"It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecu-

tion, and this notwithstanding the person is in jeopardy a second time, if after one conviction or acquittal, the jury is empanelled to try him again."

In People v. McGee, 1 Cal.2d 611, 613, 36 P.2d 378, 379, in holding that the statute of limitations in criminal cases is jurisdictional, the court remarked that "This is, of course, a rule essentially different from that governing civil actions, and it results from the different character of the statute in the two kinds of proceedings. *In civil actions the statute is a privilege which may be waived by the party.*" (Emphasis added.)

[1] It is settled law in this state, and not questioned by the petitioners, that "The right to interpose a plea of once in jeopardy is a personal privilege, of which a defendant may or may not avail himself." People v. Stoll, 143 Cal. 689, 696, 77 P. 818, 821; People v. Newell, 192 Cal. 659, 667, 221 P. 622; People v. Frank, 75 Cal. App. 74, and cases cited at page 81, 241 P. 924.

[2, 3] It must not only be specially pleaded (sec. 1016, Penal Code), but the statute (sec. 1017, subd. 3 and 4) prescribes with particularity just how this must be done, and the cases hold that if the statute is not substantially followed the plea is ineffectual. People v. O'Leary, 77 Cal. 30, 18 P. 856; People v. Solani, 6 Cal.App. 103, 91 P. 654; People v. Moronati, 70 Cal. App. 17, 232 P. 991; People v. Hudson, 92 Cal.App. 593, 268 P. 687; People v. Rogers, 112 Cal.App. 615, 297 P. 924. If no evidence is offered in support of the plea the defense is waived. People v. Newell, supra; People v. Frank, supra; People v. Higbee, 78 Cal.App. 455, 248 P. 927; People v. Grace, 88 Cal.App. 222, 263 P. 306.

[4] While the defense of the statute of limitations may "be raised at any time, before or after judgment" (People v. McGee, supra), or on habeas corpus (In re Davis, 13 Cal.App.2d 109, 56 P.2d 302), the defense of former jeopardy cannot be raised for the first time on a motion for new trial. People v. Bennett, 114 Cal. 56, 45 P. 1013; People v. Lachuk, 5 Cal.App. 2d 729, 43 P.2d 579), or on appeal (People v. Lee June Chong, 94 Cal. 379, 29 P. 776; People v. Sachau, 78 Cal.App. 702, 248 P. 960.

The contrast between the defense of the statute of limitations and that of former jeopardy is concisely pointed out in the case of People v. Allen, 47 Cal.App.2d 735, 748, 118 P.2d 927, 934, where the court said: "The fact that the statute of limitations is jurisdictional necessarily determines that a prosecution within the period specified is an essential element of the offense. *Thus, the problem is essentially different from the defense of once in jeopardy.* The Penal Code specifically requires a special plea in order that this defense may be raised (Penal Code, § 1016). If a special plea is not made, this defense is waived. Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65; People v. Solani, 6 Cal.App. 103, 91 P. 654. But there is no provision of the Penal Code requiring or permitting a special plea in reference to the statute of limitations. A general verdict of guilty as charged, therefore, necessarily includes a finding on this element as it does in reference to the other elements of the offense." (Emphasis added.)

In the case of In re Collins, 151 Cal. 340, 350, 90 P. 827, 831, 91 P. 397, 129 Am.St. Rep. 122, the court says in so many words that former acquittal or conviction is matter of defense which "does not go to the jurisdiction, and affords no ground for release on habeas corpus." This was followed in Re Perry, 94 Cal.App. 235, 237, 270 P. 996.

In Ex parte King, 10 Cal.App. 282, 283, 101 P. 810, 811, it is said: "Indeed, it seems to be settled by authority, as stated in Church on Habeas Corpus, § 253: 'Neither will once in jeopardy be reviewed or inquired into on habeas corpus. If pleaded and disregarded, it is an error to be corrected by appeal.' For the reason that the question is one of error, and not of jurisdiction, the application of petitioner could not be entertained * * *".

The case of In re Connor, 16 Cal.2d 701, 108 P.2d 10, 12, was an application for release on habeas corpus from the state penitentiary on the ground that throughout the period of the petitioner's "arraignment, trial and conviction, the court failed

to inform him of his right to counsel, or to appoint counsel to defend him, or to allow him a sufficient opportunity to procure legal assistance, all in alleged violation of fundamental rights guaranteed to him by the federal and state Constitutions, * * * and in violation of section 987 of the Penal Code." The writ was discharged and the petitioner remanded. In the opinion the subject now under discussion is so fully treated that we quote from it rather extensively:

"Under the general rule well established in this state, but which admits of some modification under exceptional circumstances, this contention cannot at this late date be made the basis of a successful collateral attack by habeas corpus upon the validity of the judgment. The point could have been urged by petitioner on an appeal from the judgment, but none was taken. It could also have been urged in the proceedings to vacate the judgment instituted in 1933 and 1934, but it was not, either in the trial court or on appeal. In re Connor, supra. It is not a good ground for discharge in this proceeding. In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him. In re Drew, 188 Cal. 717, 207 P. 249; In re Connor, supra. Neither may the writ of habeas corpus be employed to serve the purposes of an appeal. In re Leonardino, 9 Cal.App. 690, 100 P. 708. The function of the writ, as described in the case last cited, 'is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal'.

"Again, in Re Murphy, 79 Cal.App. 64, 248 P. 1044, 1045, it is said: 'The law appears to be well settled that upon a petition for a writ of habeas corpus the scope of the inquiry is limited to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. This inquiry is limited to the face of the proceedings. In other words, the alleged invalidity must appear upon the face of the judgment attacked by this method. 12 R.C.L. 1185, § 8, p. 1240, sec. 59; 13 Cal.Jur. 217, § 4, and cases there cited. In Ex parte Long, 114 Cal. 159, 45 P. 1057, it is stated: "The inquiry to be had thereunder (on habeas corpus proceedings) does not extend beyond the question of jurisdiction and the validity of the process on its face." People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. 107, 111.'

"In Re Maldonado, 97 Cal.App. 288, 275 P. 495, 496, a habeas corpus proceeding, the petitioner claimed that he had not been informed of his legal rights at the time of his arraignment. Denying him relief, the court stated: 'The writ of habeas corpus is not a substitute for an appeal. 13 Cal. Jur. 217, § 4. Errors in the trial and denial of statutory rights which could be waived are grounds of appeal, but are not grounds for discharge on habeas corpus. 13 Cal.Jur. 236, § 17.'

"A like conclusion was announced in In re Gutierrez, 1 Cal.App.2d 281, 36 P.2d 712, 714. Petitioner there applied for a writ of habeas corpus upon the ground, among others, that 'he was denied counsel and was not represented by counsel.' Refusing to grant relief, the court said: 'The proper method of presenting this objection is by appeal from the judgment. Ex parte Ah Sam, 83 Cal. 620, 24 P. 276; In re Maldonado, 97 Cal.App. 288, 275 P. 495. * * * Each of the foregoing rights is one that he could have waived, and the alleged denial of any one or all of them might properly have been raised by appeal but it is not a ground for discharge in this proceeding.' [citations] In other words, while the right of an accused to counsel will be protected, it is a right which may be waived."

Although we are satisfied, for the reasons and on the authorities cited, that the court had jurisdiction to enter judgment, that does not altogether settle the present problem, for the Supreme Court in In re Bell, 19 Cal.2d 488, 493, 494, 122 P.2d 22, 26, has said that "Habeas corpus is also

widely used to test the constitutionality not only of a statute but of the *procedure in petitioner's trial, even though the trial court has jurisdiction to try the petitioner* [citations] *and any infringement of constitutional right during the trial may be raised on appeal.* * * *." (Emphasis added.)

[5] If (as we have held) the trial court had jurisdiction to try these petitioners and to enter judgment, the question which has to be decided (in the light of what has been just quoted) is: Whether habeas corpus can be used to test the constitutionality of the trial procedure *at this stage of the proceedings,* that is, after judgment and during the pendency of the appeal therefrom, or, to be more exact, whether it can be so used *instead of the appeal.* That question seems to be answered by the cases cited in Re Connor, 16 Cal.2d 701, 108 P. 2d 10, supra, holding that habeas corpus cannot be used as a substitute for an appeal. The latest utterance of the Supreme Court on this subject is that found in In re Seeley, 29 Cal.2d 294, 176 P.2d 24, 26, as follows:

"In the determination of a proceeding in habeas corpus in this state the court is ordinarily concerned with an inquiry into the jurisdiction of the court in which the prisoner was convicted. *It is the general rule that the writ may not be used to correct error nor be employed where there is a remedy by appeal or other direct attack.* But in exceptional cases it may be issued even though other remedies might have been available. In re Belt, 159 U.S. 95, 100, 15 S.Ct. 987, 40 L.Ed. 88; In re Bell, 19 Cal.2d 488, 122 P.2d 22; In re Connor, 16 Cal.2d 701, 705, 712, 108 P.2d 10.

"In Re Bell, supra, 19 Cal.2d at page 494, 122 P.2d [22,] at page 26, this court said: 'There are other situations in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that *cannot otherwise be raised* or is so important as to render the ordinary procedure inadequate." (Emphasis added.)

In re Bell was itself such a case for it came before the court after the petitioner had been convicted in the Justices' Court of violating an ordinance and the conviction had been affirmed on appeal in the Superior Court. In such instance, as pointed out in In re Martinez, 56 Cal.App.2d 473, 475, 132 P.2d 901, 902, "there is no other way in which the question can be presented to a higher court."

There are two recent cases which illustrate and apply what was said in the Bell case respecting testing the constitutionality of the procedure in a criminal trial.

In the Wallace case [Ex parte Wallace], 24 Cal.2d 933, 152 P.2d 1, 3, habeas corpus was held to be available because the ground on which the petitioner relied could not have been raised on his appeal (which had become final) as he obtained the information underlying his petition only after the death, in 1939, of one of the principal persons involved, at which time his time for appeal had expired. The court said:

"A violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding *if the petitioner has no other adequate remedy to test the constitutionality of the proceeding resulting in his conviction.* In re Bell, 19 Cal.2d 488, 494, 122 P.2d 22; Portnoy v. Superior Court, 20 Cal.2d 375, 378, 125 P.2d 487; In re Silverstein, 52 Cal. App.2d 725, 126 P.2d 962; In re Connor, 15 Cal.2d 161, 163, 99 P.2d 248; In re Connor, 16 Cal.2d 701, 705, 108 P.2d 10." (Emphasis added.)

In Re Byrnes, 26 Cal.2d 824, 827, 161 P.2d 376, 377, the court said: "It is well settled that a writ of habeas corpus ordinarily may not be employed as a substitute for an appeal. (In re Bell, 19 Cal.2d 488, 492, 122 P.2d 22), yet the scope of inquiry in such proceedings has been broadened rather than narrowed (Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357), and *the writ may be used to present questions of law that cannot otherwise be reviewed or are so important as to justify an extraordinary remedy.* In re Bell, supra, 19 Cal.2d at page 494, 122 P.2d 22; In re Silverstein, 52 Cal.App.2d 725, 126 P.2d 962." (Emphasis added.)

In the Byrnes case the court did not release the petitioner from custody. It di-

rected the Superior Court to hear, within 90 days, any motion which Byrnes might make, looking to his relief from default in the preparation of a transcript on appeal, thereby aiding him to get his case before the appellate court. He had no remedy left but habeas corpus to accomplish this, and habeas corpus was in that case used as an auxiliary to his appeal.

In the McVickers case [In re McVickers], 29 Cal.2d 264, 176 P.2d 40, 46, attention is drawn to the expansion of the habeas corpus rule where, it is said:

"The extent of the growth of the function of habeas corpus collaterally to attack judgments of conviction in this state is illustrated by comparing with recent decisions (e. g., In re Connor, 1940, 16 Cal.2d 701, 712, 108 P.2d 10; In re Bell, 1942, 19 Cal.2d 488, 122 P.2d 22, and cases there cited; [In re] Byrnes, 1945, 26 Cal.2d 824, 827, 161 P.2d 376) the case of Ex parte Max, 1872, 44 Cal. 579, 581, which pointed out the 'obvious distinction between the office of writ of error or an appeal, on the one hand, and a writ of habeas corpus upon the other.'"

The contrast is accentuated by the reference, 29 Cal.2d at page 275, 176 P.2d at page 46, to the court's recent statement in the Byrnes case, supra, that "the scope of inquiry in such proceedings has been broadened rather than narrowed". In the recent cases, as we have seen, the broadening process was brought into play because in each of them the petitioner was left without any other vehicle for getting his constitutional or jurisdictional grievance before the court. In a case such as this, where the appeal is actually pending and awaiting briefing, if it should be held (as we are asked to hold) that habeas corpus is appropriate, then after every felony conviction where any of the rights mentioned in section 13 of Article I are in issue, appeal as now known could be completely bypassed and habeas corpus substituted outright in its place.

The case of Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422, is strongly relied on by the petitioners. That was a proceeding in prohibition where the writ was issued to halt a second trial at the threshold. In Menjou v. Superior Court, 128 Cal.App. 117, 16 P.2d 1007, mandate was used in the same way. From an early date the court has acted sua sponte to prevent a second trial (see People v. Horn, 70 Cal. 17, 11 P. 470; People v. Roberts, 114 Cal. 67, 45 P. 1016, and People v. Terrill, 132 Cal. 497, 64 P. 894), when it was self-evident that the defendant had been once in jeopardy and a second trial would be vain and useless. These cases are referred to in the Menjou opinion, 128 Cal. at page 122, 16 P.2d 1007. It was doubtless on such a theory that Jackson v. Superior Court was decided. Prohibition, a purely preventive remedy, was invoked in that case at an altogether different stage of the proceedings—to stop the trial of a case. Here habeas corpus was invoked after the trial had gone through to judgment, on the claim that the court had no jurisdiction to enter such judgment. We are satisfied that the Jackson case is not controlling. In re Berman, 104 Cal.App. 259, 286 P. 1043, and its companion case, are the only reported cases which we have found where habeas corpus was used to halt further proceedings on the ground of jeopardy, and in the Berman case the remedy of habeas corpus was invoked at approximately the same stage of the proceedings as prohibition and mandate were invoked in the other cases.

[6, 7] For the foregoing reasons we are satisfied that habeas corpus is not available to the petitioners to test or examine the question of former acquittal and jeopardy arising because of the dismissal of the juror. That question is a debatable one and it will have to be decided on the appeal itself. See In re Bell, 19 Cal.2d 488, 495, 122 P.2d 22, and In re Ballas, 53 Cal.App. 109, 199 P. 816. Because it is debatable the petitioners should be granted bail pending the decision on appeal and the present bail order should be continued in effect.

It is ordered that the order heretofore made on October 3, 1946 respecting bail be continued in effect pending the decision herein on appeal. In other respects, the writ is discharged.

NOURSE, P. J., and DOOLING, J., concur.

**LYNCH et al. v. WATSON et al.**

**Civ. 15391.**

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1947.
Rehearing Denied March 6, 1947.
Hearing Denied April 15, 1947.

**1. Appeal and error ⇐863**

On appeal from judgment dismissing an amended complaint after demurrer thereto has been sustained without leave to amend, inquiry of an appellate tribunal is confined to a consideration whether amended complaint stated sufficient facts with sufficient certainty to entitle plaintiff to have the demurrer overruled and to have the cause proceed to trial.

**2. Judgment ⇐687**
**Limitation of actions ⇐172**

Where cause of action alleging breach of contract showed that action was commenced almost six years after execution and breach of the contract, and that plaintiffs had previously sued the defendant administrator's intestate for breach of the contract, cause of action was properly dismissed because it showed that plaintiffs had their day in court and that action was barred by limitations. Code Civ.Proc. § 337, subd. 1.

**3. Trespass ⇐40(1)**

Cause of action alleging that defendant administrator's intestate during his lifetime made trespassing statements to various persons concerning plaintiffs and breached his agreements to lease, and that defendants joined in scheme to trespass on and injure and destroy plaintiffs' business, name, reputation and property, was insufficient to allege offense of "trespass de bonis asportatis".

See Words and Phrases, Permanent Edition, for all other definitions of "Trespass De Bonis Asportatis".

**4. Conspiracy ⇐18**

Cause of action charging conspiracy to defraud on part of administrator of an estate and his attorney, because attorney made affidavit in support of motion to dismiss an action and recited therein matters appearing in a public record, and that administrator did not prohibit the filing of such affidavit nor the making of the motion, was insufficient to charge conspiracy to defraud.

**5. Appeal and error ⇐1178(8)**

Judgment dismissing action after demurrers to amended complaint had been sustained without leave to amend was affirmed, where it appeared on face of complaint that allegations thereof were insufficient to state a cause of action or any of the various charges made and that complaint was incapable of further amendment to state a cause of action.

**6. Appeal and error ⇐891**

Appellant's application for permission to produce certain evidence in the District Court of Appeal was denied where judgment dismissing the action was affirmed because complaint was incapable of amendment to state a cause of action.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by H. L. Lynch and H. L. Lynch, as trustee, against Claude A. Watson, acting as administrator of the estate of John S. Holmstrand, deceased, and Walter G. Danielson for breach of contract, trespass de bonis asportatis, and conspiracy to defraud. From a judgment dismissing the action without leave to amend, the plaintiffs appeal, and apply for permission to produce certain evidence in the District Court of Appeal.

Judgment affirmed and application denied.

H. L. Lynch, in propria per., for appellants.

Walter G. Danielson of Los Angeles, for respondents.

YORK, Presiding Justice.

Defendants interposed general and special demurrers to the original complaint herein and plaintiffs were given ten days in which to amend. This is an appeal from a judgment of dismissal which was entered after general and special demurrers to plaintiffs' first amended complaint were sustained without leave to amend.

Said first amended complaint is for "breach of contract, trespass de bonis asportatis, conspiracy to defraud, damages", and is directed against Claude A. Watson, as administrator of the estate of John S. Holmstrand, deceased, and Walter G. Danielson, as alleged agent for said administrator. Said amended complaint alleges in Paragraph II of the first cause of action that said decedent in his lifetime "did great wrongs unto the plaintiffs" and that the latter are bringing the instant action against the representative of decedent "because the said wrongs have been continuing wrongs and a continuing trespass, and the plaintiffs herein have suffered, and are still suffering great injury by and through said wrongs and said trespass by and through the administration of said estate by the said Claude A. Watson, the said plaintiffs being damnified by his acts therein."

In appellants' opening brief it is explained that the foregoing paragraph "is introductory to the remainder of the first count". At any rate, the remaining paragraphs of the first cause of action, to wit: III, IV, V, VI, VII, VIII and IX, allege the making of two written agreements by Holmstrand and Lynch to lease for oil drilling seven Holmstrand lots in Block H of the Townsite of Howard, as well as other property in the same tract owned by various other parties; that a lease or leases were to be made to include the described lots and that said Lynch had the right to include the lots in one or more leases in groups or combinations as he saw fit, it being the intention of the parties that the said leases should be "open leases, made in counterpart, and executed at different times as the lots were secured and cleared"; that the contracts were continuing contracts and some of them had been executed and "are in force at this time" and other counterparts were to be executed later. That on August 10, 1939, decedent signed an option giving plaintiff H. L. Lynch "the right to buy of him a certain note in the principal sum of $200.00." In consideration of the making of said option, Lynch agreed that "when I have received said Deed of Trust and note and have cleared said property, I will secure an Agreement to Lease from the owner thereof, and will deposit same with a Title Company together with other agreements to lease the lots which, with the above described property, are to constitute the lease provided for in that certain Agreement to Lease made between the said John S. Holmstrand and H. L. Lynch prior to January 1, 1938, and the later Agreement to Lease, or supplementary agreement, made with me by the said John S. Holmstrand, dated May 25, 1938. * * The agreement to lease which I am to secure to be on the same terms, as near as may be, as the said agreements to lease dated May 25, 1938, and prior thereto." It is then alleged (Par. V) that on or about August 24, 1939, said Holmstrand breached his contract of August 10, 1939, by assigning the note and trust deed to a third party, and thus deprived appellant Lynch of the opportunity to clear the title to the property covered thereby and to included the same in an oil lease and also prevented him from carrying out his obligation to others who had signed his oil lease; that the property covered by the trust deed was thereafter sold by the trustee at a trustee's sale; that said property "had a peculiar value to the plaintiffs herein, far exceeding its ordinary real-estate value; * * * that owing to said property being oil land, it is impossible to accurately estimate the full extent of the damage incurred by plaintiffs herein on account of said breach of contract, because the future damage in this case cannot be accurately determined." It is then alleged that on August 9, 1940, said Lynch sued Holmstrand in the Superior Court of Los Angeles County, Docket No. 454935 "for breach of contract, trespass and damages" because of the breach of said contract by Holmstrand; that on July 7, 1942, said Holmstrand died; that on October 5, 1943, respondent Claude A. Watson, as administrator of the estate of Holmstrand, was substituted as defendant in said action, and on October 16, 1943, he moved by his attorney, respondent Walter G. Danielson, for a dismissal of said action on three grounds: 1. That plaintiff had not prosecuted the cause with reasonable diligence; 2. That plaintiff had not filed a claim with the administrator of said estate as provided

by the Probate Code; and 3. That plaintiff had not filed a non-resident cost bond. The motion was granted and the action dismissed; that said dismissal was affirmed on appeal; that a petition for an appeal to the Supreme Court of the United States was presented to a justice of said court and said "petition is now before said Court". It is then alleged that because of contract by Holmstrand, said "plaintiffs H. L. Lynch and H. L. Lynch, trustee, have suffered damage directly in the sum of $850.00"; and that because they were deprived of the opportunity to clear the property covered by the trust deed and of fulfilling their contracts concerning oil leasing, plaintiffs suffered special damages of $8,000.

As a second cause of action of the amended complaint, it is alleged that "John S. Holmstrand, in his lifetime, made trespassing statements to various persons regarding the plaintiffs herein and performed certain acts breaching his agreements to lease made with plaintiff H. L. Lynch * * which statements and acts, so made and performed by him, constituted the offense of trespass de bonis asportatis; that in performing said acts he injured and destroyed contract rights of the plaintiffs herein and in making said statements he interfered with and injured their business reputation and held them up to public contempt and scorn; * * * that a general and fraudulent scheme then existed and still exists amounting to a conspiracy, to so trespass upon, interfere with, and destroy rights, injure property, and blacken the business name of said plaintiffs; that the said John S. Holmstrand joined in said general and fraudulent scheme; that, in its operations, said general and fraudulent scheme became a whispering campaign directed against the said plaintiffs; * *." It is then alleged that "Walter G. Danielson, as agent for said Claude A. Watson, joined in said general and fraudulent scheme to so trespass upon, interfere with, injure and destroy the business name, reputation and property of said plaintiffs"; by unlawfully, untruthfully and wickedly making the statement "both in a judicial proceeding and outside of a judicial proceeding, that H. L. Lynch * * * had brought groundless actions affecting and clouding the title to real-property, and by then referring to actions in which the said H. L. Lynch is trustee, designating them by Court number and title * * * that by his actions in connection with the estate of John S. Holmstrand, deceased, the said Walter G. Danielson, by assisting in obtaining the judgment of dismissal of said action number 454935 on erroneous and fictitious grounds, has injured and destroyed leasing agreements and other contractual rights of plaintiffs herein * * * said acts and statements performed and made by said Walter G. Danielson, constitute the offense of trespass de bonis asportatis", to the injury of plaintiffs; that defendant Claude A. Watson, acting as administrator of the estate of Holmstrand petitioned the court and was substituted in action No. 454935 in the place and stead of the decedent Holmstrand; "that he had knowledge of the trespassing acts of defendants Holmstrand and Danielson and of the methods being used to injure and destroy the contractual rights and property of plaintiffs herein" and with such knowledge he continued to act as administrator and continued to passively allow his agent Danielson to continue the trespassing acts conmmenced by the said John S. Holmstrand, and deliberately entered into this general fraudulent scheme, constituting trespass de bonis asportatis, in order to secure the dismissal of said action 454935. Similar acts are alleged against one F. Allen and one D. Brown, who are not parties to this appeal. Then follows an allegation of injury in the sum of $10,000 which is asked as punitive damages.

The third cause of action is for Conspiracy to Defraud and Damages, it being alleged therein that John S. Holmstrand entered into a conspiracy to defraud the plaintiffs, his acts in that regard consisting of wicked and malicious statements made to others; that defendant Walter G. Danielson joined in such conspiracy and that his acts, as previously set out in said amended complaint, were done in furtherance of said conspiracy, wickedly and maliciously with intent and design to injure plaintiffs; that defendant Watson joined "said continuing conspiracy to defraud said

plaintiffs" by his approval of the means used to obtain the dismissal of action No. 454935, hereinbefore referred to; that F. Allen and D. Brown were also parties to the continuing conspiracy to defraud plaintiffs, said complaint alleging punitive damages in the sum of $25,000.

[1] On an appeal from a judgment dismissing an amended complaint after demurrer thereto has been sustained without leave to amend, the inquiry of an appellate tribunal is "confined to a consideration of whether the amended complaint stated sufficient facts with sufficient certainty to entitle plaintiff to have the demurrer overruled and to have the cause proceed to trial." Genuser v. Ocean Accident & Guarantee Corporation Ltd., 42 Cal.App.2d 673, 675, 109 P.2d 753, 754.

The instant action was filed on July 11, 1945, and an examination of the first amended complaint discloses that the agreement, which it is alleged was breached by decedent, forms the basis of the three causes of action attempted to be alleged.

[2] The first cause of action alleges the breach of the contract of August 10, 1939, by John S. Holmstrand, with resulting damages to appellants by reason of the fact that they were prevented by such breach from carrying out their obligations to other persons, who were parties to appellants' oil leases. Said cause of action further alleges that on August 9, 1940, appellants sued said Holmstrand for breach of the contract of August 10, 1939; that during the pendency of that action defendant Holmstrand died; that Claude A. Watson was substituted therein as defendant, and on October 16, 1943, said Watson by his attorney Danielson moved for a dismissal of that action because of appellants' failure to prosecute the same with reasonable diligence; that said motion was granted; the suit dismissed, and such dismissal was affirmed upon appeal. Lynch v. Watson, 69 Cal.App.2d 51, 158 P.2d 250. Therefore, it appears upon the face of the amended complaint as to the first cause of action that appellants have had their day in court and that the contract upon which it is based is barred by the provisions of subd. 1, section 337, Code of Civil Procedure, since the instant action was commenced almost six years after the execution and breach of said contract.

The essence of the second cause of action which is denominated "trespass de bonis asportatis" is that John S. Holmstrand in his lifetime made trespassing statements to various persons concerning appellants, and performed certain acts breaching his agreements to lease made with appellant H. L. Lynch. It is then alleged that defendant Danielson, as agent for Claude A. Watson, the administrator of the estate of Holmstrand, joined in a scheme "to trespass upon, interfere with, injure and destroy the business, name, reputation and property" of appellants, and that the overt act of Danielson consisted of certain statements made by him in an affidavit used in support of the motion to dismiss the action brought against John S. Holmstrand; and that said Watson, as administrator of the estate of Holmstrand, with knowledge of the "trespassing acts of defendants Holmstrand and Danielson * * * and of the said trespassing statements made against plaintiff H. L. Lynch * * * continued to act as administrator of said estate * * and did not make known to plaintiffs herein * * * any disapproval of said trespass."

The offense of trespass de bonis asportatis is defined in Black's Law Dictionary at p. 1171 as "(Trespass for goods carried away.) In practice: The technical name of that species of action of trespass for injuries to personal property which lies where the injury consists in *carrying away* the goods or property." (Emphasis included.)

2 Bouvier's Law Dictionary, Rawle's third Revision, at page 3318, defines the term as follows: "A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away."

In 52 Am.Jur. at p. 836, sec. 2, the following is stated: "At common law, trespass designated a form of action which lay for the recovery of damages inflicted by the direct application of force, the remedy often being called 'trespass vi et armis'. Where the injury consisted of taking chattel property from the plaintiff's possession,

the action was known as 'trespass de bonis asportatis', or 'trespass de bonis.' "

It is stated in 24 Cal.Jur. at p. 664, sec. 8: "Any unlawful interference with the personal property of another or exercise of dominion over it by which the owner is damnified gives rise to an action in the nature of trespass de bonis asportatis. Thus the securing of goods through fraud, wrongfully removing furniture from another's premises, even by the wife of such other person, or the wrongful seizure of goods by an officer, are trespasses." See also, Rider v. Edgar, 54 Cal. 127, 131.

[3] It is obvious that the language employed in the second cause of action fails to allege the offense of trespass de bonis asportatis, even though appellants in their closing brief strenuously contend that the wrongs complained of constituted such offense. Moreover, it is not clear what, if any, other cause of action might have been read into the language so employed.

[4] The allegations of the third cause of action charging a "conspiracy to defraud" on the part of the administrator of an estate and his attorney, because said attorney made an affidavit in support of a motion to dismiss an action and recited therein matters appearing in a public record, and that the administrator did not protest the filing of said affidavit nor the making of the motion, are clearly insufficient to charge conspiracy to defraud.

[5] Because it appears on the face of the first amended complaint that the allegations thereof are insufficient to state a cause of action on any of the various charges made, and also that said amended complaint is incapable of further amendment to state a cause of action, the judgment of the trial court must be sustained.

Appellants have made an application to produce certain evidence in this Court, to-wit: (1) A certified copy of the Registrar's Certificate of Title covering lots 1, 2, 3, 4, 24, 25, and 26 in Block H of the Townsite of Howard; (2) Copy of petition for appeal to the Supreme Court of the United States from the judgment in action No. 454935, Superior Court of Los Angeles County. Appellant H. L. Lynch in his affidavit supporting said application states that the "object of this evidence is to prove that said action affected the property of said estate; that it was not cleared of this notice by the sale of the property, and that a petition for an appeal to the Supreme Court of the United States is pending in that action.

"As there was only a trial of defendants' demurrers in the action at bar, there was no opportunity to introduce the evidence in the Superior Court."

[6] In view of the decision reached by this court on the appeal from the judgment herein, the application to produce evidence is denied.

The judgment is affirmed.

DORAN and WHITE, JJ., concur.




**FICKETT v. RAUCH.** *
**Civ. 15563.**

District Court of Appeal, Second District, Division 2, California.
Feb. 20, 1947.
Rehearing Denied March 13, 1947.
Hearing Granted April 17, 1947.

**1. Appeal and error ⇐978(1)**
**New trial ⇐93**

Whether a new trial shall be granted because of impossibility of having phonographic report of trial transcribed rests in the wide legal discretion of the trial court, and, where it does not appear that appellant could not have prepared a proper record on appeal by means of a bill of exceptions, denial of the motion is not an abuse of discretion. Code Civ.Proc. § 953e.

**2. Appeal and error ⇐979(1)**

The trial court's action on motion for a new trial because of impossibility of having phonographic report of trial transcribed will not be disturbed unless it is clearly shown that there has been an "abuse of discretion", which means that the

* Subsequent opinion 187 P.2d 402.

court exceeded the bounds of reason in exacting a reasonably high degree of diligence on the part of appellant in procuring the preparation of a transcript. Code Civ. Proc. § 953e.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

**3. Appeal and error ⇐948**

Respondent is entitled to every presumption in favor of the fairness, impartiality, and regularity of the proceedings of the trial court, and abuse of its discretion in denying motion for new trial under statute authorizing new trial because of impossibility of having phonographic report of trial transcribed must clearly appear. Code Civ.Proc. § 953e.

**4. Appeal and error ⇐979(1)**

Respondent should not be too readily deprived of his judgment and the intendments in its support and be forced to reestablish his claim when, so far as appears, the evidence would be identical with that theretofore presented, notwithstanding appellant without his own fault has been deprived of a transcript of the proceedings below. Code Civ.Proc. § 953e.

**5. Appeal and error ⇐854(6)**

If order of trial court denying a new trial notwithstanding impossibility of having phonographic report of trial transcribed may be sustained on any ground, it must be affirmed. Code Civ.Proc. § 953e.

**6. New trial ⇐93**

If a bill of exceptions can, with the aid of the judge, be prepared without a complete transcript of the evidence and proceedings, a motion for a new trial should be denied notwithstanding impossibility of having phonographic report of trial transcribed. Code Civ.Proc. § 953e.

**7. Appeal and error ⇐979(1)**

Where appellant has not exercised that degree of diligence required to guard against the contingency of court reporter's death or inability to complete the transcript, it cannot be said that court's discretion was abused in denying motion for new trial. Code Civ.Proc. § 953e.

**8. New trial ⇐93**

The statute authorizing new trial because of impossibility of having phonographic report of trial transcribed does not confer absolute right to new trial, but each case must be decided on its own merits. Code Civ.Proc. § 953e.

**9. Appeal and error ⇐933(5)**

On appeal from order denying motion for new trial notwithstanding impossibility of having phonographic report of trial transcribed any conflict in affidavits on motion must be resolved in favor of prevailing party. Code Civ.Proc. § 953e.

**10. New trial ⇐140(3)**

A motion for new trial because of impossibility of having phonographic report of trial transcribed should be supported by an affidavit of merits stating testimony given contrary to court's finding, and it must be shown that there was nothing of a substantial nature proved from which the finding could reasonably have been derived. Code Civ.Proc. § 953e.

**11. New trial ⇐93**

Where, after two days of testimony, trial court held that alleged partnership had been proved and defendant joined the army without having bill of exceptions filed or testimony transcribed and did not present proposed bill of exceptions after notice of appeal or accept plaintiff's offer of affidavits of plaintiff's witnesses as to their testimony, or set forth in affidavit of merits, on motion for new trial, substance of testimony on partnership issue, denial of new trial notwithstanding impossibility of having phonographic report of trial transcribed due to death of reporter was not an abuse of discretion. Code Civ.Proc. § 953e.

WILSON, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edward L. Fickett against Philip J. Rauch to establish a partnership and for an accounting. From an order denying defendant's motion for a new trial, the defendant appeals.

Affirmed.

Gordon M. Snyder, of Los Angeles, for Appellant.

Paul R. Hutchinson, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in denying defendant's motion for a new trial on the ground of his inability to have a phonographic report of the trial transcribed (Code of Civil Procedure, sec. 953e) by reason of (1) the death of Reporter Bagley who had reported the first two days of the trial and (2) of inability to find the deceased's stenographic notes.

December 31, 1942, respondent filed his complaint to establish a partnership with appellant in a trucking venture and for an accounting. Trial of the action was had on July 26 and 27, 1943, hereinafter referred to as the first two days. Evidence was heard on the issue of the partnership only. Without making written findings on the single issue or entering an interlocutory decree the court orally opined that a partnership had been established,* ordered an accounting and continued the matter for a trial of the accounting to August 23, 1943. Prior to the latter date appellant was inducted into the army, which fact suspended his obligations to the civil courts. Because the national government was then engaged in a global war and because appellant was a necessary witness on the accounting issues the case was continued ten times. The trial of the accounting issues was commenced on April 12, 1945. With three separate continuances intervening the trial was concluded on August 23, 1945. On October 30 findings and conclusions as to all issues were filed and on November 1, 1945, judgment in respondent's favor was entered.

Two days after the denial of a motion for new trial on January 9, 1946, on the conventional grounds (Code Civil Proc. § 657) appellant orally moved the court for

* The Court: If I had nothing else before me but the testimony of the defendant himself I would have to find that there was a partnership. He admits that there was such a set-up. There is not any question that so far as their action to one another is concerned it is not as clear as it might have been. That is nothing new in my experience, both as a lawyer and sitting on the bench—there is not any question that there was a partnership. The Court has to imply from the conversations as to the extent of that partnership. It was a try-out in this particular work over there at Las Vegas. One man was to furnish his experience and the other man to provide the capital. Nothing was said as to whether there should be a contribution to the partnership by the one man with the experience of the other man against that. From their actions I would have to think that the partnership was not of that full type. And in order to settle this partnership, an account would have to be had for the amount of money that was put in by Mr. Rauch, the amount of money that he received from the contract, the amount of repairs, the expenses of drivers, all the expenses of the job, of course, and then a sale of the trucks thereafter, or their value if that can be reached, deducting therefrom the amount that Mr. Rauch put into the trucks. If there is any balance over—I am just giving you the highlights—that would depend on the items or profit as to whether they should or should not be allowed. Then if there is any profit thereafter, that should be settled 50–50, deducting therefrom whatever money was paid to plaintiff in connection with these checks—the salary checks. That is as near as I can come to it from this evidence.

Now, I will continue the matter until you folks get an opportunity to go over the books, without the necessity of appointing a referee, because that will cost a lot of money, and from the statements made here it would not be profitable. How much time do you need? No decree will be made at this time. I will continue the matter for a week or two weeks to see if you can get together on the suggestions I have made, and in view of my suggestions whether any offer of compromise can be, if you can settle with each other without the expense of litigation. It is one of those unfortunate cases that things didn't pan out as brightly as they looked at the beginning. If you do not get together, what I propose to do is to appoint a referee to take the testimony. There is not any sense in doing that. The easiest way is to go over the accounts and settle it. That is the way the Court has to do or the receiver. * * * I can continue it 30 days. * * * Continued to August 23rd.

an order appointing a reporter and directing him to read and transcribe the stenographic notes of Reporter Bagley who had deceased in July, 1944. Prior to action on such motion on January 25, 1946, appellant filed his notice of motion for a new trial on the ground of the reporter's death without having transcribed his notes, pursuant to Code Civil Procedure, section 953e. From the order denying a new trial on such ground comes this appeal.

In support of his motion appellant filed a number of affidavits which, omitting repetitions and redundant matter, are as follows:

Affidavits of Attorney Snyder et al.

Affidavit of Gordon M. Snyder: In November, 1944, attorney Eley, predecessor of affiant, in attempting to obtain a transcript of the first two days learned that the reporter had deceased on July 24, 1944; such testimony had not been transcribed and it was impossible to obtain a transcript; affiant was substituted as appellant's attorney August 13, 1945, instead of John Eley, Jr.; after denial of his motion for a new trial (under section 657, supra) he proceeded pursuant to section 953e; due diligence has been used by both counsel of appellant to locate and have Bagley's notes transcribed; by reason of appellant's induction into the army the matter was continued from time to time until August 23, 1945; basing his belief upon the opinion of Eley, affiant avers that the evidence presented on the first two days preponderated to show that no partnership existed and that Bagley's notes, if transcribed, would show that the court's finding of partnership was insufficient as a matter of law, and would show that "the court erred in excluding evidence relative to the intent and state of mind of the defendant at the time of entering into the agreement" for the trucking ventures; on January 29, 1945, he requested Eley to prepare a bill of exceptions prior to the hearing on his motion for a new trial under section 953e; pursuant to appointment both he and Eley conferred with respondent's counsel on two separate occasions in an attempt to prepare a statement of facts; on March 6 Eley declared that he was unable to prepare a bill of exceptions; the evidence on a new trial would be different from that introduced on the first two days, and the result would be different for the reason that the evidence introduced on the issue of partnership was insufficient as a matter of law to show the existence of a partnership; if such partnership did exist it terminated August 31, 1942, which date is significant in that it fixed the value of the trucks under plaintiff's exercise of option under Civil Code section 2436; the evidence was insufficient as a matter of law to prove any agreement between the parties for the purpose of engaging in the trucking business in the region of Las Vegas, Nevada; on August 16, 1945, affiant moved the court to reopen the case so that the testimony reported by decedent could be reheard and a transcript made which motion was opposed by respondent and was denied.

Affidavits of V. W. Janney, assistant secretary of the superior court, Mrs. Bagley, the widow, Grace Farnell, Bagley's transcriber, and Ward McConnel, reporter for Judge Schmidt's department, establish the nonexistence of decedent's notes immediately prior to July 29, 1943.

Affidavit of Attorney Eley.

John Eley, Jr., avers that on discovering in November, 1944, that Mr. Bagley had deceased he communicated with decedent's transcribers and with his widow and learned that the notes of the first two days had never been transcribed; all of the evidence taken on the first two days was on the issue of partnership and such issue had been informally determined by the court on July 27, 1943, without making an interlocutory decree or findings upon such issue; such evidence preponderated to show that no partnership had existed; on January 30, 1946, affiant communicated with respondent's counsel in an attempt to prepare a bill of exceptions as to the proceedings on the first two days; Mr. Hutchinson stated that he would have available time in the following week commencing February 4, 1946; that he would gladly confer with affiant if any useful purpose could be served but that affiant should attempt to prepare a bill of exceptions; affiant was unable to do so for the reason that his notes and memory were not sufficient to recall the testimony given

on the first two days; due to Hutchinson's illness affiant was unable to meet with him prior to February 7, 1946, when he offered to submit to Hutchinson a proposed bill of exceptions which did not purport to contain any of the testimony given but merely conclusions from which it was hoped that the testimony could be recalled; Hutchinson stated that he was detained by professional engagements and suggested that affiant send to him a copy of the proposed bill; whereupon affiant mailed a copy thereof to Hutchinson; although other attempts were made to see the latter he was not reached until February 26, 1946, when Hutchinson telephoned affiant; affiant then advised respondent's counsel that his own notes and memory were insufficient to prepare a statement of the facts and the testimony from which a bill of exceptions might be prepared; Hutchinson stated that if affiant desired he could go over his notes to see if the testimony could be recalled but that he would be unavailable prior to March 1, 1946,; on that date affiant and Snyder called at Hutchinson's office and for about two hours they attempted to arrive at a statement of facts and to agree upon the testimony of the first two days; after Hutchinson produced from his file the names of the five who had testified the attorneys attempted to recall the testimony of each witness but could not agree even on the order of their appearance; it became apparent that the notes of affiant and of Mr. Hutchinson were both insufficient to enable them to recall the testimony of such witnesses; Hutchinson referred to various papers in his file which he or the plaintiff had prepared prior to the trial; at questions concerning the contents of one of such papers Hutchinson became angry and said that it was an impossibility to remember, that his notes were necessarily sketchy but that all of the witnesses were still available and could be reached for their affidavits, and declared that the proposed appeal was most frivolous and ridiculous and that he was not going to spend any more time trying to reach an agreement on the testimony. During a second conference it became apparent that neither Hutchinson nor affiant had sufficient memory or notes to recall the testimony or to agree on a statement of facts; Hutchinson contended that the testimony of Rich and Elhard was conclusive in showing a partnership based on conversations with defendant; he stated that they were both available and that they and plaintiff could give their affidavits as to their testimony and that such affidavits would be better than his memory. Although Hutchinson attempted by telephonic conversations with his client to recall the non-transcribed testimony he and affiant were unable to agree on the major portion of it and neither was able to recall the testimony of the first two days solely from his notes and memory, but Hutchinson insisted that his statement prepared before the trial properly set forth the testimony given at the trial; such was rejected by Snyder and affiant; it is impossible to agree on the testimony given on the first two days in the absence of the notes of the deceased reporter. Affiant believes that a different judgment would be rendered if a new trial were granted in that the evidence before the court was legally insufficient to show that a partnership existed and that there was no evidence presented which would tend to prove a community of interest, since there was no evidence that (a) Fickett was to own an interest in the trucks, or (b) was empowered to make contracts, or (c) had power to manage the business, or (d) had a right to draw on the bank checking accounts, or (e) had made any capital contributions to the venture, or (f) had taken ownership of any of the assets in the name of the parties or that they had operated under a partnership name, or (g) that Fickett had ever received any of the proceeds of the venture as profits, or (h) had ever been entrusted with the execution of any agreement on behalf of the business, or (i) had ever offered to, or (k) had ever demanded that appellant share in the expenses, or (l) as survivor would have had a right superior to appellant's executor to continue the business. Even if there had been evidence sufficient to support an inference of a partnership there was no evidence tending to prove that such partnership terminated August 31, 1942, or that the agreement was for the purpose of buying and selling trucks or handling a trucking business in the region of Las Vegas, Nevada; it was the

uncontradicted evidence that at the time the parties entered into the agreement neither knew about the Las Vegas job; the testimony of the first two days was the only evidence as to whether a partnership existed, and such evidence did not support the findings as to the existence, location, purpose or termination date of a partnership.

Affidavits of Attorney Hutchinson.

By the two affidavits of Attorney Hutchinson it was established that after Mr. Bagley's death appellant participated in approximately six trial sessions with much additional testimony without objection on account of his inability to obtain the transcript of the testimony taken on the first two days; respondent spent several hundred dollars continuing with the trial after the reporter's death; the delay from the conclusion of the trial reported by Mr. Bagley until his death was occasioned entirely by the delays of the defendant due to ten continuances at appellant's request on the ground that he had been inducted into military service, notwithstanding the fact that he had ample notice before induction in which to complete his evidence. After his induction he was able to get leave to come to Los Angeles for purposes other than the trial, at which time he could have completed the trial by deposition; there is no reason why an adequate record on appeal cannot be perfected without the reporter's transcript inasmuch as attorney Eley, affiant and the judge had notes pertaining to the trial; affiant has offered to meet with Eley to arrive at an agreement as to the factual contents of a bill of exceptions and is willing to cooperate. The evidence reported by Mr. Bagley offers no great controversial issue; it went solely to the question of whether there was a partnership; the evidence was overwhelming on that question; the Judge in his opinion from the bench said: "If I had nothing else before me but the testimony of the defendant himself, I would have to find that there was a partnership. He admits that there was such a set-up." Appellant has taken advantage of every opportunity to frustrate this case. Following the delay of two years in the trial, the case was settled in open court on April 12, 1945, but thereafter defendant repudiated the settlement; he offers no showing of any controversial issue on a point of law for his appeal and there is no meritorious appeal on the pure issue of fact. Appellant offers no showing of any controversy over what the testimony was as reported by Mr. Bagley. Affiant's first communication received from Mr. Eley relative to preparing a bill of exceptions was on February 7, 1946 (about 15 months after Eley's discovery of Bagley's death), when Eley stated his wish for an immediate conference with affiant to discuss a bill of exceptions; while affiant was willing then as he is now to assist in the preparation of a bill of exceptions it was not incumbent upon himself to propose such document, but it should first be proposed by appellant; February 8, 1946, affiant received in the mail such a proposed bill from Mr. Eley consisting of two pages of statements of what the evidence did not show; neither did it remotely resemble the reasonable requirements of a bill of exceptions; such proposed bill was never in fact filed with the court. Affiant did not hear from Eley again until February 26 when he became so concerned over not having received such bill he telephoned Eley and urged him to prepare one, to which Eley replied that he preferred to have a conference first. March 1, 1946, affiant conferred with Messrs. Eley and Snyder for about four hours and read to them from rather extensive notes made at the trial of the case; on nearly everything stated by affiant Eley took issue; affiant offered to get affidavits from the witnesses as to what they had given in testimony but such offer was rejected; as a result of such meeting affiant has concluded that it never was their intention to prepare a bill of exceptions but that they really wished to demonstrate that a bill could not be prepared because of the death of the reporter. In fact, a bill of exceptions containing a fair statement of the evidence can be prepared if appellant really wishes to do it, by reason of the court's decision and of its notes and of the notes of affiant; appellant has never submitted a proposed bill of exceptions to which objections could be filed or in connection with which an engrossed bill of exceptions could made.

The Law Applicable.

[1-9] Section 953e does not direct the trial court to grant a new trial but merely confers upon it the power to do so "when it shall be impossible to have the phonographic report of the trial transcribed * * * because of the death or other disability of a reporter." In reviewing an order made upon a motion pursuant to such section the following rules govern: (1) The determination rests in the wide, legal discretion of the trial court and where it does not appear that appellant could not have prepared a proper record on appeal by means of a bill of exceptions denial of the motion is not an abuse of discretion. Conlin v. Coyne, 19 Cal.App.2d 78, 82, 64 P.2d 1123; (2) The court's action will not be disturbed unless it is clearly shown that such discretion has been abused, i.e., that the court exceeded the bounds of reason in exacting a reasonably high degree of diligence on the part of appellant in procuring the preparation of a transcript. Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 514, 144 P.2d 570. Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345. (3) Respondent is entitled to every presumption in favor of the fairness, impartiality and regularity of the proceedings of the trial court, and abuse of its discretion must be made clearly to appear. (4) Respondent should not be too readily deprived of his judgment and the intendments in its support and be forced to reestablish his claim when, so far as appears, the evidence would be identical with that theretofore presented, notwithstanding appellant without his own fault had been deprived of a transcript of the proceedings below. (5) If the order may be sustained on any ground it must be affirmed. Moore v. Specialty Oil Tool Company, 128 Cal. App. 662, 665, 18 P.2d 82. (6) If a bill of exceptions can with the aid of the judge be prepared without a complete transcript of the evidence and proceedings the motion should be denied. Conlin v. Coyne, 19 Cal. App.2d 78, 83, 64 P.2d 1123; (7) Where appellant has not exercised that degree of diligence required to guard against the contingency of the reporter's death or inability to complete the transcript, it cannot be said that the court's discretion was abused in denying the motion. Caminetti v. Edward Brown & Sons, supra. (8) Section 953e does not confer absolute right to a new trial but each case must be decided on its own merits. Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 49, 161 P.2d 990. (9) If there is a conflict in the affidavits supporting such motion with those opposing it, those of the prevailing party must be taken as true. Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453.

The Weisbecker Decision.

Notwithstanding the universal prevalence of the foregoing principles, appellant undertakes to defeat each of them by attempts to distinguish the facts of the cited cases and to show that the Weisbecker decision not only supports his contentions but that it alone sets forth the present state of the law by reason of the fact that it is the only expression of an appellate court since the amendments to the Rules by the Judicial Council in 1943. See Rules 4e and 7 of Rules on Appeal. Appellant argues that because the court there held (p. 47 of 71 Cal.App.2d, 161 P.2d 995) that a "failure to move for a settled statement should not be considered a penalizing circumstance in connection with appellant's motion for new trial" under section 953e, one moving for a new trial under that section should not be required to attempt to prepare a settled statement in lieu of a transcript.

But the Weisbecker case is no parallel to the case at bar. The husband as plaintiff had obtained judgment for the divorce of a marriage of over 21 years' duration. Not only had she denied his allegations of cruelty but she had alleged his excessive use of intoxicants and his encouragement of her to use them but also his intimacy with another woman. Judgment based upon the finding in favor of the plaintiff without providing for the wife's support was followed by notice of appeal and notice to prepare transcripts on appeal under Code of Civil Procedure, 953e. Three days later, June 23, 1944, the court ordered plaintiff to pay charges for a reporter's transcript and this was paid. On October 30 defendant's attorney discovered that Reporter J. M. Phillipowski, who reported the trial, had died September 14, 1944. He averred in his supporting affidavit that after the transcript had been ordered the reporter

telephoned that he had received the money for the estimated cost of the transcript and one copy and would commence the transcription as soon as possible; that other calls from Phillipowski followed, apologizing for his delays and his inability sooner to complete the transcript, that he would do so, and that no rights of defendant would suffer prejudice as he had secured the necessary extensions of time; that subsequently the reporter called upon affiant at his office to reassure him; that after some silence, by telephone he called for the reporter only to learn of his decease. The attorney alleged that there were 19 exhibits and three days of testimony which could not be reduced to an adequate record without a transcript; that there was undisputed documentary evidence contrary to the finding which would show that plaintiff had lived with another woman and that he had admitted that fact; that although plaintiff had testified that he had never used intoxicating liquors excessively he admitted writing an oath to drink no more and there was proof of his conviction of drunk driving in a public place; that certain apartment house records and the testimony of its manager indicated that plaintiff had lived there with another woman at about the time of filing his complaint. The diligence of Mrs. Weisbecker's attorney was further verified by a transcriber's affidavit to the effect that the extensions were agreeable to all the attorneys. In response to the argument that the husband was "shown to be at least as culpable as his mate and with the shocking consequence that she has no further legal claim upon him for support," the appellate court observed that the shock was intensified by the denial of her motion for a new trial.

Final Argument.

In the instant action appellant with his counsel was present at the first two days and heard the testimony; he neither exhibited surprise then at the proof nor in any way registered concern at the court's declaration of finding that a partnership existed as alleged by respondent, by asking leave to introduce additional proof, by presenting a bill of exceptions as a memorial of the court's error or by procuring a transcript of the proceedings. Every person is aware of the uncertainty of life and of the ephemeral nature of things material. By such uncertainties appellant should have been guided at a time when his own life was about to experience a radical change. Although the court set the cause for further trial on August 23 to afford the parties opportunity to settle the controversy, before that day had arrived appellant was inducted into the army without announcing such fact to the court or opposing counsel. If he had been convinced at that time that the court had made an erroneous finding as to the partnership, in the exercise of reasonable care of his own concerns he would have caused the testimony to be transcribed. He knew then that the subsequent installments of the trial would be devoted only to the ascertainment of the amount he owed respondent by virtue of the partnership which the court declared would be found to exist.

The cause having been stricken from the calendar upon appellant's promise that if he could obtain leave to visit California he would notify respondent and the court in order that the trial might be concluded, and appellant having violated that promise, it was restored to the calendar on October 19, 1944, when the trial was set for January 15, 1945. Continuances were thereafter granted on appellant's motion until April, 1945, when the first evidence was taken on the matter of the accounting. When the session began respondent's counsel offered to "put on any further evidence to refresh the court's memory, knowing the predicament we are in, Mr. Bagley having passed away, to show that this was a venture made for trucking on the Beebee Construction job at Las Vegas." Appellant's counsel did not accept such offer; neither did he join in the suggestion. By such inaction, if not by his prior neglects, he closed the door against further hearing on the issue of the partnership.

Futility of Announcing Legal Corollaries.

[10] Appellant relies upon the affidavit of Attorney Eley which alleged (1) that affiant believed a different judgment would

result from another trial and (2) that the evidence was insufficient as a matter of law to sustain the finding of a partnership because there was no proof of a community of interest between the parties. This is not followed by an attempt to state the testimony of the witnesses of the first two days but by an itemization of certain legal corollaries necessarily arising from an ideal contract of partnership. In the preparation of an affidavit of merits in support of a motion for a new trial under section 953e there should be averment of the testimony given contrary to the court's finding, and it must be shown that there was nothing of a substantial nature proved from which the finding could reasonably have been derived.

Not a fact is averred in appellant's affidavit of merits as having been given in the testimony of the first two days to overcome the presumption of the regularity of the court's finding. Appellant's averment that "there was no showing of an intention to enter into a partnership and the court committed reversible error in excluding evidence offered by the defendant relative to his state of mind at the time of the agreement" is as novel as it is insupportable. No rule, principle or doctrine is suggested whereby the undisclosed intention of a party to an agreement may be given in proof contrary to the actual words of the conversation or the writing whereby proof of the agreement was made. If the contents of the conversation of the witnesses who testified on the first two days were substantial evidence of an agreement it was thereby established, and undisclosed intentions would be incompetent for any purpose.

[11] Inasmuch as appellant did not offer to the court immediately following the first two days and prior to his departure from the state a bill of exceptions containing the alleged errors; did not cause the testimony already taken to be transcribed; did not present a proposed bill of exceptions or proposed statement after giving notice of appeal; did not accept respondent's offer of the affidavits of his own witnesses as to their testimony given during the first two days as a means of aiding him to prepare a bill of exceptions or a settled statement to be used on appeal; did not set forth in his affidavits of merits the substance of testimony given on the issue of the partnership by either respondent or appellant, it cannot be held that the trial court abused its discretion in denying the motion for a new trial by reason of the death of the reporter and the impossibility of transcribing his notes of the proceedings.

The order denying motion for a new trial under Section 953e, Code of Civil Procedure, is affirmed.

McCOMB, J., concurs.

WILSON, Justice (dissenting).

I dissent. The granting or denial of a motion for a new trial pursuant to section 953e of the Code of Civil Procedure rests in the sound discretion of the court, and its ruling will not be disturbed save upon a showing of an abuse of discretion. In my opinion such a showing has been made. The shorthand reporter is dead and his notes have been lost. It is not the fault of appellant that he is unable to provide us with a record of the trial. The refusal of the court to grant a new trial in this action is virtually a denial of his right of appeal —one of the processes provided by law for the determination of the rights of persons who have become involved in litigation.

At the conclusion of a two days' trial the court orally declared that a partnership had existed between appellant and respondent, and continued the case for an accounting. The judgment subsequently entered adjudged that the parties had been partners and directed the payment by appellant to respondent of an amount found by the court to be due him by reason of the partnership business. Appellant contends that the evidence is insufficient to sustain the finding that they were partners, a fact that he has at all times disputed. That finding furnished the foundation of the judgment. In the absence of a transcript of the proceedings had in the trial court we obviously cannot pass upon the sufficiency of the evidence. The result is in contravention of a right guaranteed by law, since appellant

cannot present the vital point upon which his appeal rests.

The case came to trial on July 26 and 27, 1943, at which time the court made the oral declaration above mentioned and recited at length in the majority opinion. That statement represented the trial judge's conception of the effect of the evidence and of the proper conclusion to be deduced therefrom, but it does not have the force of finality. The sufficiency of the evidence is a matter for this court to pass upon if and when we are afforded an opportunity to read it. Since the correctness of the court's statement has been brought into question by appellant it can be reviewed only upon an examination of a transcript of the entire record of the trial, which has been made impossible. This court cannot resort to speculation or conjecture concerning what the witnesses said or the inferences to be drawn from the evidence. I am unwilling to "guess" a party out of court.

Shortly after the continuance of the trial above mentioned appellant was inducted into the armed forces of the United States. We cannot assume and there is nothing in the record from which it can be inferred that his entry into the service was procured by him for the purpose of avoiding or postponing further hearing. Thereafter the trial of the case was continued several times, ten, says the majority opinion, by reason of his absence in the service. The continuances were not granted as a matter of grace but as a right afforded him under the provisions of the Soldiers' and Sailors Relief Act. 50 U.S.C.A.Appendix, § 521.

The reporter died on July 24, 1944, but appellant's attorney did not learn of the death until November of that year. During the time intervening between the first two days of the trial in July, 1943, and the death of the reporter there was no reason for procuring a transcript. The introduction of evidence had not been completed and since the court might have reopened the case at the subsequent hearing for the taking of further evidence on the question of partnership, such additional evidence might have been sufficient to lead the trial judge to the conclusion that no partnership existed. In that event appellant would not have needed a transcript. The span of life is uncertain, but it cannot be anticipated that in every case that is tried piecemeal the reporter will pass into the beyond before the date upon which the trial can be resumed or before a transcript can be obtained in the ordinary course of litigation. Nor can it be foreseen that the reporter's notes will be lost, as in this case, before the next session of the court. Death may overtake the reporter over night, or his notes may be destroyed by fire. If the majority opinion is to prevail it behooves every litigant to procure a daily transcript of the trial lest he be denied the right to present to an appellate court such questions as he deems necessary and pertinent to the preservation of his property rights.

The efforts made by appellant's counsel to obtain a transcript, and, upon ascertaining the loss of the reporter's notes, to agree with respondent's attorney upon a bill of exceptions, are related, albeit critically of appellant, in the majority opinion. Counsel for respondent states in his affidavit that he and the attorney for appellant and the judge each had notes of the trial. Nevertheless they were never able to agree on the evidence and nothing was accomplished toward preparing a record for the appeal, either by bill of exceptions, statement of the case, or otherwise.

Counsel for the respective parties agree that their notes taken at the trial were "sketchy" and that they were unable to remember the evidence. Respondent's attorney offered to obtain affidavits from the witnesses stating what their evidence had been. Manifestly this would have been an unheard of and an extremely unsatisfactory manner of making a record on appeal even if such affidavits could have been obtained. That such method was not feasible is indicated by the fact that during a conference between counsel respondent was called on the telephone by his attorney and they were unable to agree on some of the important phases of the testimony. In any event the memories of the witnesses were probably no better than those of the attorneys. They may have been biased or prej-

udiced toward one side or the other. The effect of cross-examination would have been lost.

There was no reason or necessity, as indicated in the majority opinion, for the preparation of a proposed bill of exceptions or of a statement prior to appellant's entry into the service, or for the transcription of the testimony already taken. Since the case had not progressed to the point where a motion for a new trial could be made and since there was no order or decree from which an appeal could be taken, there was no occasion for a bill of exceptions or a statement of the case. Appellant has been unable to present a bill of exceptions or a statement since the date of his appeal because he had no transcript and the parties never agreed as to the evidence.

This case does not have a parallel in any of the cases involving the right to a new trial pursuant to section 953e of the Code of Civil Procedure. Each of the cases relied on by respondent presents a situation entirely different from that now under consideration. In Conlin v. Coyne, 19 Cal. App.2d 78, 64 P.2d 1123, part of the record had been transcribed prior to the death of the court reporter, and there was no showing as to what portion of the total record it represented, nor as to the issues to which the missing portions related. In Kroeker v. Jack, 51 Cal.App.2d 272, 124 P.2d 619, no errors were asserted to have occurred at the trial and there was no statement in the affidavits that there was any likelihood that the court would arrive at a different conclusion on a retrial. In Smith v. Orange Belt Supply Co., 58 Cal.App.2d 848, 137 P.2d 845, a part of the transcript had been completed and the court said that the portion which had been transcribed might have supported the judgment, in which event the untranscribed evidence could only raise a conflict. In Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 144 P.2d 570, there was no evidence that the disability of the reporter prevented the preparation of a transcript between the date of the appeal and the time when illness overtook him that resulted in his death. During that time he was engaged in reporting the trial of another case and his transcriber procured orders from various judges extending time for the preparation of the transcript, all of which were in violation of the law in that the orders were not based on affidavits stating reasons for the delay and no notices of the extension orders were given to counsel. Appellant's attorney was on notice that the orders were in violation of section 953a of the Code of Civil Procedure (as then in force but repealed in 1945) and he took no steps to compel the reporter to transcribe his notes. Further, there was no showing as to the nature of the evidence and no indication that there was any merit in the appeal. Contrasting the instant case with those above cited, no part of the record here had been transcribed by the deceased reporter; the affidavits point out the issues to which the missing evidence related; appellant's affidavits set forth the error upon which he rests, to wit, the insufficiency of the evidence; appellant asserts that if there should be a retrial a different judgment would result; the failure to obtain a transcript was not due to other engagements of the reporter after the transcript was ordered but was because of his death before the necessity for a transcript arose; there is a positive showing as to the nature of the evidence, and that there is merit in the appeal; a bill of exceptions cannot be prepared either by agreement of counsel alone or with the aid of the court.

The case of Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 161 P.2d 990, does not appear to have been decided on the ground of "hardship," as argued by respondent. The facts are related in the majority opinion. In deciding the question in issue it was treated as an ordinary case, the necessities of the wife not being stated as a reason for the reversal. The court there said that the appellant's attorney acted in a manner reasonably to be expected under the circumstances; the appeal was initiated in the customary and timely manner; conversations were had with the reporter concerning his progress in preparing the transcript, and the attorney was not advised that any of his client's rights were being prejudiced. In such circumstances

the court held that the conditions described in section 953e of the Code of Civil Procedure were present and that in the circumstances there existing a denial of a new trial pursuant to that section was unreasonable. I see no justification for attempting to distinguish the present proceeding from the Weisbecker case, except that it was a divorce action and in the instant case appellant is required to pay out money which he asserts is not warranted by the evidence. In each case the refusal of the court to grant a new trial was a defeat of justice.

Upon the denial of appellant's motion for a new trial he moved to reopen the case for the purpose of re-examination of the witnesses that had previously testified. This motion was denied, thus completely depriving him of any opportunity to provide a record upon which this court can determine the issues. The oral statement by the trial judge that upon appellant's testimony alone he would find that there was a partnership represented his conclusion. Like any other ruling or finding of a trial court it is not final but is subject to review on appeal. Appellate courts are constantly required to determine the sufficiency of the evidence to support findings and they do not always agree with the trial court. Whether we would do so in this case cannot be decided without the record.

The denial of the motion for a new trial, coupled with the refusal of the court to reopen the case, was an abuse of judicial discretion. The order should be reversed.

Rehearing denied; WILSON, J., dissenting.

29 Cal.2d 730

## PEOPLE v. McMONIGLE.

Cr. 4740.

Supreme Court of California, In Bank.

Feb. 18, 1947.

Rehearing Denied March 17, 1947.

**1. Criminal law ⇐771**

In murder prosecution, instruction that initially corpus delicti for every criminal case must be proven by satisfactory evidence aside from any statement, confession or admission of accused, and after the latter have been received in evidence they may strengthen the proof of corpus delecti to extent that the evidence may have that effect was proper.

**2. Criminal law ⇐338(1)**

The quantum of evidence, if it is relevant to a fact in issue, does not enter into question of its admissibility.

**3. Criminal law ⇐369(2, 15)**

In prosecution for murder of 14 year old school girl, evidence that distinctive clothing particularly a white T-shirt which accused wore on date of homicide was part of contents of foot locker which accused admittedly stole some six weeks previously from naval officer, was properly admitted to identify accused and as part of prosecution's case of "design or plan to entice" on accused's part through wearing a serviceman's clothing as a means of effecting an appealing appearance or "masquerade".

**4. Criminal law ⇐1036(1), 1044**

Alleged error in admission of evidence not objected to nor sought to be stricken was waived.

**5. Homicide ⇐169(1), 170**

In prosecution for murder of 14 year old school girl, testimony of two little girls that on day of homicide a man dressed in "a white T-shirt" and driving a "dark sedan automobile" asked them near the school if they would take care of his child, and that the man "drove back" toward the school and testimony of girl's mother fixing time of girls' meeting with accused was properly admitted to identify accused and to show scheme involving enticement of girls into his automobile under ruse.

**6. Homicide ⇐169(1)**

In prosecution for murder of 14 year old school girl, alleged adverse "psychological considerations" involved in admission of testimony of little girls regarding accused's actions on day of alleged homicide could not overcome propriety of admissibility of evidence as to accused's prior conduct relevant to general issue of his guilt.

**7. Criminal law ⇐1037(1)**

An objection to district attorney's argument cannot be made for first time on appeal.

**8. Criminal law ⇐703**

In prosecution for murder of school girl enticed into accused's automobile, district attorney's remark in opening statement that "this indictment was a culmination and result of one of the best organized and most intense investigations in the annals of the crime of kidnapping and murder" was not improper because of reference to kidnapping, where comment was properly anticipatory of sequence of events on which the prosecution relied to secure conviction.

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Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Thomas H. McMonigle was convicted of murder and he appeals.

Affirmed.

Charles Bagby, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., Stephen Wyckoff, Dist. Atty., of Santa Cruz, and John L. McCarthy, Asst. Dist. Atty., of Watsonville, for respondent.

SPENCE, Justice.

In an indictment returned by the grand jury of the county of Santa Cruz, defendant was charged with the murder of one Thora Chamberlain. He entered a dual plea of not guilty and not guilty by reason of insanity. Upon the conclusion of the trial on the general issue, the jury returned a verdict finding defendant guilty of murder of the first degree, without recommendation. Trial was then had on the issue of

defendant's sanity at the time of the commission of the offense, which issue the jury likewise resolved against him. Judgment imposing the death penalty was thereupon pronounced, and an automatic appeal therefrom is now before this court. Pen. Code, § 1239(b).

Defendant does not challenge the sufficiency of the evidence on either issue. In fact, his brief contains no summarization of the record but refers only to such portions thereof as affect the presentation of his appeal. He argues the following points as grounds for reversal: (1) The giving of an instruction permitting the jury to consider defendant's extrajudicial statements in determining the establishment of the corpus delecti; (2) the admissibility of a collateral criminal act committed by defendant; (3) the relevancy of certain testimony adduced in evidence with respect to defendant's acts prior to the alleged commission of the offense in issue; and (4) the impropriety of the district attorney's comment in his opening argument on the trial of the case. Careful examination of the entire record, with particular attention to the several matters raised by defendant, discloses nothing approximating prejudicial error which would warrant a reversal. On the contrary, from such review the conclusion is inescapable that defendant was given a fair trial and that the judgment of conviction should be affirmed. A general statement of the facts and circumstances in evidence will suffice before discussing defendant's contentions.

Shortly before 3 o'clock on the afternoon of November 2, 1945, defendant, a married man about thirty-four years old, drove by the high school grounds at Campbell (some eight miles from San Jose), where he saw Thora Chamberlain, a fourteen-year-old school girl on the sidewalk. It was a Friday and Thora, who had just been released from her last class, was on her way to the school's football field to see the game scheduled for that afternoon. According to her classmates, she was wearing the school colors for the occasion—a *red* skirt and *blue* sweater, and two pairs of bobby socks, a *red* and *blue* one on each foot—and she was carrying her school books, her zipper binder and a rooting section cowbell. Defendant stopped his car at the curb, lowered the window and spoke to Thora for several minutes. A number of her schoolgirl friends passed along the sidewalk at that time. One of them testified that Thora called her to the curb and said that the man in the car was "an ex-service man," who wanted someone to take care of his sister's children for about half an hour that afternoon. Defendant was wearing slate gray Navy issue trousers, a Navy type white T-shirt with a blue insignia bearing the words "Londonderry, Ireland" on the front, several service medals, including the "Purple Heart" emblem, and a garrison hat with a water-repellant cover. Thora's friend declined defendant's request and started again for the game as Thora called that she would be along shortly and "to save her a seat." A few minutes later Thora was seen by another schoolgirl friend to enter the car and "drive away" with defendant; "no other persons" were in the car. Thora never returned from that ride and her body has never been found.

Defendant, who was employed as a laborer at a construction yard in Burlingame, reported for work on Saturday morning, November 3, after having been absent "Monday through Friday [of] that week." He stayed on the job through November 8. That night he left his home, telling his wife that he was only taking the bus to Los Angeles but actually "hitch-hiking" from there to Cottage Hills, Illinois, to visit his father. Agents of the Federal Bureau of Investigation traced defendant as he wandered through the Middle West and kept on his trail as he registered at different hotels under assumed names. They took him into custody in the early morning of December 6, when he arrived by bus in San Francisco. Defendant was then in a semi-conscious condition as the result of having taken a large dose of sleeping tablets, and he was taken to the hospital for observation and medical treatment. He was discharged to the care of the local F.B.I. office on December 8, after the examining doctor declared that "his physical findings and neurological findings were normal," and that defendant then seemed "rational," "mentally clear," and "well oriented in all spheres." Defendant voluntarily remained in the cus-

tody of the F.B.I. agents until December 17, when he was released to the Santa Clara County Sheriff and then transferred to the Santa Cruz County authorities.

At the trial the F.B.I. agents testified at great length regarding defendant's reconstruction of the events of his ride with Thora Chamberlain and their extensive searching expeditions for her body. They made trips with defendant over various roads in San Mateo, Santa Clara, and Santa Cruz Counties on December 10, 11 and 12 as defendant, with the professed purpose of doing "everything humanly possible to help them solve this situation," undertook to trace his line of travel on November 2. Upon his return from these several excursions defendant incorporated the itinerary, so given to the F.B.I. agents, in a statement "freely and voluntarily" signed by him on December 12. Therein he claimed that on November 2, 1945, he had taken Thora Chamberlain from Campbell to Los Gatos, thence to Santa Cruz via State Highway No. 17; that from Santa Cruz they proceeded north along the coast via State Highway No. 1 to a point "about three-tenths of a mile south of the San Mateo County line in Santa Cruz County"; and that as they were seated in the front seat of the automobile at that point, the girl was shot by a .32 calibre Colt revolver that he had in the car. His specific statement was: "If I shot her, that is where it took place * * * whatever happened to the girl happened to her at this point * * * there was but one shot fired * * * I do not recall * * * replacing the bullet which was discharged from it on the occasion the gun was fired on Highway No. 1 at the time this situation happened to the girl. I am satisfied that the girl was dead at the time I proceeded north. While I am not certain as to just what happened with the gun in the front seat of the car, I know it is my responsibility for what occurred at this time." Defendant further claimed that he then proceeded north along the coast route to a place which is "ten and one-half miles approximately north of Half Moon Bay on California State Highway No. 1" and which is known as Devil's Slide in San Mateo County, where the girl's body was dropped over a three-hundred foot cliff into the ocean.

The F.B.I. agents made an intensive examination of the precipitous terrain of the Devil's Slide area and directed a search of the ocean at the base of the cliff. The girl's body was not found but they did recover a pair of *red* and a pair of *blue* socks, which were nestled in the rock about two-thirds down the face of the cliff and which were positively identified by Thora's parents as belonging to their daughter. The agents also undertook an investigation in and about the construction yard where defendant had worked. In the course of their search they dug up a "causeway" and found some "slate gray trousers." When confronted with this evidence, defendant admitted to the agents that these were the trousers that he had worn on November 2; that upon his return to his home that night he had washed them to remove the blood stains, "but he was fearful he had not removed the traces of blood and remembered that there might be some remnants of blood in the seams of the trousers or the trousers pockets, that therefore he wrapped these trousers up and took them to the [construction company] yard, where upon his first opportunity he had buried them at the point they had been recovered."

At the trial defendant's fellow-employees testified that upon his return to work on November 3, defendant had boasted that "he was out with a fifteen year old girl the night before." Defendant's employer testified that on November 6 he had given defendant permission to build a small ramp or causeway on the company property adjacent to the yard by filling in a ditch with concrete blocks and dirt, and that defendand worked on that project alone that day. In excavating the premises under defendant's direction following his admission with respect to the "slate gray trousers," the F.B.I. agents unearthed from this ramp-fill various articles which were positively identified at the trial and introduced in evidence as belonging to Thora Chamberlin: her brown shoes, schoolbooks and papers, zipper binder and cowbell. Defendant previously had caused the F.B.I. agents to do extensive digging in the backyard of his San Mateo home looking for the place "where he had buried the [girl's] clothing," but they found nothing.

The .32 calibre Colt gun to which defendant referred in his statement of December 12, was identified by an F.B.I. agent as one which he found in luggage abandoned by defendant at a hotel in Quincy, Illinois, where, according to the testimony of the hotel manager, defendant stayed in the latter part of November, 1945. This was in the course of defendant's flight to the Middle West. According to defendant, the bullet which was discharged and killed Thora Chamberlin had imbedded itself in the wooden frame of the door post between the right front and rear doors of the car; he had "dug the bullet out" following the homicide and had buried it under a certain tree in the yard of his home. The bullet was found by an F.B.I. agent at the location described, and it was introduced in evidence along with the wooden door post frame containing the bullet hole. Also at defendant's direction, the F.B.I. agents recovered from a drainage ditch along the road near defendant's place of work certain automobile padding and upholstery, which material defendant admitted he had ripped from the front seat of his car after the events of November 2 and "disposed of" because it was blood-stained "after the girl was shot [and] the blood was gushing from her mouth." Special technicians and examiners from the F.B.I. laboratory at Washington, D. C., to which the blood-stained articles, as well as the gun and bullet, were sent for analysis and checking, testified as to their findings corroborative of the presence of human blood on the automobile upholstery and the firing of the bullet from the .32 calibre Colt gun admittedly belonging to defendant.

In statements made subsequently to the one of December 12, 1945, defendant gave differing versions of the homicide, more directly admitting the killing of Thora Chamberlain but assigning different methods and different locations for its perpetration. By a statement given at the San Mateo County Sheriff's Office on January 3, 1946, defendant claimed that he "choked" the girl to death at a point on the beach just northerly of Half Moon Bay and threw her lifeless body over "a steep cliff" about one-half mile from where her bobby socks were later found. On January 4, at his own request and for the professed purpose of giving a "more accurate and detailed" recital than that contained in his previous day's account, defendant signed in the Santa Cruz District Attorney's Office another statement wherein he claimed that he either "stabbed" the girl with his "hunting knife" or "choked" her at a point about ten miles north of Half Moon Bay; and that he threw "the body over the edge of the road" in the vicinity of Devil's Slide. Again on January 19, defendant gave a statement to the F.B.I. agents wherein he claimed that he "had picked up" the girl for the purpose of delivering her into the hands of a "White Slave Ring in San Francisco"; that upon stopping at a place on the road along the ocean "south of Half Moon Bay," he "gave the girl ether" and she "went off to sleep"; that he then drove "to a place on the other side of Half Moon Bay on Number One," where he "choked the girl," disrobed her and left her body hidden near the road for the night; that he returned the next day and took the body to a field adjacent to the construction yard where he worked, placed it in "a drainage ditch" and covered it with some dirt and refuse which he hauled by dump truck from "jobs he was handling." Intensive excavation of this area by the F.B.I. agents with the aid of a bulldozer failed to disclose the girl's body. Finally, defendant reverted to his original story with respect to his disposition of the body over the cliff in the Devil's Slide area, insisting that examination of the rocks there by the F.B.I. agents would disclose some blood or hair * * * some evidence; [as] that is where the girl's body is." But again their search was to no avail.

Each of the extrajudicial statements contained a recital to the effect of having been given by defendant of "his own free will," for the professed purpose of "clearing up this case so that the body of the girl may be found for the benefit of the girl's parents." Trips totaling some one thousand miles were taken by the F.B.I. men over roads in San Mateo, Santa Clara, and Santa Cruz Counties, often in company with defendant, following his many confusing "leads." Then at the trial defendant took the witness stand in his own behalf and gave an entirely new version of Thora

Chamberlain's death. Thus he testified that while driving in Campbell on November 2, he "lost" his way and asked Thora "the directions to San Jose" ; that she "willingly got in [the] car" in order to show him the road, "after she said that she didn't wish to stay on at the school, as there was some sort of game or something going on there"; that he "was driving quite fast at the time" along a country road about a mile and one-half westerly from Campbell when the girl became frightened, "jumped" from the car and "was injured" ; that he placed the girl in the car and "headed back towards the town [Campbell] " to "get her in the hospital" but "after she was in [the] car approximately five minutes she passed away" ; that he then returned to the point where the girl had been injured and buried her body under some leaves "alongside of the road."

On cross-examination defendant claimed that his story at the trial "was true" and in explanation of its inconsistency with the accounts given in his previous statements, he asserted that he "deliberately wouldn't tell them the truth" because of "the attitude of the district attorney" and others in promoting the prosecution in Santa Cruz County. He attempted to explain the bullet hole in the door post of his car by saying that it was caused by the accidental discharge of his gun several months earlier. When queried as to how he would "explain * * * the fact that Thora Chamberlain's socks were found on Devil's Slide on highway number 1," defendant answered: "There is only two ways I figure those socks came at that point * * * they were either placed there at the point or else the statement [that they were found there] is untrue." At the close of the cross-examination, defendant was asked whether he wanted "to go out as a part of these court proceedings and show us the body of Thora Chamberlain" in corroboration of his testimony that he buried her "alongside of the road" near Campbell after she "expired" as a result of her injuries upon "jumping" from his car. Defendant replied that he would like to have such opportunity. Accordingly, arrangements were made for the following morning, but when the court convened at that time as scheduled, defendant declined to go upon advising the court [out of the presence of the jury] that a prisoner in the county jail the preceding night had informed him that the trip would expose him to "mob violence" and he would not be protected therefrom. After some further colloquy between defendant and the court, in which defendant repeated his refusal to make the trip, the jury returned to the courtroom, and the case was argued and submitted.

[1] In this state of the record, defendant first contends that the court erred in instructing the jury concerning the evidentiary effect of his extrajudicial statements. The challenged instruction reads as follows: "The Court instructs you that initially and in the first instance the corpus delicti for every criminal case must be proven by satisfactory evidence aside from any statement, confession or admission of the defendant. (Citing cases.) After the latter however have been received in evidence they may strengthen and fortify the proof of the corpus delicti to the extent that the evidence may have that effect." This is a correct statement of the law in recognition of the "sharp distinction between the rule governing the *admission* of extrajudicial statements, admissions, or confessions and the rule governing the jury in its *consideration,* of such evidence after it is admitted." People v. Selby, 198 Cal. 426, 434, 245 P. 426, 429. "To warrant a conviction [the corpus delicti] must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom." People v. Ives, 17 Cal. 2d 459, 463, 110 P.2d 408, 411.

The leading California case on the question of the establishment of the corpus delicti is People v. Selby, supra, 198 Cal. 426, 245 P. 426. There, after a full discussion of prior decisions in this state on the subject, the court said at page 437 of 198 Cal., at page 431 of 245 P. : "It is apparent from this review of the cases that the general trend of authority has been to hold that, upon *prima facie* proof of the *corpus delicti,* the extrajudicial statements, admissions, or confessions of the accused may be *admitted* in evidence, and, having been

so properly admitted, they may, with the evidence aliunde, be considered by the jury in its determination whether or not all the elements of the crime and the connection therewith of the accused have been established to a moral certainty and beyond all reasonable doubt." Consistent with this premise of distinction, it was said in People v. Mason, 37 Cal.App.2d 407, at page 409, 99 P.2d 567, at page 568: "Where a confession is freely and voluntarily made, it is admissible as evidence in support of the *corpus delicti* as well as of the criminal participation of the accused. Full proof of the *corpus delicti* independently of the confession of the accused is not required; otherwise it could serve no office except to prove the criminal agency." For like statement of the law, upon citation of the Selby case, see People v. Ives, supra, 17 Cal.2d 459, 463, 464, 110 P.2d 408; People v. Domenighini, 81 Cal.App. 484, 490, 254 P. 292; People v. Coyle, 81 Cal.App. 671, 675, 254 P. 597; People v. Gilbert, 86 Cal.App. 8, 9, 10, 260 P. 558; People v. Valenti, 103 Cal.App. 249, 252, 284 P. 485; People v. Black, 111 Cal.App. 90, 95, 295 P. 87; People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741; People v. Meyers, 7 Cal.App.2d 351, 355, 356, 46 P.2d 282; People v. Baker, 25 Cal.App.2d 1, 3, 4, 76 P.2d 111; People v. Chan Chaun, 41 Cal.App.2d 586, 589, 107 P.2d 455; People v. Day, 71 Cal.App.2d 1, 4, 5, 161 P.2d 803; and People v. Harshaw, 71 Cal.App.2d 146, 149, 161 P.2d 978. To the extent that the language in the opinions in People v. Cornett, 61 Cal.App.2d 98, 105, 141 P.2d 916 and People v. Thompson, 69 Cal.App.2d 80, 85, 158 P.2d 213, may be said to announce a contrary rule, such language must be disapproved.

In arguing against the propriety of allowing his extrajudicial statements to strengthen "the [over-all] proof of the corpus delicti," defendant cites such cases as People v. Simonsen, 107 Cal. 345, 40 P. 440, People v. Besold, 154 Cal. 363, 97 P. 871 and People v. Vertrees, 169 Cal. 404, 146 P. 890, which "deal alone with the degree of proof of the *corpus delicti* essential to warrant the *introduction in evidence* of the extrajudicial statements, admissions or confessions of the accused and are therefore of little value or assistance in determining the point here involved." People v. Selby, supra, 198 Cal. 426, 434, 245 P. 426, 430. Nor does it avail defendant to cite People v. Wagner, 29 Cal.App. 363, 372, 155 P. 649 and People v. Tapia, 131 Cal. 647, 651, 653, 63 P. 1001, for the proposition that the jury must be "convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed" before they might consider the extrajudicial statements of the defendant. These two cases were expressly disapproved in People v. Selby, supra, upon the court's summarization of the law on the point as follows, at pages 438, 439 of 198 Cal., at pages 431 of 245 P.: "It may finally be said that the authorities are unanimous on the proposition that the corpus delicti is not required to be established to a moral certainty and beyond a reasonable doubt before the extrajudicial statements, admissions or confessions of a defendant may be received in evidence—prima facie proof of the corpus delicti being sufficient for that purpose. And, with the exception of People v. Tapia, supra, and People v. Wagner, supra, the rule is likewise unanimously declared that it is *not* necessary that the jury, in resolving the question of the guilt or innocence of a defendant upon all the evidence in the case, should, before considering for any purpose the extrajudicial statements, admissions, or confessions of a defendant, be first satisfied to a moral certainty and beyond a reasonable doubt that the corpus delicti has been established by evidence aliunde.

"When the case is submitted for their verdict, the jury may consider *all* the evidence in the case, including the extrajudicial statements, admissions or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt. If this were not the correct rule, proof of the extrajudicial statements, admissions, or confessions of the accused would have no utility except to connect him with the crime charged. The general rule is that, unless evidence is admitted for a limited

purpose, it will be considered for every purpose. Any expressions in People v. Tapia, supra, and People v. Wagner, supra, to the contrary of what we have declared are at variance with the authorities and are not binding."

It follows from the foregoing that the instruction here challenged was properly given.

[2, 3] Defendant's second objection rests upon the claim that evidence of a prior criminal act committed by him was improperly admitted, but the record does not sustain him. At the trial it was developed that the distinctive clothing which defendant wore on November 2, was part of the contents of a foot locker which defendant admittedly stole some six weeks previously in San Francisco from a petty officer of the United States Navy. By reference to this serviceman's clothing, and in particular to the white T-shirt with its blue insignia bearing the words "Londonderry, Ireland," various witnesses—such as the proprietor and waitresses at the restaurant near the high school where defendant had his lunch and played "pinball" games until almost 2:30 o'clock in the afternoon, as well as several classmates of Thora Chamberlain to whom he was seen talking near the school grounds—identified defendant as having been in Campbell on November 2, 1945. Thus, so far as affecting defendant's identification, the *stolen character* of the clothing was not material; but it does not follow that "the fact of the theft, which was later brought home to the defendant when he took the stand, was introduced solely for the purpose of prejudicing the defendant and blackening his character in the eyes of the jury." The relevancy of the theft to the prosecution's case stems from its integration with the proof of "a design or plan to entice" on defendant's part through wearing a serviceman's clothing as a means of effecting an appealing appearance or "maquerade."

At the trial the serviceman in question testified that he had been a "Chief Commissary Steward in the United States Naval Reserve," stationed in England and Ireland, and that on the afternoon of September 21, 1945, a "four foot locker" bearing his name and service rank, and containing various articles of wearing apparel, was stolen from his car. Upon interrogation as to what specific clothing was in the foot locker at the time of its theft, he included a "Navy T-shirt" with the inscription "Londonderry, Ireland" in blue letters and "slate gray Navy issue trousers" identical in appearance with the trousers introduced in evidence as having been found by the F.B.I. men "buried in a causeway" in the construction yard where defendant had worked. Defendant admitted the theft of the foot locker; and, in fact, it was later found in the garage of defendant's San Mateo home. From these matters in evidence the jury might well have inferred that defendant conceived the idea that the perpetrator of an offense would be less easily detected if at the time of its commission he wore another's clothing, and that defendant deliberately chose to steal a plainly marked serviceman's "foot locker" as probably containing wearing apparel which would enable him to effect a disguise. Moreover, the jury might have inferred from the character of the stolen clothing that defendant at the very time of the theft had some such idea to commit the precise type of crime with which he is here charged and so was anxious to avail himself of any appeal attaching to his masquerade as a serviceman in furthering his ability to prevail upon or "entice" a young girl to "drive off" in his car in response to his request. While the theft of the foot locker occurred some six weeks prior to the commission of the homicide here at issue, such time element would go only to the weight of the evidence but not to its relevancy as bearing upon the prosecution's theory of defendant's preconceived design or plan of action to "masquerade" as a serviceman; hence wearing the "Navy issue trousers," the "Londonderry, Ireland" T-shirt with military medals pinned on the front thereof, and the garrison hat.

The rule sustaining the admissibility in evidence of such relevant prior crime was stated by this court in the recent case of People v. Peete, 28 Cal.2d 306, at pages 314, 315, 169 P.2d 924, 929: "It is settled in

this state, however, that except when it shows merely criminal disposition (People v. Cook, 148 Cal. 334, 340, 83 P. 43; People v. Glass, 158 Cal. 650, 658, 112 P. 281), evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged. 'The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.' (Citing numerous authorities.) 'It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged; but, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.' (Citing cases.)" To like effect, see People v. Nakis, 184 Cal. 105, 114, 193 P. 92.

Nor does it avail defendant to argue that "there was no need" for the prosecution to show "the fact of the theft" as a circumstance connecting defendant with the perpetration of the crime charged, since several witnesses attested to his identity through reference to certain peculiarities in his physical features as well as to his distinctive dress on the day in question. The quantum of evidence, if it is *relevant* to a fact in issue, does not enter into the question of its admissibility. Speaking to this point, the court in People v. Cook, 148 Cal. 334, said at page 340, 83 P. 43, at page 46: "The prosecution in a criminal case is not obliged to rest upon evidence which merely establishes the guilt of the defendant prima facie—upon evidence, that is to say, which is merely sufficient in law to sustain a verdict of guilty. The guilt of the defendant must be proved beyond a reasonable doubt in order to secure such a verdict, and the district attorney not only may, but ought to, introduce all proper evidence at his command tending to establish the guilt of the defendant, in order to overcome any doubts or scruples of the jurors." Accordingly, there was no error here in permitting the prosecution to introduce in evidence "the fact of the theft" as part of its case against defendant.

For his third point of objection, defendant urges that "immaterial evidence was admitted into the record," and that he was prejudiced thereby. The challenged evidence concerns the testimony of two little girls, aged seven and eight years respectively, and the mother of one of them. Each of the children testified that as they were walking home together from the Campbell Grammar School, which is situated "across the street from the high school," shortly after 2:30 o'clock in the afternoon of November 2, a man dressed in "a white T-shirt" and driving a "dark sedan automobile" stopped and asked them if they would take care of his child. They refused and continued on their way home. One of the children further stated that the man in question was wearing "a service hat" with "a vizor," and that following his conversation with them, he "turned around" and drove "back towards the high school." The purpose of the mother's testimony was to fix the time of the girls' meeting with defendant. People v. Zimmerman, 65 Cal. 307, 308, 4 P. 20. She fixed the event as occurring immediately preceding their arrival home "around five minutes to three" on the afternoon of November 2, 1945.

[4-6] Preliminary, it should be noted that this evidence was adduced at the trial without objection and no motion to strike was made by defendant's counsel following its introduction. In such circumstances any claim of error is deemed to have been waived. People v. Fleming, 218 Cal. 300, 313, 23 P.2d 28; People v. Harvey, 22 Cal. App.2d 532, 535, 71 P.2d 841. But regardless of the record's disclosure in this respect, defendant cannot prevail in his argument on the merits. The episode

which the girls described was significant both in time and place. In its tendency to show that the man in the "white T-shirt" who accosted these children was in fact the defendant, the evidence was relevant to the issue of identity, for it placed him a short distance from the Campbell high school, but proceeding in that direction, a few minutes prior to his meeting with Thora Chamberlain. Moreover, the evidence in question was relevant to the prosecution's purpose of showing the general scheme or plan upon which defendant operated that afternoon, involving the enticement of young girls into his car under the ruse that he needed someone to care for his children. Dressed in the clothing of a serviceman with medals, including the "Purple Heart," pinned to the front of his shirt, although defendant admittedly had never served in the military forces, defendant apparently was seeking to appeal to their sympathies as a basis for their agreeing to "help" him. Cf. People v. Northcott, 209 Cal. 639, 653, 289 P. 634, 70 A.L.R. 806; People v. Cosby, 137 Cal.App. 332, 335, 336, 31 P.2d 218. The inability of the two little girls who testified against defendant, to identify him in the courtroom during the trial was simply a factor going to the weight of their testimony, a matter for the determination of the jury and one which would tend to operate to defendant's advantage. Nor does it avail defendant to point now to unfavorable "psychological considerations" arising from this evidence by its suggestion of "purposes of enormous evil" on the part of defendant in his dealings with young girls. Regardless of the justification of his present appraisal of the effect of this line of testimony upon the jury, his counsel at the trial apparently did not so view it, for the story of the little girls to which defendant now so violently objects was not even tested on cross-examination. But in any event these alleged adverse "psychological considerations" cannot overcome the propriety of the admissibility of evidence as to defendant's prior conduct relevant to the general issue of his guilt. 8 Cal.Jur. § 154, p. 37.

[7, 8] Defendant's fourth and final point relates to the remark of the district attorney in his opening statement at the trial that "this indictment was the culmination and result of one of the best organized and most intense investigations in the annals of the crime of kidnapping and murder." Defendant apparently objects to the reference to the "crime of kidnapping," but there is no merit to his argument. Irrespective of the untimeliness of his objection, raised for the first time on appeal (People v. Boggs, 12 Cal.2d 27, 40, 82 P.2d 368; People v. Wagner, 62 Cal.App.2d 597, 601, 145 P.2d 646), it is manifest from the foregoing review of the evidence that the scope of the district attorney's preliminary remark was fully justified. The abduction of Thora Chamberlain by defendant was inextricably linked to the murder charge in this case, so that the district attorney's comment on the dual nature of defendant's offense was but properly anticipatory of the sequence of events on which the prosecution relied to secure a verdict of conviction against defendant.

In the light of the foregoing discussion, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



78 Cal.App.2d 385

**RIOLFO v. MARKET STREET RY. CO. et al.**

**Civ. 13110.**

District Court of Appeal, First District, Division 2, California.

March 5, 1947.

Hearing Denied May 1, 1947.

**1. Appeal and error ⇐207, 719(1)**

Judgment for defendants in personal injury action would not be reversed because of statement of defendants' counsel that medical expenses incurred by plaintiff had been paid by his employer under provisions of the compensation act, where no objection or motion to strike was made at

the trial and the remarks were not assigned as misconduct. Labor Code, § 3201 et seq.

**2. Trial ⇐295(6)**

In action against street railway company for injuries sustained by member of garbage crew when struck by rope attached to company's trolley bus while he was on top of garbage truck double parked in street, giving of contributory negligence instruction was not prejudicial because of omission of provision requiring member only to exercise ordinary care, when instructions were read as a whole and in view of the facts.

**3. Appeal and error ⇐1170(9)**

In action against street railway company for injuries sustained by member of garbage crew when struck by rope attached to company's trolley, giving of instruction that if sole proximate cause of accident was double parking of garbage truck in violation of statute, no damages could be awarded was not prejudicial error, on ground that it tended to confuse jury after giving of instruction that it was no concern of jury whether employer or other members of garbage crew were negligent, and that employer's negligence could not be imputed to member of garbage crew. Vehicle Code, § 586; Const. art. 6, § 4½.

**4. Trial ⇐260(1)**

Refusal of requested instruction was not error, where subject was adequately covered in other instructions.

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Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by John Riolfo against the Market Street Railway Company, a corporation, and Eddie Havens to recover for injuries sustained by the plaintiff in a fall from a top of a garbage truck when he was struck by a rope attached to the back of trolley bus. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Tobriner & Lazarus, and Walter J. DeMartini, all of San Francisco, for appellant.

Cyril Appel, and Jesse H. Miller, both of San Francisco, for respondents.

DOOLING, Justice.

This is an appeal by plaintiff from a judgment entered on a verdict of a jury for defendants. Plaintiff sued for damages resulting from personal injuries received in a fall from the top of a garbage truck after being struck by the rope attached to the back of defendants' trolley bus.

The defendant, Market Street Railway Company, operates an electric bus which draws current from two overhead electric wires by two trolley poles. There is a rope attached to the end of each trolley pole which extends down and is attached to the back of the bus in a box containing a reel and a spring so that the rope is kept taut. The bus runs on rubber tired wheels and is so constructed that it can move approximately 14 feet to the right or left of the center line between the two overhead wires. While the bus is in such a position the trolley pole extends diagonally from the top of the bus to the two wires. The ropes attached to the end of the poles are also pulled into a diagonal position and extend down past the side of the bus to the box.

Plaintiff and several other men were collecting garbage in a truck owned by the Sunset Scavenger Association. Plaintiff was assigned to stay on the truck and sort the garbage as it was collected. As the garbage crew neared the end of their rounds for the day, the driver double parked the truck on 18th street approximately half way between Castro and Collingwood streets in San Francisco. This placed the truck under the two overhead electric wires. Cardboard had been inserted in the sides and rear of the truck so as to enlarge its capacity. Mr. Ratto, the foreman, testified that the top of the load was about 12 feet above street level. The electric wires were 16 feet above the street. Plaintiff, who had nothing to do with the driving or parking of the truck, was on top sorting the garbage and spreading it so as to balance the load. As Mr. Ratto left the truck he warned plaintiff to watch out for the electric buses.

Several persons were standing on the corner waiting for the bus and they were eye witnesses to the accident. They testified that plaintiff would stoop down and be lost from their view. When the accident occurred, plaintiff was rising from a stooping position and the rope from the trolley pole hit him, he lost his balance, grabbed the rope and was pulled into the street. The bus driver testified that he saw no one as he approached the truck from the rear. He honked his horn and turned around the truck and the first knowledge he had that anything was wrong was when he felt the trolley go off the wire. These witnesses also estimated the speed of the bus as between 2 and 5 miles per hour. Plaintiff testified that he was standing up in full view at the time of the accident. Plaintiff's witnesses also estimated the speed of the bus as much higher, one witness testifying that the bus was going 50 miles per hour. As the bus approaches it makes the trolley wires "sing" or "hum" and the noise is discernible for about half a block. Plaintiff testified that he heard the bus approaching but paid no attention to it, and did not remember whether he heard a horn honked or not.

The jury returned a verdict in favor of defendants and plaintiff has appealed. The appeal is based on the asserted misconduct of counsel for defendants and error in the giving and refusing of instructions.

[1] At the close of appellant's case his counsel stated that he and counsel for respondents had entered into a stipulation as to the amount of medical expenses incurred, but that these expenses had not been paid by appellant but by his employer. Counsel for respondents then stated that the stipulation was correct as the expenses had been paid under the provisions of the Workmen's Compensation Act. Labor Code, § 3201 et seq. Counsel for appellant stated, "You know there is no compensation involved in this case." Counsel for respondents replied that he was stipulating that the bills had been paid by appellant's employer under the provisions of the Workmen's Compensation Act. No objection nor motion to strike was made and the remarks were not assigned as misconduct. This was the only reference to compensation or the compensation act that was made. Now, on appeal, it is contended that these remarks constituted prejudicial misconduct. It is settled that, unless objection is made below, such questions cannot be raised on appeal. Mullanix v. Basich, 67 Cal.App. 2d 675, 687, 155 P.2d 130; Burke v. John E. Marshall Inc., 42 Cal.App.2d 195, 208, 108 P.2d 738; Packard v. Moore, 9 Cal. 2d 571, 580, 71 P.2d 922; 11 So.Cal. Law Review 407, 413, 414; 2 Cal.Jur. 266.

However, appellant argues, these remarks were so prejudicial to his case that the necessity for objection was not necessary. In a case much stronger on its facts, as compensation was not only referred to but was argued to the jury, a similar contention was made and the court stated: " 'The cases on which appellant relies to support his position are clearly distinguishable in that they involve appeals from orders granting new trials where one of the grounds for the granting of the motion for a new trial was prejudicial misconduct of the attorney. Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111; Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Ferrario v. Conyes, 19 Cal.App.2d 58, 64 P.2d 975; Mangino v. Bonslett, 109 Cal.App. 205, 292 P. 1006. Walling v. Kimball, 17 Cal.2d 364, 110 P.2d 58, notes this difference in approach to the problem of what constitutes prejudicial misconduct on appeal. But, when the case comes to us after the trial judge has denied a new trial urged upon these grounds and has thus found that the claimed misconduct was not prejudicial, the judgment must be affirmed unless there is no reasonable basis for such finding. We may not assume that the jury denied appellant any recovery because it believed he might get some compensation from another source. It is more reasonable to assume that the verdict followed the evidence on the issues of negligence and contributory negligence.' " Huber v. Henry J. Kaiser Co., 71 Cal.App.2d 278, 285, 162 P.2d 693, 697. See also, Brown v. McCuan, 56 Cal.App.2d 35, 41, 132 P.2d 838.

[2] The court instructed the jury: "It was the duty of the plaintiff, John Riolfo,

to use his faculties of sight and hearing to ascertain the presence of and the approach of the trolley bus * * *" and if he failed to do so and as a proximate result he was injured the jury "may find" that such conduct was such contributory negligence as would bar his recovery of damages.

Appellant contends that the instructions should have read that "it was the duty of the plaintiff to use his faculties of sight and hearing in the exercise of ordinary care, to ascertain the presence of the trolley bus." He contends that this omission places on him a fixed standard of care such as is required of a pedestrian rather than the degree of care required of one whose work necessitates his presence in the streets. However "The instructions must be read as a whole, viz., each instruction should be considered in connection with the others and if, without straining any portion of the language, the instructions harmonize as a whole, and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and elements which are to be gathered from the instructions as a whole." Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303, 305. See also, Megee v. Fasulis, 65 Cal.App.2d 94, 101, 150 P.2d 281; Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390. Here reading the instructions as a whole the jury was fully and fairly informed that plaintiff need only exercise ordinary care, and that this care was measured by that "exercised by a man of ordinary prudence under the circumstances."

Furthermore appellant was not in the ordinary position of a person required to work in a public street. He knew that he was working on a truck which was double parked in violation of law close to where the trolley bus must pass, he had been instructed by his foreman to keep a lookout for passing buses, and he himself testified that he heard the noise of the trolley on the wire made by the approaching bus but did not look up "because sometimes there is a truck or bus going in the opposite direction, in the other direction and that makes a noise too—and I am busy." We cannot hold under the peculiar facts that the instruction complained of was prejudicial.

[3] The court instructed the jury that "It is no concern of yours * * *" whether plaintiff's employer or his servants were negligent and their negligence cannot be imputed to him. It then gave the instruction appellant assigns as error. The court read Vehicle Code, § 586 which prohibits double parking and instructed that double parking of the garbage truck was negligence and "If you find from the evidence in this case that the sole proximate cause of the accident was the double parking of the garbage truck in violation of the section of the Vehicle Code I have just read to you, I instruct you that you cannot award any damages to the plaintiff in this case * * *." The jury retired to deliberate and later returned to the courtroom. The foreman stated, "* * * there is one matter we don't quite understand. You read us the instruction you gave about the parking of the garbage truck, there are two separate instructions there, and we would like to have them both read." The court then read the instruction on double parking and the instruction that any negligence of the employer or other employees could not be imputed to the plaintiff. The foreman then asked for the instructions as to contributory negligence which were given. The jury then retired and later returned a verdict for defendants.

Appellant contends that the court erred in giving the above instruction as to double parking as it was not applicable to any issue in the case and merely confused the jury. This is, of course, grounded on the idea that the jury imputed the negligence of the truck driver to appellant. It is difficult to see how they could do so as each time the instruction was given the jury was told that the double parking must be the sole proximate cause of the accident and any negligence of the driver or employer could not be imputed to appellant. "Even

though it be conceded that the instruction complained of was entirely inapplicable, we are unable to discover from the record that the rights of appellants were in any way prejudiced thereby. Under such circumstances, the giving of the instruction does not constitute such error as to warrant reversal of the judgment. Wright v. Salzberger & Sons, supra [81 Cal.App. 690, 254 P. 671]; Lower v. Hughes, 80 Cal.App. 444, 448, 449, 251 P. 952; Marston v. Pickwick Stages, Inc., 78 Cal.App. 526, 532, 248 P. 930." Schatte v. Maurice, 116 Cal.App. 161, 169, 2 P.2d 489, 492; See also, Callison v. Dondero, 51 Cal.App.2d 403, 124 P.2d 852; Levy v. Berner, 110 Cal.App. 65, 69, 293 P. 896.

[4] Finally appellant contends that it was error to refuse to give an instruction he proposed which was to the effect that the mere fact that some one else in appellant's position could have avoided the accident would not be enough to prove that appellant was negligent. A similar instruction was criticised in Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, at page 701, 111 P.2d 689, but the court there found that the instructions when taken as a whole cured its defects. Here the court adequately covered this subject in the other instructions so the refusal was not error even if the proposed instruction be correct. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 204, 108 P.2d 738; Huber v. Henry J. Kaiser Co., 71 Cal.App.2d 278, 290, 162 P.2d 693.

In view of the constitutional inhibition that no judgment shall be set aside or new trial granted in any case on the ground of misdirection of the jury, unless the court after an examination of the entire cause should be of the opinion that the error complained of has resulted in a miscarriage of justice (Cal. Constitution, Art. VI, sec. 4½), there is no reasonable ground herein upon which the judgment may be reversed. Martin v. Vierra, 34 Cal.App.2d 86, 95, 93 P.2d 261, 94 P.2d 567.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.

29 Cal.2d 677

## ROSEMARY PROPERTIES, Inc., v. McCOLGAN (two cases).

S. F. 17263, 17264.

Supreme Court of California, in Bank.

Feb. 18, 1947.

Rehearing Denied March 17, 1947.

**1. Taxation ⇐104, 117, 376(1)**

A corporation franchise tax is not one on income as such but for the privilege of exercising a corporation franchise measured by its net income. Gen.Laws, Act 8488.

**2. Taxation ⇐117, 376(1)**

Under the Corporation Franchise Tax Act using the term "net income" to specify the sum which when multiplied by the prescribed percentage rate determines the amount of the franchise tax, "net income" is the final measure by which the tax is computed, so that any dividend paid from earnings or profits would be a dividend paid out of income included in the measure of the tax, and as such would be exempt from a franchise tax in the hands of the recipient corporation. Gen.Laws, Act 8488, §§ 4(3), 6(c)(1), 7, 8(c, g, h), 9(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Net Income".

**3. Statutes ⇐188**

In construing statute, a word should not be given forced and strained meaning contrary to its common understanding.

**4. Statutes ⇐209**

The Legislature will not be held to have intended to use a significant word in two different senses in same statute.

**5. Taxation ⇐376(1)**

The amendment of provision of Corporation Franchise Tax Act for deduction of dividends, declared from income included in measure of tax imposed by such act on corporation declaring dividends, in computing net income of another corporation, receiving such dividends, for franchise tax purposes, by addition of language allowing deduction of dividends, declared from income taxed under Corporation Income Tax Act to corporation declaring dividends, does not deflect from propriety of

construing word "income" in both original and added provision to mean "gross income", as Corporation Income Tax Act supplements and is complementary to Franchise Tax Act. Gen.Laws, Act 8488, § 8(h).

**6. Statutes ⇐225¾**

The Legislature's readoption of statutory provision without change after its construction by District Court of Appeal amounts to ratification of such construction.

**7. Taxation ⇐376(1)**

A domestic corporation was entitled to deduct from its gross income, in computing its net income for franchise tax purposes, entire amounts of dividends paid to it by another such corporation from its earnings and profits, exceeding its net income, after statutory deduction for depletion, from royalties received from lessees of its oil and gas properties. Gen.Laws, Act 8488, §§ 4(3), 6(c)(1), 7, 8(c, g, h), 9(d); 26 U.S.C.A. Int.Rev.Code, § 115.

TRAYNOR, J., GIBSON, C. J., and CARTER, J., dissenting.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Two actions by the Rosemary Properties, Inc., against Charles J. McColgan, as Franchise Tax Commissioner, to recover the amounts of additional franchise taxes assessed against plaintiff by defendant for 1938 and 1939. Judgments for plaintiff, and defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., John L. Nourse, of Los Angeles, and James E. Sabine, Deputy Atty. Gen., of San Francisco, for appellant.

Latham & Watkins and Austin H. Peck, Jr., all of Los Angeles, for respondent.

Mackay, McGregor & Reynolds and Martin J. Weil, all of Los Angeles, as amici curiae on behalf of respondent.

SPENCE, Justice.

Two actions were brought by plaintiff to recover additional franchise taxes assessed by defendant against plaintiff for the years 1938 and 1939, respectively. They were tried upon a stipulated set of facts, and they have been briefed together on appeal in presenting a problem of statutory construction affecting the propriety of a dividend deduction for franchise tax purposes for the two years in question, under the terms of the Bank and Corporation Franchise Tax Act, Stats. 1929, ch. 13, p. 19, as amended, Deering's Gen. Laws, 1937, Act 8488, hereinafter referred to as "the act." The trial court entered a judgment in favor of plaintiff in each case and from said judgments, defendant has appealed.

Plaintiff, a California corporation, duly filed its franchise tax returns for the years 1938 and 1939, the former based on its 1937 income and the latter on its 1938 income. Plaintiff's report of gross income for these successive years listed $76,195 and $83,545 as dividends paid to it respectively in 1937 and 1938 by the Ventura Land and Water Company, hereinafter referred to as "Ventura." However, in computing its net income for franchise tax purposes for those years, plaintiff deducted the full amount of the respective Ventura dividends from its returns. As a result of that deduction and other deductions not here involved, plaintiff reported a net loss for each year and paid a minimum tax of $25 on each of its returns as required by section 4(3) of the act.

In due season defendant served notices on plaintiff of his intention to assess an additional franchise tax for each of the two years. Plaintiff protested the proposed assessments but paid them with interest, after which these actions followed to recover the additional assessments charged and collected by defendant by reason of his adjustment of the Ventura dividend deduction taken by plaintiff on each of its returns. This disputed item will determine whether or not plaintiff's franchise tax obligation for each of the two years exceeds the minimum $25 assessment as originally reported. In order to appraise the factors in controversy, it is necessary to examine the franchise tax returns filed by Ventura for the corresponding years.

Ventura, a California corporation, conducted its entire business in this state. Its

principal source of income was royalties from California oil and gas properties, which it owned and leased to operating oil producers. Ventura's gross income for the year 1937—as reported on its 1938 return—was $1,203,295.60 and for the year 1938—as reported on its 1939 return—was $1,417,090.48, of which sums $1,195,768.97 and $1,399,534.92 were derived, respectively, from its oil royalties. Prior to 1937 Ventura had recovered in full its cost depletion for its oil-bearing lands. But in pursuance of section 8(g) of the act, which authorizes a deduction for depletion at the rate of 27½ per cent of the gross income from oil and gas wells, Ventura listed, and was allowed, on its respective returns a deduction of $328,836.47 from its oil royalties for 1937 and a deduction of $384,872.10 from its oil royalties for 1938. These respective percentage depletions on its oil royalties and other allowable deductions reduced Ventura's net income for franchise tax purposes for 1937 to $775,282.65 and for 1938 to $908,171.54. It was stipulated that Ventura's earnings and profits for the year 1937 amounted to $963,338.63 and for the year 1938 amounted to $1,112,147.82, from which sums came the respective dividends of $76,195 and $83,545 paid plaintiff.

As the basis for the additional franchise tax assessments against plaintiff, defendant claims that only 80.478 per cent of the dividend paid in 1937 and 81.659 per cent of the dividend paid in 1938 were included in the measure of the tax imposed by the act on Ventura. Defendant obtains these percentages by dividing Ventura's net income for the year in question by its earnings and profits for the same period. The two figures differ because of the factors taken into account: thus, the oil depletion allowance which entered into the computation of Ventura's net income was a statutory percentage deduction but such item did not affect Ventura's schedule of earnings and profits since depletion sustained on a cost basis had already been recovered in previous years; and disbursements such as those made for federal income tax and franchise tax charges, which reduced the amount of Ventura's earnings and profits, did not affect the net income computation because not deductible under the act. § 8(c). So—according to defendant—Ventura's net income of $775,282.65 divided by its earnings and profits of $963,338.63 gives the percentage of 80.478, which multiplied by plaintiff's dividend of $76,195 represents the proper dividend deduction to be allowed plaintiff for 1937; and Ventura's net income of $908,171.54 divided by its earnings and profits of $1,112,147.82 gives the percentage of 81.659, which multiplied by plaintiff's dividend of $83,545 represents the proper dividend deduction to be allowed plaintiff for 1938.

Since plaintiff contends that the entire Ventura dividend received in 1937 and 1938 was deductible for franchise tax purposes in its respective returns as having been declared by Ventura from income "included in the measure of the tax" imposed by the act on Ventura, it is necessary to construe the language of the act to determine plaintiff's liability for the additional taxes assessed and collected by defendant under the above formula.

Section 4(3) requires that every corporation doing business within this state and not expressly exempted from taxation by the Constitution shall annually pay, for the privilege of exercising its corporate franchise, "a tax according to or measured by its net income, to be computed * * * at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year."

Section 7 defines "net income" as "gross income less the deductions allowed." Section 8 enumerates the allowable deductions. Among the items so listed is the dividend deduction under subdivision (h), the premise of the parties' dispute. Applicable to plaintiff's 1938 return is the provision for the deduction in the subdivision as amended in 1937 (Stats.1937, p. 2328): "Dividends received during the income year from a bank or corporation doing business in this State declared from *income which has been included in the measure of the tax* imposed by this act upon the bank or corporation declaring the dividends." (Italics ours.) Applicable to plaintiff's 1939 return is the provision for the deduction in the subdivision as amended in 1939 (Stats.1939, p. 2942): "Dividends received during the in-

come year declared from *income which has been included in the measure of the tax* imposed by this act upon the bank or corporation declaring the dividends, or from income which has been taxed under the provisions of the Corporation Income Tax Act of 1937 to the corporation declaring the dividends." (Italics ours.)

The import of the above italicized language carried into the respective amendments of section 8(h) here applicable is the pivotal point in controversy. Defendant's arguments rest on these steps: (1) That under fundamental principles of tax law as well as by statutory provision in the act itself since 1939, dividends are defined to be "any distribution made by a corporation to its shareholders * * * out of its earnings or profits" (Stats.1939, p. 2936, § 6(c) (1); 33 C.J. 303, § 78; 47 C.J.S., Internal Revenue, § 131, p. 259; Title 26 U.S.C.A. Internal Rev. Code, § 115); (2) that the "earnings or profits" of a corporation are generally not the same figure as its taxable net income because affected by different considerations—the former by the corporation's actual expenditures, the latter by the allowable statutory deductions; (3) that since the source of dividends is "earnings or profits," the word "income" as used in the allowable deduction of "dividends * * * declared from *income* which has been included in the measure of the tax" means "earnings or profits"; and so (4) where "earnings or profits" exceed "net income," then "it follows as a mathematical certainty that dividends declared from such earnings or profits are declared from earnings or profits which in part have not been included in the measure of the tax and the dividends are not fully deductible." Plaintiff does not dispute steps (1) and (2) of defendant's argument, but it does challenge their relevancy to the problem at hand and the logic of the concluding steps (3) and (4) in limiting the phrase "income which has been included in the measure of the tax" to mean no more than statutory net income. Rather, so plaintiff contends, the quoted phrase refers to "gross income subject to taxation by the state"; and since that item would include "earnings or profits" attributable to California sources, dividends paid therefrom would be "declared from income which has been included in the measure of the tax." A reasonable construction of the disputed language in relation to the basic concept of the act sustains plaintiff's position.

[1, 2] The tax in question is not one on income as such but one which the corporation must pay "for the privilege of exercising their corporate franchises within this state" (Matson Navigation Co. v. State Board of Equalization, 3 Cal.2d 1, 11, 43 P.2d 805, 808,) and "according to or measured by its net income." § 4(3). As the nature of the tax is distinguished, so is its basis of calculation. Thus, the act uses the term "net income" to specify the sum which, when multiplied by the prescribed percentage rate, determines the amount of the franchise tax. In this sense "net income," as defined by the act, is the final measure by which the tax is computed. San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 256, 125 P.2d 36. Since "net income" means "gross income less the deductions allowed" (§ 7), these factors necessarily enter into the computation and are included in the measure of the tax. The income involved is *all* income, including earnings and profits, attributable to California sources; the deductions, including the prescribed depletion rate of 27½ per cent of gross income from oil and gas properties, are additional considerations. Following these principles, any dividend paid from "earnings or profits"—an item of gross income entering, like the authorized deductions, into the determination of net income—would be a dividend paid out of income included in the measure of the tax. As such the dividend is exempt from franchise tax in the hands of the recipient corporation.

This same conclusion was reached in the case of Burton E. Green Investment Co. v. McColgan, 60 Cal.App.2d 224, 140 P.2d 451, with regard to a practically identical factual situation involving the application of section 8(h) in its 1937 form. There the plaintiff taxpayer owned stock in Belridge Oil Company, a California corporation which during the year in question, 1937,

derived all but a small portion of its income from the production and sale of oil and gas in this state. In its franchise tax return covering that year, Belridge Oil Company reported *all* its income and claimed the oil depletion allowance under section 8(g), which percentage depletion exceeded its actual cost depletion by a substantial amount. During 1937 Belridge Oil Company had paid to plaintiff certain dividends which plaintiff, in its appropriate franchise tax return, included in its gross income and then deducted under authority of section 8(h). In asserting an additional assessment against plaintiff, defendant tax commissioner took the position that "because the 27½ per cent of the gross income from the oil wells operated by Belridge exceeded the depletion deduction based upon actual cost, the excess of the deduction allowed over actual cost depletion is not a part of income which had been included in the measure of the tax imposed, within the meaning of section 8(h)." 60 Cal.App.2d 230, 231, 140 P.2d 454. In rejecting this theory, the court said, 60 Cal.App.2d at pages 231, 232, 140 P.2d at page 455: "If the total Belridge income for 1937 was included in its gross income for franchise tax purposes and if out of its earnings of 1937 that corporation paid the dividend in question to plaintiff out of profits earned in that year, it must follow that the entire dividend so paid to plaintiff was declared from income which had been included in the measure of the tax. If it was, then it was deductible in full. The very purpose of Section 8 subd. h is to avoid double taxation and thereby prevent the destruction of capital assets. While it aims to tax all income received as dividends (except those exempted by law) which have not been taxed while in the treasury of the dividend payor, at the same time it purposes to avoid the inclusion of the same income in the measure of the tax to be paid by two or more different taxpayers. If the same dividend is included in the measure of the tax paid by two taxpayers successively under the Franchise Tax Act, the result is multiple taxation."

Defendant attacks the pertinency of the Green Investment Company case because "it failed to take into consideration whether the earnings or profits of the declaring corporation out of which the dividends were declared were greater than the net income by which the tax on the declaring corporation had been measured." But such claim mistakenly assumes the relationship between "earnings and profits" and "statutory net income" to be a distinctive and controlling factor. In fact, this ratio involves no different considerations than were before the court in the Green Investment Company case. It simply rests on the theory that to the extent Ventura's dividends were declared from "earnings and profits" which exceeded in amount its "net income"—a difference wholly attributable to Ventura's taking of the oil and gas statutory depletion allowance—such dividends were paid from an untaxed source, and so from income not "included in the measure of the tax." In the Green Investment Company case the same point was considered as presented with relation to the extent the statutory percentage depletion exceeded the cost depletion and the consequent argument that "a portion of the Belridge dividend was paid from an untaxed source." In declaring this argument to be based upon a fallicious concept, the court aptly said, 60 Cal.App.2d at page 235, 140 P.2d at page 457: "Whether the amount of net income for the purpose of computing the franchise tax is increased or decreased by any adjustment which does not at the same time proportionately enlarge or diminish profits, it will not affect either the declaration of a dividend or the amount thereof. * * * Since * * * all of the Belridge income [including earnings and profits] was reported as gross income, all of its dividends were from a fund which had been flailed by the tax master," and therefore from "income which has been included in the measure of the tax."

The design of the act clearly contemplates the oil and gas percentage depletion (§ 8 (g)) and the dividend deduction (§ 8(h)) as independent allowances to be taken by two separate corporations in the computation of their respective net incomes. Defendant attacks the propriety of a "percentage depletion [which] can go on and on after cost * * * has been completely

recovered" by the oil operating company, but that is not a matter to be considered here. The procedure which defendant challenges is authorized by the act. Upon such premise it would appear that if the percentage depletion is properly deducted from gross income by the dividend declaring company in computing its net income for franchise tax purposes, it should not thereafter be assessed to the recipient corporation in the latter's computation. Rather, as the court succinctly stated in the Green Investment Company case, 60 Cal.App.2d at page 234, 140 P.2d at page 457, "the recipient is authorized to deduct the dividend which has passed through the tax mill before its distribution by the declaring corporation."

A consideration of the legislative history of section 8(h) lends additional force to plaintiff's position. As first enacted in 1929 (Stats.1929, p. 23), section 8(h) provided for the deductibility of dividends "received during the taxable year from income arising out of business done in this state." This was construed to mean that it did not require dividends to arise out of business done in this state by the corporation which declared the dividends. Consequently, the deduction could be taken where the corporation paying the dividend was a foreign corporation and did no business in the state but merely owned stock in corporations operating in California from which it received income. Corporation of America v. Johnson, 7 Cal.2d 295, 299, 300, 60 P.2d 417. To correct this situation, section 8(h) was amended in 1933 (Stats.1933, pp. 688, 689) by adding the requirement that the declaring corporation must have done business in this state. At the same time there was inserted the further requirement that the declaring corporation must have been constitutionally taxable in this state. But the base of the deduction was still whether the dividend was declared from income "arising out of business done in this state." Under such statutory test, it is apparent that the propriety of plaintiff's claim to the full Ventura dividend deduction taken on its respective franchise tax returns could not be questioned.

[3] Then in 1937 section 8(h) was amended to include the language in question. In making the change the words "arising out of business done in this state" were deleted and the deduction of dividends was allowed when declared from income "which has been included in the measure of the tax imposed by this act." This new wording is significant in that coincident with its adoption the following provisions were eliminated from subdivision (h) as it read in 1933: (1) The allocation allowance applicable where dividends were declared from income "derived from business done within and without this State"; and (2) the reference to the inapplicability of the deduction to dividends paid by constitutionally tax exempt corporations. With its attention so focused on the eliminated provisions, the Legislature in the 1937 amendment apparently considered them unnecessary in view of the new wording, briefer in form, as expressive of the purpose of the deduction to avoid double taxation. Thus the language "income which has been included in the measure of the tax" appears to have a definite connection with the problem of allocating income within and without the state; and appears to refer to income attributable to California sources. Such view of the 1937 amendment coincides with the original purpose of the dividend deduction and with the natural import of the words. Cf. Burton E. Green Investment Co. v. McColgan, supra, 60 Cal. App.2d 232, 233, 140 P.2d 451. The substituted language furnishes no basis for assuming that it was intended thereby to establish a new scheme of tax deduction dependent upon a ratio between "earnings or profits" and "net income"—a view which would require, as defendant concedes, the interpretation of the word "income" in the disputed phrase to mean "earnings or profits." Such interpretation not only creates a redundancy in that the word "dividend" itself implies a distribution from "earnings or profits," but it also does violence to a cardinal principle or statutory construction in assigning a forced and strained meaning to a word contrary to its common understanding. Corbett v. Chambers, 109 Cal. 178, 180, 41 P. 873; In re

Alpine, 203 Cal. 731, 737, 265 P. 947, 58 A.L.R. 1500; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 642, 122 P.2d 526; 23 Cal.Jur. 749, § 124. Under such circumstances it is but reasonable to conclude that had the Legislature intended to restrict the dividend deduction solely to taxable net income, rather than to correlate it simply with income attributable to California sources, language expressive of such material change of purpose would have been adopted.

[4] Additional proof of the legislative intention is found in section 9(d) which was also enacted in 1937 (Stats.1937, pp. 2329, 2330) when the phrase "included in the measure of the tax" first appeared in section 8(h). Thus, in computing net income, section 9(d) allowed no deduction for "any amount otherwise allowable as a deduction which is allocable to one or more classes of income not included in the measure of the tax imposed by this act." In so referring to income which is excluded from the computation of the franchise tax, the Legislature must have intended it in the sense of "gross income," since deductions are not allocable to "net income," which can only result *after* the appropriate deductions have been taken. Speaking to this point, the court in the Green Investment Company case, supra, said, 60 Cal.App.2d at page 233, 140 P.2d at page 456: "In view of the use of the word income in Section 9 subd. (d) in the sense of gross income we are convinced that it has the same significance in Section 8 subd. (h). The legislature could not have intended to use a significant word in two different senses in the same statute. Ransome-Crummey Company v. Woodhams, 29 Cal.App. 356, 156 P. 62; Coleman v. Oakland, 110 Cal.App. 715, 295 P. 59."

[5] Nor does a contrary purpose appear from the 1939 amendment of section 8(h) by the addition of language allowing the deduction where the dividends were declared "from income which has been taxed under the provisions of the Corporation Income Tax Act of 1937 to the Corporation declaring the dividends." The Corporation Income Tax Act (Stats.1937, p. 2184, as amended; Deering's Gen. Laws, 1937, Act 8494a) supplements the Franchise Tax Act and is complementary thereto. West Publishing Co. v. McColgan, 27 Cal.2d 705, 708, 166 P.2d 861. Manifestly, the purpose of the 1939 amendment in the application of the dividend deduction was to place corporate stockholders of corporations taxable under the Corporation Income Tax Act on an equal basis with corporate stockholders of corporations taxable under the Franchise Tax Act. Accordingly, the phrase "income which has been included in the measure of the tax" for franchise tax purposes and "income which has been taxed under the provisions of the Corporation Income Tax Act" should be given consistent interpretation. Defendant argues that this is not possible unless the phrase in each case refers to "net income." The subject of the tax under the Corporation Income Tax Act is net income; under the Franchise Tax Act, as previously noted, the subject of the tax is the privilege of exercising corporate franchises within this state, and the final measure thereof is "net income." The rate of tax is the same in both cases, 4 per cent of net income. But notwithstanding this distinction in the nature of the tax, once the taxpayer reports his gross income from California sources, whether for purposes of computation under the Franchise Tax Act or the Corporation Income Tax Act, all of that income "has passed through the tax mill"—has, so to speak, been taxed. Under such circumstances the 1939 amendment does not deflect from the propriety of construing the word "income" as used in the correlated references to mean "gross income."

[6] Moreover, in considering these successive amendments the force of the decision in the Green Investment Company case cannot be overlooked. The court there said: "Since the gross income and specified deductions are the factors included in arriving at the net income, the conclusion is unavoidable that it is gross income that is included in the measure of the tax." 60 Cal.App.2d 233, 140 P.2d 456. That case was decided in August, 1943. Since that time the Legislature has met on three occasions: at special sessions in 1944

and 1946, and at its regular biennial session in 1945, yet it has not amended section 8 (h) of the act to avoid the result of that decision. Notable at the 1945 session is its readoption of section 8(h) without the slightest change in the language construed in the Green Investment Company case. Stats. 1945, p. 1791. Such readoption of a statutory provision amounts to ratification of the court's construction thereof. Speaking to this point, the court said in Union Oil Associates v. Johnson, 2 Cal.2d 727, at pages 734, 735, 43 P.2d 291, 295, 98 A.L.R. 1499: "It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment." See, also, Guardianship of Reynolds, 60 Cal.App.2d 669, 675, 141 P.2d 498; Hecht v. Malley, 265 U.S. 144, 153, 44 S.Ct. 462, 68 L.Ed. 949; Carroll Electric Co. v. Snelling, 1 Cir., 62 F.2d 413, 416.

But of even greater significance in this connection is the Legislature's direct refusal at the 1945 session to adopt an amendment to section 8 (h) designed to overcome the effect of the decision in the Green Investment Company case. Assembly Bill No. 912, introduced at that session for the purpose of amending various sections of the act in question referred, among others, to section 8 (h). After restating in subdivision (1) of that subsection the language of section 8(h) as amended in 1939, supra, said Assembly Bill 912 significantly proposed the following addition: "(2) The portion of the dividend deductible under subdivision (1) of Section 8(h) shall be determined by ascertaining the ratio which the net income of the corporation declaring the dividend bears to the earnings and profits of such corporation for the same income year." Assembly Bill No. 913, introduced at the same session for the purpose of amending various sections of the Corporation Income Tax Act, contained the same proposal with reference to section 7(h) of that act, so that the correlation in operation between that Act and the Franchise Tax Act would continue. It is obvious that the proposed addition in the pertinent sections of the two acts provided for the dividend deduction to be determined exactly in the manner in which defendant seeks to have it computed here in the absence of such provision. However, the Senate, upon recommendation of its Committee on Revenue and Taxation, amended both Assembly bills and the proposed addition was stricken in each case. Senate Journal, Fifty-Sixth Session, p. 2635. In such form both bills were ultimately passed: Assembly Bill No. 912 became chapter 946 of the 1945 Laws, Stats. 1945, p. 1779, and Assembly Bill No. 913 became chapter 859 of the 1945 Laws, Stats. 1945, p. 1572. Such action of the Legislature forcefully demonstrates that it appreciated that a substantial change in the wording of section 8(h) would be required to effect a different basis for allowance of the dividend deduction as previously provided and construed; and that it decided to adhere to the premise of the Green Investment Company case in the construction of said section.

[7] For these reasons we conclude that plaintiff was entitled to deduct the Ventura dividend in full on its respective franchise tax returns covering its 1937 and 1938 income.

The judgments are, and each of them is, affirmed.

SHENK, EDMONDS, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I dissent.

The allowance of the deduction in section 8(h) of the Bank and Corporation Franchise Tax Act is designed solely to prevent double taxation of corporate income by this state. This section was drafted to cover dividends generally; it was not aimed particularly at dividends declared out of earnings or profits not included in the measure of the tax because of the percentage depletion deduction. Dividends out of earnings or profits not included in the measure of the tax on the dividend-declaring corporation because of the percentage depletion deduction are on the

same footing as any other dividends out of earnings or profits not included in the measure of the tax on such corporation. Earnings or profits may be excluded from the measure of the tax for a variety of reasons other than the percentage depletion deduction. They may represent income earned by the dividend-declaring corporation from business outside of this state; they may have been accumulated before the effective date of the act; they may have been declared by a corporation not taxable under the Bank and Corporation Franchise Tax Act. Whatever the reason earnings or profits of the dividend-declaring corporation are not included in the measure of the tax on such corporation, a recipient corporation cannot deduct dividends delared out of such earnings or profits, for the deduction is expressly limited to dividends declared out of income that was included in the measure of the tax.

If all of the net income of a corporation is derived from business in California, and all of its earnings or profits are included in the measure of the tax, all dividends declared out of such earnings or profits will be deductible by the recipient corporations. The same income would be taxed twice if it were included in the measure of the tax on the dividend-declaring corporation and included again in the measure of the tax on the recipient corporations. If none of the income of the dividend-declaring corporation is included in the measure of the tax on such corporation, none of its dividends will be deductible by the recipient corporations. Thus the dividend-declaring corporation may be a foreign corporation that does no business in California and is not subject to the act; it may be a Federal Reserve Bank not subject to state taxation; it may be an insurance company not subject to taxation on or measured by net income; it may have earned the income in question before the effective date of the Bank and Corporation Franchise Tax Act.

The income of the dividend-declaring corporation may be derived in part from business carried on outside the state. Income from out of state business is not included in the measure of the tax and consequently dividends representing such income are not deductible by the recipient corporations.

The deduction is allowed only when the earnings or profits out of which the dividends are declared have been included in the measure of the tax on the corporation declaring the dividends. For example: X Corporation, which derives all its income from business done in this state, declares a dividend from its earnings or profits to Y, a foreign corporation not subject to the act, which in turn, out of the money received declares a dividend to Z, which is taxable under the act. Since the earnings or profits from which the dividend was declared by Y was not included in the measure of a tax under the Act on Y, the dividend is not deductible by Z. Even if Y did business in California, and was therefore taxable under the act, Z could not deduct the dividend, since the earnings or profits from which the dividend was declared would not be included in the measure of the tax on Y because the dividend would be deductible by Y under section 8(h).

A dividend may be declared by a foreign corporation that operates an oil well outside this state and does no business here. It may have no net income for purposes of taxation, and yet have earnings or profits for dividend purposes. A California corporation receiving such a dividend could not deduct the amount thereof under section 8(h), for the earnings or profits out of which it was declared were not included in the measure of the tax by this state on the dividend-declaring corporation. The result would be no different if the dividend-declaring corporation were a California corporation operating its oil well in this state. Since it would have no net income under the act, it would pay the minimum tax of $25. Yet it would have earnings or profits from which to declare dividends to its shareholders. Such dividends would not be deductible for the reason that prevails in all cases in which dividends are not deductible, namely, the earnings or profits out of which the dividends are declared would not be included in the measure of the tax on the dividend-declaring corporation.

In the foregoing example, the dividend-declaring corporation had no net income.

The principle that the deduction is allowed only to the extent necessary to prevent double taxation by this state is equally applicable when the dividend-declaring corporation has net income. Thus a California oil company after deducting percentage depletion, may have net income for tax purposes of $500,000 but earnings or profits of $1,000,000 for dividend distributions. If the earnings or profits are distributed as a dividend to a California corporation, only one-half of the dividend will be deductible, since the measure of the tax on the dividend-declaring corporation will include only one-half of the earnings or profits out of which the dividend is declared.

In the present cases, the earnings or profits from which the dividends were declared likewise exceeded the net income by which the tax on the dividend-declaring corporation was measured, and there has obviously been no tax measured by such excess. To the extent they represent such excess, dividends cannot be deducted without defeating the purpose of section 8(h) to limit the deduction to the extent necessary to prevent double taxation.

Not only the purpose of section 8(h) but its express provisions preclude a deduction in their entirety of the dividends in question. Section 8(h) as amended in 1937 provides: "Section 8: In computing 'net income' the following deductions shall be allowed: * * * (h) Dividends received during the income year from a bank or corporation doing business in this State declared from income which has been included in the measure of the tax imposed by this act upon the bank or corporation declaring the dividend." In 1939 the Legislature added the following to section 8(h): "or from income which has been taxed under the provisions of the Corporation Income Tax Act of 1937 [1] to the corporation declaring the dividends."

The purpose of this provision can be grasped only if its terms are understood. The "measure of the tax imposed by this act" is net income. §§ 1, 2, 4. "Net income" is defined in section 7 of the act to mean "gross income" as defined in section 6, less the deductions provided for in section 8. "Dividends" mean "any distribution made by a corporation to its shareholders * * * out of its earnings or profits * * *." [2] § 6(c) (1). "Earnings or profits," generally speaking, mean gross receipts less the expense of producing them. Weyerhaeuser, 33 B.T.A. 594, 597; Ayer, 12 B.T.A. 284, 287. Since dividends are declared, not from statutory gross income or statutory net income, but from earnings or profits, and only from earnings or profits, the word "income" in the phrase "Dividends * * * declared from income * * *" necessarily means earnings or profits.

Since net income (statutory gross income less statutory deductions) and earnings or profits (gross receipts less the expense of producing them) are computed differently, they will usually not be the same. If the earnings or profits exceed net income, it follows as a mathematical certainty that part of the earnings of profits have not been included in the measure of the tax and that the dividends declared out of such earnings or profits are not fully deductible.

The following illustrations, cited by defendant, show the difference between net income and earnings or profits and demonstrate that dividends may be declared from earnings or profits that have not been included in the measure of the tax. A domestic corporation, engaged in activities solely within this state, receives gross income of $100,000 and pays salaries amounting to $40,000, rent amounting to $25,000 and federal income taxes amounting to $15,000. For purposes of computing earnings or profits all of these items are taken into consideration, but for purposes of com-

[1] The Corporation Income Tax Act supplements the Bank and Corporation Franchise Tax Act and imposes a tax on the net income of certain corporations not subject to the latter act. See West Publishing Co. v. McColgan, 27 Cal.2d 705, 708, 166 P.2d 861.

[2] This definition was added in 1939. The Franchise Tax Commissioner, following the federal income tax law on which the state act is based, ascribed the same meaning to the term "dividend" in the administration of the act before this definition was added.

puting net income, federal income taxes are not, since they are not deductible under the act. Thus we have the following comparison:

| *Earnings or Profits* | | |
|---|---|---|
| Gross Income | | $100,000 |
| Minus | | |
| Salaries | $40,000 | |
| Rent | 25,000 | |
| Federal Income Taxes | 15,000 | 80,000 |
| Earnings or profits | | $20,000 |

| *Net Income* | | |
|---|---|---|
| Gross Income | | $100,000 |
| Minus | | |
| Salaries | $40,000 | |
| Rent | 25,000 | 65,000 |
| | | $35,000 |

In the foregoing illustration, the statutory net income is greater than the earnings or profits because federal income taxes are not deductible in computing net income. Since the net income includes all the earnings and profits (it even exceeds them), any dividends declared out of such earnings or profits will represent income included in the measure of the tax, and will therefore be fully deductible. The reverse may be true. Suppose the same facts as above except that the corporation engages in activities both within and without the state and that under an appropriate allocation formula only 30 per cent of its net income is attributable to this state. The comparison would then be:

| | |
|---|---|
| Earnings or profits | $20,000 |

| | |
|---|---|
| Total Net Income | $35,000 |
| Net income attributable to California | 30% |
| | $10,500 |

In the foregoing illustration the earnings or profits are greater than the net income by which the tax is measured because net income not attributable to California is excluded from the measure of the tax. Dividends declared out of earnings or profits representing such income will therefore not be deductible.

Similarly, dividends declared out of earnings or profits excluded from the measure of the tax by virtue of the deduction for percentage depletion are not deductible. It makes no difference whether percentage depletion is allowed as an exemption, an exclusion from gross income, or as a deduction from gross income. Income representing the allowance for depletion is as effectively excluded from the measure of the tax by way of deduction as it would be by way of an exemption or exclusion from gross income. The figure that is left after the deductions are taken is net income. That part of the gross income accounted for by deductions cannot possibly be included in net income, for the deductions exclude the amount thereof from the net income. Most of the deductions will represent outlays made in earning the gross income, and since such outlays cannot be the source of dividends, no problem with respect thereto can arise under section 8(h). The problem presented in the instant cases can arise only when the item deducted is itself income that is part of the corporation's earnings and profits. When the deduction for depletion represents a return of the corporation's capital, any dividend distribution represented by the amount of such deduction would be a return of capital to the shareholders and would lower the basis of the stock for computing gain or loss. If the depletion allowance does not represent a return of capital it can only represent earnings and profits (See Rudick, "Dividends and "Earnings or Profits" Under The Income Tax Law, 89 U. of Pa. L.Rev., 865, 866; 1 Mertens' Law of Federal Income Taxation, 472; Ayer, 12 B.T.A. 284; Treas.Reg. 111, § 29.115-3) that are not included in the measure of the tax. Since such earnings and profits are not

included in the corporation's net income and therefore not included in the measure of the tax, dividends declared therefrom do not meet the requirements of section 8(h) as dividends "declared from income which has been included in the measure of the tax."

Suppose a domestic corporation is engaged in activities solely within this state. Suppose further that it receives gross income in the amount of $130,000, including royalties from oil and gas wells in the amount of $100,000, and that the corporation pays salaries of $40,000, and that it does not have any cost depletion but takes a deduction for depletion equal to 27½ per cent of the $1000,000, or $27,500. The comparative computations would then be:

| *Earnings or Profits* | | |
|---|---|---|
| Gross Income | | $130,000 |
| Minus | | |
| Salaries | $40,000 | |
| Rent | 25,000 | |
| Federal Income Taxes | 15,000 | 80,000 |
| Earnings or profits | | $50,000 |

| *Net Income* | | |
|---|---|---|
| Gross Income | | $130,000 |
| Minus | | |
| Salaries | $40,000 | |
| Rent | 25,000 | |
| Percentage Depletion | 27,500 | 92,500 |
| Net Income | | $37,500 |

In this illustration nothing is subtracted for depletion in computing earnings or profits because there was no depletion cost, and nothing is subtracted for federal income taxes in computing net income because the act does not provide for a deduction for federal income taxes. On the other hand, federal income taxes are subtracted in computing earnings or profits because they are an expense, and percentage depletion is deducted in computing net income because the act provides for such a deduction. In this illustration the earnings or profits exceed the net income by $12,500, and it is mathematically impossible for such excess to be included in the net income. Consequently, dividends cannot be deducted to the extent they are declared out of such excess.

In the present cases, the "net income" of the Ventura Land and Water Company (hereinafter called "Ventura") for tax purposes for the year 1937 was $775,282.65. It was stipulated that the earnings or profits of Ventura for that year were $963,338.63. The two figures differ for the following reasons: The "earnings or profits" were not reduced on account of cost of depletion because there was none, but in computing "net income," $328,836.47 was deductible as percentage depletion, because this deduction was provided for by statute. On the other hand, Ventura had outlays of $110,372.58 for federal income taxes, $30,157.90 for California franchise tax and $250 as non-deductible contributions, all of which served to reduce Ventura's "earnings or profits," because they constituted expenses, but none of which was deductible in computing "net income" for franchise tax purposes, because the act does not provide for such deductions. Thus, although Ventura's "net income" for franchise tax purposes for the income year 1937 was $775,282.65, its "earnings or profits" (the fund available for distribution of dividends) for that year amounted to $963,338.63, or $188,055.98 more than its net income. The excess for 1938 was $203,976.28.

As in the preceding example, it is mathematically impossible for the earnings or profits in excess of the net income to be included in the net income. Consequently, at least to the extent the dividends represent such excess, they are not deductible.

Plaintiff contends, and the majority opinion sustains the contention, that the phrase "income which has been included in the measure of the tax" refers to "gross income subject to taxation by the state" and since that item would include earnings and profits attributable to California sources, dividends paid therefrom would be "declared from income which has been included in the measure of the tax."

The Bank and Corporation Franchise Tax Act imposes a tax "according to or measured by its net income." §§ 1, 2, 4. How could the Legislature state in plainer terms that "net income" is the measure of the tax? In the light of this language how can it be seriously contended that the measure of the tax is "gross income subject to taxation by the state?" Plaintiff confuses the measure of the tax with its computation. It is true that gross income is a necessary factor in computing net income. So are the deductions allowed, but that does not make them the measure of the tax. Any gross income that remains after deductions are taken is included in the measure of the tax, but it is logically and mathematically impossible for any gross income that is represented by such deductions to be included therein. In concrete figures, plaintiff's contention amounts to saying that if a corporation has gross income of $100,000 and is allowed deductions of $50,000, leaving a net income of $50,000, then the whole $100,000 has been included in the net of $50,000.

Any possible doubt that section 8(h) requires the source of the dividend to be included in the net income of the dividend declaring corporation has been dispelled by the 1939 amendment adding the phrase "or from income which has been taxed under the provisions of the Corporation Income Tax Act of 1937 to the corporation declaring the dividends." The purpose of this amendment is to place corporate shareholders of corporations taxable under the Corporation Income Tax Act on an equal footing with corporate shareholders of corporations taxable under the Bank and Corporation Franchise Tax Act. The two acts are complementary. See West Publishing Co. v. McColgan, 27 Cal.2d 705, 708, 166 P.2d 861. The rate of tax is the same and the provisions for the two acts are correlated. The essential difference between them is that in the former the subject of the tax is net income, in the latter the subject of the tax is the privilege of doing business in this state in corporate form, and net income is the measure of the tax. Since the Corporation Income Tax Act is imposed directly on net income, the 1939 amendment does not use the phrase "income included in the measure of the tax." Had the Legislature intended the phrase as used with respect to corporations subject to the Bank and Corporation Franchise Tax Act to mean gross income it would have provided in the 1939 amendment for the deduction of dividends declared from gross income rather than from income taxed under the Corporation Income Tax Act.

Assume for the purposes of argument that "income" as used in section 8(h) means "gross income" as plaintiff contends. Section 8(h) would then be construed as if it read, "Dividends received during the income year declared from gross income which has been included in the measure of the tax." Even this construction would not support plaintiff's contention, for the section would still contain the qualifying phrase, "which has been included in the measure of the tax" a phrase that recognizes unequivocally that not all "gross income" is included in the measure of the tax.

Only if all gross income is included in the measure of the tax can plaintiff's contention be sustained. In the foregoing discussion it has been demonstrated that when the earnings or profits out of which dividends have been declared exceed the statutory net income of the dividend-declaring corporation, it is mathematically impossible for all of the gross income to be included in the measure of the tax on such corporation. Confusing net income with the process of computing it, plaintiff contends that all gross income is included in the measure of the tax because it is "income which has been taken into account" or "income which has been through the tax mill" or "income which has been flailed by the tax master." This contention would render meaningless the limitation of the deduction to "dividends declared from income which has been included in the measure of the tax," for the gross income of all corporations taxable under the act is "taken into account" or goes "through the tax mill" or is "flailed by the tax master." Accordingly, dividends declared by such corporations would be deductible in their entirety.

Thus the entire gross income of a corporation doing business within and without this state is "taken into account" in computing its tax. The corporation is required to report its gross income from all sources, both within and without the state, and the net income that is arrived at after taking the statutory deductions is allocated part to this state and the remainder to the other states, usually by means of a formula. Butler Bros. v. McColgan, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991. Thus for purposes of illustration, suppose a corporation that does business in California and in other states has a total gross income from all its business for a particular year of $1,000,000, earnings or profits of $800,000, and net income of $600,000, of which $60,000 is attributable to California. If the corporation then pays out the entire $800,000 of earnings or profits as dividends to California corporations whose only activities were in this state, the view that all amounts that have been taken into account as "gross income" have thereby been included in the measure of the tax would mean that the California corporations receiving these dividends amounting to $800,000 could deduct them in their entirety although the corporation declaring the dividends had only paid a tax measured by $60,000. Certainly no such result is necessary to avoid double taxation by this state, and plaintiff concedes that such dividends would not be fully deductible. Yet such dividends meet the conditions urged by plaintiff for the deduction of the dividends in question, for all the gross income of the dividend-declaring corporation was "taken into account," "went through the tax mill" and was "flailed by the tax master."

Plaintiff's suggestion that the disputed phrase in section 8(h) should be interpreted to mean "gross income attributable to California sources" is not only administratively unworkable but is inconsistent with the basic structure of the act. With respect to a corporation doing business within and without the state, the act provides, not for the ascertainment of the gross income attributable to this state, but for the ascertainment of the net income attributable to this state. Such a corporation is required to report its gross income from all sources within and without the state; all applicable deductions are taken, and the total net income is determined. Part of this total is then allocated to this state. Ordinarily, in the cases of businesses conducted within and without the state there is no feasible way of determining what part of the gross income or of the deductions is attributable to this state. Consequently, the act provides for a determination of the amount of net income earned by the business as a whole and then for an allocation of part of that income to this state.

It is contended that it is anomalous for the Legislature to allow oil companies a deduction for depletion that is more than sufficient for a recovery of costs and then in effect to nullify the tax savings derived by the dividend-declaring corporation from percentage depletion by denying their corporate shareholders a deduction for dividends out of earnings or profits represented by the depletion deduction. The extent to which income is taxed and the extent to which deductions are allowed is entirely a matter of legislative discretion so long as constitutional restrictions are observed. The Legislature has seen fit to allow a deduction for depletion in the terms prescribed. It has also seen fit to deny a deduction for dividends unless double taxation by this state would result. Whether it was wise for the Legislature to do either of these things is of no concern here. The Legislature has not chosen, as it could have, to require domestic corporations to include their entire net income, including income from out of state business, in the measure of the tax. Yet it denies corporate shareholders of such corporations a deduction for dividends declared out of earnings or profits from out of state business, and the very reason it does so is that such earnings or profits are not included in the measure of the tax on the dividend-declaring corporation. There is no more reason to grant corporate shareholders of oil companies a deduction for dividends out of earnings or profits excluded from the measure of the tax on such companies by way of the deduction for percentage depletion than there would be to grant corporate shareholders of domestic corpora-

tions a deduction for dividends declared from earnings or profits excluded from the measure of the tax on such corporations because derived from out of state business. In each case the recipient corporations are denied the deduction because the tax savings allowed the dividend-declaring corporation preclude double taxation by this state.

Section 3 of the Corporation Income Tax Act provides: "provided, however, that the income of any corporation which is included in the measure of the tax imposed by the Bank and Corporation Franchise Tax Act, Statutes 1929, Chapter 13, as amended, shall not be subject to the tax imposed by this act * * *." Plaintiff contends that if the Bank and Corporation Franchise Tax Act applies, the Corporation Income Tax Act does not apply and that since this is the clear meaning of section 3 it follows that the phrase "included in the measure of the tax" in section 3 of the Corporation Income Tax Act must mean gross income from California sources. The purpose of the Corporation Income Tax Act is to prevent discrimination against corporations subject to the Bank and Corporation Franchise Tax Act. Since the subject of the tax in the latter act is the privilege of exercising corporate franchises in this state, decisions of the Uuited States Supreme Court prevent its application to foreign corporations engaged exclusively in interstate commerce. See cases cited in West Publishing Co. v. McColgan, 27 Cal. 2d 705, 708, 166 P.2d 861. A tax on the net income of such corporations, however, is valid, and the Corporation Income Tax Act imposes such a tax. Id., 27 Cal.2d at page 709, 166 P.2d at page 861; West Publishing Co. v. McColgan, 66 S.Ct. 1378. In order to avoid any suggestion of discrimination against interstate commerce the act was made applicable to the income of all corporations derived from sources within this state, including the income of corporations taxable under the Bank and Corporation Franchise Tax Act. In order to prevent discrimination against corporations taxable under the latter act by the imposition of a double tax burden thereon, section 3 of the Corporation Income Tax Act was added to exempt the income included in the measure of the tax on such corporations. If that were the only exemption provision in the Corporation Income Tax Act, other income, such as income from out of state business, from dividends for which a deduction is allowed, and income represented by the depletion deduction would be taxable under the Corporation Income Tax Act. That act, however, contains other provisions identical with provisions of the Bank and Corporation Franchise Tax Act that allow a deduction for dividends (§ 7(h) and percentage depletion (§ 7(g) and that exclude income from out of state business. § 3, 13. Thus the exemption of such income in the Corporation Income Tax Act arises because of specific provisions of that act and not from any theory that gross income is included in the measure of the Bank and Corporation Franchise Tax within the meaning of section 3 of the Corporation Income Tax Act.

A comprehensive tax statute such as the Bank and Corporation Franchise Tax Act exemplifies intricate draftsmanship; it evolves out of the painstaking deliberations and studies not only of public officials but of others interested in tax legislation. Such a statute, wrought from a consideration of many conflicting interests, cannot long retain unity and coherence if one section or another is refabricated by the courts without regard for the structural whole. The technical concepts of the statute, its express provisions, should not lightly be vitiated by facile phrases such as "gone through the tax mill" or "flailed by the taxmaster" that denote a lack of insight into the legislative purpose that binds together the provisions of the statute. If the express words of the statute are overridden by such phrases neither taxpayers nor tax officials can look to the written word of the statute for its authentic meaning, and the already difficult task of understanding the revenue acts becomes hopeless.

The majority opinion relies heavily on the case of Burton E. Green Investment Co. v. McColgan, 60 Cal.App.2d 224, 140 P.2d 451, petition for hearing denied by this court. That case unquestionably supports plaintiff's contentions, but in my opinion

it was erroneously decided and should be disapproved. It is contended, however, that section 8(h) was not amended at the regular session or the two special sessions of the Legislature after the decision in that case, that in 1945 a Senate committee rejected a proposed amendment providing that dividends were deductible only in the ratio of the dividend-declaring corporation's earnings or profits to its net income, and that therefore the Legislature adopted the court's construction of the act in the Green case. The opinion in the Green case, however, contains so many errors fundamentally at variance with many provisions of the act that the Legislature cannot reasonably be presumed to have adopted the construction of the act in that case. These errors will be briefly described.

(1) The court in the Green case states, 60 Cal.App.2d 224, 231, 140 P.2d 451, 455, that net income "does not constitute the 'measure of the tax.' The income included in the measure of the tax is all income." These statements repudiate the following express provisions of the act: "Every national banking association located within the limits of this State, shall annually pay to the State a tax *according to or measured by its net income,* to be computed, in the manner hereinafter provided, upon the basis of its *net income* for the next preceding fiscal or calendar year * * *." (§ 1; italics added.) "Every bank, other than a national banking association doing business within the limits of this State, shall annually pay to the State for the privilege of exercising its corporate franchises within this State, a tax *according to or measured by its net income,* to be computed, in the manner hereinafter provided, upon the basis of its *net income* for the next preceding fiscal or calendar year * * *." (§ 2; italics added.) "Every financial corporation doing business within the limits of this State * * * shall annually pay to the State for the privilege of exercising its corporate franchises within this State, a tax *according to or measured by its net income,* to be computed, in the manner hereinafter provided, upon the basis of its *net income* * * *." (§ 4(1); Italics added.) "With the exception of financial corporations, every corporation doing business within the limits of this State * * * shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax *according to or measured by its net income,* to be computed, in the manner hereinafter provided, * * * upon the basis of its *net income* for the next preceding fiscal or calendar year * * *." (§ 4(3); Italics added.) If the income included in the measure of the tax were all income, as the court in the Green case states it is, the tax on national banks would be invalid under section 5219 of the United States Revised Statutes, 12 U.S.C.A. § 548, for, while that section authorizes a tax on national banks according to or measured by their net income, it does not authorize a tax measured by all their income. Can it reasonably be contended that the Legislature adopted a construction that would not only repudiate express provisions of the act but invalidate the tax on national banks?

(2) The court in the Green case states, 60 Cal.App.2d 224, 233, 140 P.2d 451, that proof of the legislative intention is to be found in section 9(d), which was also enacted in 1937. That section provides: "In computing net income no deduction shall be allowed for: * * * (d) Any amount otherwise allowable as a deduction which is allocable to one or more classes of income not included in the measure of the tax imposed by this act." The court states that the word "income" is used in section 9(d) in the sense of "gross income" and that the word "income" in section 8 (h) must have been used in the same sense. Why must it? The two sections serve different purposes and there is no necessary relation between them. Assume, however, for the purpose of argument, that the word "income" means "gross income" in both sections. The court also states, 60 Cal.App. 2d 224, 231, 140 P.2d 451, that all income is included in the measure of the tax. Yet section 9(d) specifically refers to "classes of income [which have] not [been] included in the measure of the tax * * *." If all income is included in the measure of the tax, as the court says it is, how can there be classes of income that have not been included in the measure of the tax? The court's reasoning renders section 9(d)

meaningless, for, if, as the court says, all income is included in the measure of the tax, there would never be a case in which items of income had not been included in the measure of the tax, and hence, there never would be a case in which any amount was allocable to one or more classes of income not included in the measure of the tax.

In section 9(d) the Legislature was not concerned with the question whether the classes of income referred to were either "gross income" or "net income." There are several reasons why a class of income may not have been included in the measure of the tax; it may be a class of income that has been excluded from the statutory definition of gross income, e. g. amounts received under life insurance policies (§ 6(b); it may be a class of income, which, although required to be reported in gross income is fully deductible, such as income from business activities of certain types of corporations (§§ 8(1) and 8(m); or it may be a class of income that is allocated to other states because it is derived from sources outside this state, e. g. income from intangibles having a situs outside the state. § 10.

(3) The court in the Green case states, 60 Cal.App.2d 224, 235, 140 P.2d 451, 457, that "the Act make[s] no provision for computing depletion on the basis of cost." This statement is erroneous. Section 8(g) of the act as amended in 1937 incorporated by reference the provisions of section 113 and 114 of the federal Revenue Act of 1936, 26 U.S.C.A. Int.Rev.Acts, pages 859, 866. Since 1939 these provisions have been set forth in full in the California Act. Under these provisions, a deduction may be taken for either cost depletion or percentage depletion, whichever is greater. Hence, if cost depletion exceeds percentage depletion a deduction for cost depletion may be taken. Certainly, the Legislature did not adopt a construction of the act that repudiates so vital a provision.

(4) The court in the Green case erroneously assumed that percentage depletion represents an exhaustion of capital and that the dividends were fully deductible to prevent a tax on capital. The court states, 60 Cal.App.2d 224, 234, 140 P.2d 451, 456, that "Whatever method of computing depletion be followed * * * the purpose is to leave in the hands of the taxpayer unappropriated that portion of the cost attributable to the amount of capital exhausted in earning the income on which any variety of tax is to be paid * * *. In view of the extreme difficulty of devising a precise formula * * * it was obviously determined that depletion based upon a percentage of the gross income from the mineral or oil deposit must closely approximate the actual physical exhaustion. * * * If it represents a positive exhaustion of the capital it should be deducted by the owner of the property as a method of avoiding the exhaustion of capital. If it is properly deducted in computing the oil operator's income for dividend purposes it should not thereafter be charged to the recipient corporation in computing his income for franchise tax purposes. To avoid such a hardship the recipient is authorized to deduct the dividend * * *."

The foregoing statement is in error on at least three counts: (a) Percentage depletion does not necessarily represent an exhaustion of capital. "Percentage depletion is not based on cost and in many cases taxpayers recover tax free by way of percentage depletion far in excess of the cost of their oil properties. * * *" Estate of Japhet, 3 T.C. 86. The percentage depletion deduction may continue, as here, after cost or capital invested has been completely recovered. Thus, in the present cases Ventura had deductions of $328,836.47 and $384,872.10 for percentage depletion in the two years here involved. It is stipulated that Ventura fully recovered its cost or capital in prior years. Therefore, there can be no question of "invasion of capital" since Ventura has completely recovered its capital investment in prior years. There also was no question of invasion of capital in the Green case.

(b) Percentage depletion in excess of cost depletion is not deductible in computing earnings or profits for dividend purposes. Ayer, 12 B.T.A. 284; Wood, 3 T.C. 186, 187; see, Rudick, *"Dividends" and "Earnings or Profits" under The Income Tax Law*, 89 U. of Pa.L.Rev., 865, 886; 1

Mertens, Law of Federal Income Taxation 472. Plaintiff in the present cases recognized this and stipulated to the computations of "earnings or profits" for the years involved. These computations plainly show that percentage depletion in excess of cost depletion is not a deductible item in computing the fund available for dividends.

(c) If a corporate distribution is a "dividend" within the meaning of the act, then necessarily no element of capital can be present in the distribution. "Dividends" are specifically defined in the act (§ 6(1) as distributions out of earnings or profits. In computing "earnings or profits" available for dividends, a deduction for cost depletion is always allowed as long as there is any cost to be recovered. Any distribution out of capital would not be a "dividend" because it would not be made out of earnings or profits. If a distribution is made out of capital it does not constitute a dividend and the recipient cannot claim a deduction for it under section 8(h), which permits a deduction only for dividends. A distribution out of capital reduces the basis for tax purposes of the stock held by recipients of the distribution, but cannot constitute a dividend. Since a dividend is defined as a distribution out of "earnings or profits," it follows that any corporate distribution that constitutes a dividend cannot represent an invasion of capital. The distributions in the Green case were admitted to be dividends. Hence the conclusion of the court that a deduction of the Belridge dividends was necessary to prevent a tax on capital was clearly in error.

(5) The court in the Green case erroneously stated, 60 Cal.App.2d 224, 233, 140 P.2d 451, that the 1937 amendment to section 8(h) was not intended to alter its meaning as expressed in 1933. A comparison of the amended sections and a list of the changes effected will show the extent of the court's error. Section 8(h) as amended in 1933 (Stats.1933 ch. 209) provided: "In computing 'net income' the following deductions shall be allowed: * * * (h) Dividends received during the taxable year from a bank or corporation doing business in this State declared from income arising out of business done in this State; * * *. The provisions of this subsection shall not apply to dividends received from corporations not taxable under article thirteen of the Constitution of this State * * *." Section 8(h) as amended in 1937 provided: "Dividends received during the income year from a bank or corporation doing business in this State declared from income which has been included in the measure of the tax imposed by this act upon the bank or corporation declaring the dividends." The most obvious change made by the 1937 amendment was to restrict the deduction to dividends declared by corporations taxable under the act, as contrasted with the 1933 section, which permitted the deduction as long as the declarer corporation was doing business in the state and was subject to tax under article XIII of the Constitution. Thus, for example, dividends from insurance companies would be deductible under the 1933 act, but not under the 1937 act. Another obvious change was the restriction of the dividend deduction to distributions from income that had been included in the measure of the tax imposed upon the *corporation declaring the dividends*. The insertion of this restriction was prompted by the decision in Corporation of America v. Johnson, 7 Cal.2d 295, 60 P.2d 417, which interpreted the language "income arising out of business done in this State," which appeared in the 1929 version of section 8(h) as not restricted to income from business done by the corporation declaring the dividends. Since the same phrase "income arising out of business done in this State" was present in the 1933 provisions of section 8(h) presumably the rule of the Corporation of America case applied to it except as restricted by other conditions in the 1933 act.

The plaintiff seeks to dismiss these errors as "rhetorical imperfections." They cannot be dismissed so lightly, for they were the very premises on which the court based its interpretation of the statute. This court's denial of a hearing in the Green case, does not constitute approval of the propositions of law laid down in the opinion of the District Court of Appeal.

Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 167, 168, 78 P.2d 731, 117 A.L.R. 838; Bohn v. Bohn, 164 Cal. 532, 537, 538, 129 P. 981, 983.[3] In Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604, 125 A.L.R. 1368, the United States Supreme Court said that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." In the present case not even the reexamination of this court's own doctrines is involved.

Rules of statutory construction are at best only aids in ascertaining the legislative purpose. One of those aids has here been seized upon, in disregard of the plain signposts within the statute and the basic concepts underlying it, to establish administratively unworkable conditions, accord unequal treatment to dividends, and open the way to a more extensive deduction than necessary to achieve the legislative purpose of avoiding double taxation.

Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, directly involved the question whether failure to amend a statute after a judicial construction thereof constituted congressional adoption of that construction. The court said: "We conclude that the Schwimmer [United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889], Macintosh [United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302] and Bland [United States v. Bland, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319] cases do not state the correct rule of law. We are met, however, with the argument that even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, in 1940 when the new Naturalization Act was passed [8 U.S.C.A. § 501 et seq.] Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the Schwimmer, Macintosh and Bland cases. * * *

"It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the Schwimmer, Macintosh and Bland cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." 66 S.Ct. 826, 830.

The foregoing statement is particularly applicable here, where it is contended that the silence of the Legislature in 1945 establishes the intention of the Legislature that enacted the provision some eight years previously, even though administrative construction antedating the Green case and in

[3] In Bohn v. Bohn, supra, the court declared: "Our further examination of the case has led us to the conclusion that the department opinion was correct. The principal reason for granting a hearing in bank was that, in a case between the same parties, presenting precisely the same issues of fact and law, the District Court of Appeal for the Second appellate district had reversed an order like the one here appealed from, and that a petition to have the appeal transferred to this court for hearing and determination had been denied. Bohn v. Bohn, 16 Cal.App. 179, 116 P. 568. It is, of course, much to be regretted that opposite rulings should be made in two cases which present identical questions. But an order of this court, refusing to transfer a cause after judgment in the District Court of Appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the district court of appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects."

contradiction with it was followed by reenactment of the section without change. It would be as logical to contend that the Legislature thereby adopted the administrative construction. Although legislative silence may sometimes give a clue to legislative intention, it is by no means conclusive. Whitcomb Hotel, Inc., v. California Emp. Comm., 24 Cal.2d 753, 756–758, 151 P.2d 233, 155 A.L.R. 405.

The conclusion that legislative silence constitutes approval of what the courts have done, as Mr. Justice Rutledge so aptly stated in his concurring opinion in Cleveland v. United States, 67 S.Ct. 13, 17, "must be derived by a form of negative inference, a process lending itself to much guesswork."

This view is forcefully amplified in that opinion as follows:

"There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will. And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See Moore v. Cleveland R. Co., 6 Cir., 108 F.2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see, Girouard v. United States, supra, * * * as they ought to do when experience has confirmed or demonstrated the error's existence.

"The danger of imputing to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes, ideas entertained by the Court concerning Congress' will, is illustrated most dramatically perhaps by the vacillating and contradictory courses pursued in the long line of decisions imputing to 'the silence of Congress' varied effects in commerce clause cases. That danger may be and often is equally present in others. More often than not the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all. Cf. United States v. American Trucking Ass'ns, 310 U.S. 534, 550, 60 S.Ct. 1059, 84 L.Ed. 1345. At best the contrary view can be only an inference, altogether lacking in the normal evidences of legislative intent and often subject to varying views of that intent. In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation."

GIBSON, C. J., and CARTER, J., concurred.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.




78 Cal.App.2d 432

**BARRON-GRAY PACKING CO. v. TAPLEY et al.**

**Civ. 7284; Sac. 5783.**

District Court of Appeal, Third District, California.

March 7, 1947.

As Modified on Denial of Rehearing April 5, 1947.

**Chattel mortgages ⇐138(1)**
**Vendor and purchaser ⇐260(1)**

Where original lease of peach orchard provided that lessor was to receive as rental one-third of crop, and lease, with express reservation in lessor of one-third of crop, was assigned, and lessor thereafter executed contract for sale of orchard, reserving "a share rental of 25 per cent." belonging to lessor, and purchasers gave chattel mortgage on peach crop to bank

which had full knowledge of terms of lease, assignment, and contract of sale, and purchasers assigned to bank all proceeds from sale of peach crop payable to purchasers of orchard from buyer of peach crop, lessor's vendor's lien took precedence over the subsequent chattel mortgage of purchasers and purported assignment to the bank. Civ.Code § 3046.

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Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by the Barron-Gray Packing Company, a corporation, against J. F. Tapley, Nellie Tapley, Ray Simmons, Minnie Simmons, the Bank of America National Trust & Savings Association, Shosahu Sasaki, and William F. Jackson, to determine the ownership of the purchase price of a crop of peaches purchased by the plaintiff, wherein the Bank of America National Trust & Savings Association, a national banking association, filed an answer and cross-complaint, and wherein Ray Simmons, Minnie E. Simmons, J. F. Tapley, Nellie Tapley, Shosahu Sasaki, and William F. Jackson filed an answer to the cross-complaint. From a judgment in favor of J. F. Tapley and Nellie Tapley as to an undivided one-fourth interest in the proceeds of the sale, and for the Bank of America National Trust & Savings Association against Ray Simmons and Minnie Simmons, the Bank of America National Trust & Savings Association appeals.

Judgment affirmed.

Rich Weis, Carlin & Fuidge, of Marysville, for appellant.

Manwell & Manwell, of Marysville, for respondent.

THOMPSON, Justice.

This is a suit by the purchaser of a crop of peaches to determine the ownership of the purchase price thereof, as between the vendors of the land, who specifically reserved a lien for 25% of the unharvested crop of 1944 by the express terms of an executory contract to sell the land, and the subsequent mortgagee of the crop and chattel mortgage, with knowledge of the terms of the contract. The Bank of America filed an answer and cross-complaint. The answer of the vendors to the cross-complaint pleaded the facts of the entire transaction and their claim of lien and ownership of one-fourth share in the crop and proceeds thereof to apply on the unpaid purchase price of the land.

The defendant J. F. Tapley owned 312 acres of farm land in Yuba County, upon which there is a peach orchard containing 25 acres of land. October 1, 1941, Tapley leased the peach orchard to S. Sasaki for three years ending October 15, 1944, for consideration of 25% of the crop produced in 1942 and 1943, and 33⅓% of the crop of 1944. It was stipulated the lease could not be assigned without consent of the owner. June 30, 1942, the lease was assigned to W. F. Jackson, with the written consent of Tapley. March 18, 1943, J. F. Tapley and wife contracted in writing to sell the 312 acre ranch to Ray Simmons and wife for $31,200, payable in specified installments. The contract of sale expressly reserved 25% of the "crop share rental", as provided in the lease to Jackson. The contract also provided that "the landlord's share for the rental of said peach orchard shall be delivered to the cannery or canneries agreed upon." The purchasers immediately took possession of the ranch, except that Jackson retained the right to harvest the crop of peaches for the year 1944.

May 4, 1944, Ray Simmons and his wife, the purchasers of the ranch on said executory contract of sale, executed a promissory note for the sum of $5,400 to the Bank of America, payable on September 25, 1944, secured by a crop and chattel mortgage on the peach crop of 1944, and on specified farm machinery. June 29, 1944, Ray Simmons purported to assign to the Bank of America all proceeds of said crop of peaches which were *payable to him* from the Barron-Gray Packing Company, to which that crop was sold. Before the loan was made by the bank to Mr. and Mrs. Simmons, J. C. Dooley, the local manager of the Bank of America, was told of the lease of the orchard to W. F. Jackson, and of the terms of the contract of sale of the ranch, and prepared a release which he requested Mr. Simmons to procure from Jackson. The Vice President and Manager of the bank

testified that he knew of the terms of the Jackson lease and the contract of sale of the ranch. There is evidence that Mr. Dooley was told, before the loan was made, that "the Tapleys claimed twenty-five per cent of the crop." The crop of peaches for the season of 1944 was sold on contract, with the consent of J. F. Tapley, and delivered to Barron-Gray Packing Company for the sum of $5,099.11. The Tapleys claimed one-fourth of that sum. The bank claimed the entire amount.

This suit was commenced October 5, 1944, by Barron-Gray Packing Company against the defendants, including the Bank of America, to determine the respective parties to whom the proceeds of said sale of fruit belong. The entire sum was paid into court to be distributed to the proper parties. The Tapleys answered the complaint, setting up the entire transaction, and claiming, under the lease and the contract for sale of the ranch, one-fourth of the proceeds of sale of the fruit. The Bank of America filed an answer and cross-complaint setting up its claim to the entire amount of proceeds of sale of fruit under its crop and chattel mortgage. The Simmons note and mortgage, their assignment of the proceeds of sale to the bank, and the contract for sale of the ranch from the Tapleys to Simmons were attached to the answer and cross-complaint as exhibits. An answer to the cross-complaint was filed by the Tapleys. At the trial, evidence, both oral and documentary, was adduced.

The court adopted findings to the effect that the bank was holder and owner of the mortgage dated May 4, 1944, to secure the unpaid debt of Ray Simmons and wife in the sum of $5,400, but that the bank's lien was subject to the claim of J. F. Tapley and wife to one-fourth of the proceeds of sale of the peach crop of 1944; that the bank took the note and mortgage with full knowledge of the claim of the Tapleys and of the terms of the previous Jackson lease and the prior contract for sale of the ranch to Mr. and Mrs. Simmons, which reserved title in the Tapleys to one-fourth of the peach crop of 1944 and the proceeds of sale thereof. The court also found that the lease of the orchard to Jackson was not rescinded or assigned to Mr. and Mrs. Simmons with the consent of the Tapleys, or at all. Judgment was rendered in favor of the defendants, J. F. Tapley and wife "to an undivided one-fourth interest of the peach crop" of 1944, or to the proceeds of sale thereof in the sum of $1,074.77. Judgment was also rendered in favor of the Bank of America, against Mr. and Mrs. Simmons, for the sum of $7,947. A motion for new trial was denied. Mr. and Mrs. Simmons have not appealed. From that portion of the judgment which was rendered against the defendant and cross-complainant, in favor of J. F. Tapley and wife, the Bank of America has appealed.

The appellant asserts in its opening brief that the only question involved on this appeal is whether the defendants, Tapleys, are entitled to one-fourth of the proceeds of sale of the peach crop of 1944.

We are of the opinion the judgment in favor of J. F. Tapley and wife, the owners of the land in question, for the sum of $1,074.77, which appears to be less than one-fourth of the proceeds of sale of peaches for the year 1944, is amply supported by the evidence. The original lease of the orchard to Sasaki provides that the lessor, J. F. Tapley, was to receive as rental for the year 1944, 33⅓% "of the *crop* of 1944," and that the lease shall not be assigned "without the written consent of lessor." That lease, with the express reservation in the lessor of 33⅓% of the crop was assigned June 30, 1942, to W. F. Jackson, with the written consent of J. F. Tapley. It was in full force at the time when the appellant took the note for $5,400 from Mr. and Mrs. Simmons, secured by the crop and chattel mortgage, dated May 4, 1944. The bank then had full knowledge of the existence and terms of the lease, contract, and claim of the Tapleys. The contract to sell the land to Ray Simmons and wife, dated March 18, 1943, specifically referred to the Jackson lease, and again reserved to the lessor the said proportion of the crop of 1944, which was inadvertently stated in the contract for sale of the ranch to be "a share rental of 25%" belonging "to Sellers." June 29, 1944, Ray Simmons assigned to the bank "all proceeds [from the sale of

the crop of 1944] *payable or to become payable to the undersigned* from Barron-Gray Packing Co." That assignment did not and could not transfer to the bank the proceeds from that portion of the crop which belonged to the Tapleys. Moreover, the bank made its loan and took the crop and chattel mortgage with full knowledge of the terms of the Jackson lease and the contract for sale of the ranch, which instruments specifically retained at least one-fourth of the crop of 1944 as the property of the Tapleys. Mr. Dooley, the Vice President and Manager of the Rideout Branch of the Bank of America, testified to his previous knowledge of the terms of those instruments and the claim of the Tapleys to one-fourth of the crop, as follows:

"Q. Were you shown the contract of sale between them [Mr. and Mrs. Simmons] and Dr. and Mrs. Tapley? A. Yes. * * * I think we told them they would have to make a release from Jackson before we could make a loan on the crop. * * * I called Manwell a couple of times about getting the release from Jackson and I talked with Mr. Cheim about the crop several times. * * * I think you [Mr. Manwell] wrote a letter to Barron and Gray and told them not to make payment to the bank. * * *

"[By Mr. Manwell, attorney for the Tapleys]: Q. I told you at that time the Tapleys claimed twenty-five per cent of the crop? A. You might have told me that. * * *

"Q. You asked Cheim to get a subrogation from the Tapleys? A. Yes.

"Q. You never got it? A. I think he refused to get it."

It was stipulated Dr. Tapley would testify that he retained "twenty-five per cent interest in the orchard." There is a conflict of evidence regarding Jackson's possession of the orchard in the fall of 1943 and in 1944 after the executory contract for sale of the ranch to Mr. and Mrs. Simmons was made. Mr. Isador Cheim, who was acting as Tapley's agent and who was assisting him in operation of the ranch in 1943 and 1944, testified that, in May, 1944, they had a meeting with Dr. Tapley, at which Ray Simmons was present and he was then trying to get Jackson to leave the premises. Regarding Jackson's presence on the property and his possession of the orchard, this colloquy occurred:

"Q. Was Jackson around the place at that time? A. There is a certain period in an orchard, where there is nothing has to be done and I don't think in November and December it is necessary to do anything.

"Q. Was Jackson living on the place at that time? A. I believe his son was. I know Mr. Simmons was not operating the place in the fall of nineteen hundred and forty three. * * *

"Q. Did you ever see Jackson in the fall of Nineteen hundred and forty three, any place? A. I did—he had a foreman on the place. * * * I saw him on the place, but not at that time.

"Q. Did you ever attempt to contact him about his lease on the place? A. I had no reason to contact him. He was taking care of the place.

"Q. You don't know whether Simmons was doing it or Jackson? A. I do. * * * I mentioned to Mr. Dooley about the contract and what it provided but that is all."

The defendants and cross-defendants, J. F. Tapley and wife, held a prior express lien, superior to the appellant's crop and chattel mortgage, on twenty-five per cent of the peach crop and the proceeds of sale thereof, as security for payment of the purchase price of their ranch, as specifically provided by their written contract of sale to Ray Simmons and wife, dated March 18, 1943. That lien took precedence over the subsequent chattel mortgage and purported assignment which were executed by the vendees to the bank. Oaks v. Kendall, 23 Cal.App.2d 715, 73 P.2d 1255. The contract for sale of the land provides.

"* * * Buyers agree to pay to Sellers the sum of $1,000.00 upon the execution of this agreement, the receipt whereof is acknowledged by Sellers, and the Buyers also agree to pay to Sellers the share received by them from the lease of the peach orchard on said premises which at the present time is leased to one Jackson for the seasons of 1943 and 1944 at a share rental of 25% to Sellers, and it

is agreed that at no time shall said orchard be leased for a lesser crop share rental than 25% for Lessor and it is further agreed that any future lease of said peach orchard, or any part or portion of the premises hereinabove described shall be made subject to the written approval of Sellers first had and obtained.

"In the event that said crop share rental should amount to less than the sum of $2,000.00 for any year, then and in that event Buyers agree to pay to Sellers, in cash, the difference between the proceeds of said crop share rental and the sum of $2,000.00. Each annual payment of said 25% crop share rental or said sum of $2,000.00 shall be made on or before the first day of November of each year until the whole amount of the purchase price is fully paid and discharged.

"It is further agreed that the landlord's share for the rental of said peach orchard shall be delivered to the cannery or canneries agreed upon between all of the parties in the name of Sellers."

It is not disputed that the bank had full knowledge of the foregoing express terms of the contract of sale of the ranch and of the existing lease of the orchard to Jackson before the execution and acceptance of the mortgage in question. The vendor's lien, which we have held exists in the present case, involves only the express lien reserved by the terms of the contract of sale, as distinguished from the general implied vendor's lien, to secure payment of the vendor's one-fourth interest in the peach crop and the proceeds of sale thereof to apply on the unpaid portion of the purchase price of the ranch. Such lien is uniformly recognized and upheld by the authorities. Avery v. Clark, 87 Cal. 619, 25 P. 919, 22 Am.St.Rep. 272; Kent v. Williams, 114 Cal. 537, 46 P. 462; Sec. 3046, Civil Code; 25 Cal.Jur. sec. 208, p. 739; 66 C.J. sec. 793, p. 1041; 91 A.L.R. 148, note. In the Avery case, supra, it is said, 87 Cal. at page 625, 25 P. at page 920, 22 Am.St.Rep. 272:

"Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title he cannot be said to have any implied lien upon the land. *The security which he then has for the purchase-money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee.* Taylor v. McKinney, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves." (Italics added.)

To the same effect is the case of Oaks v. Kendall, supra, in which a rehearing was denied by the Supreme Court.

In 66 Corpus Juris, section 793, page 1041, it is said:

"The rights and liabilities of the parties as to rents and profits may, of course, be governed by express agreement, whereby the right to rents and profits may be reserved to the vendor."

We conclude that the trial court properly determined that the vendors, J. F. Tapley and wife, reserved by contract, and are entitled to, one-fourth of the peach crop of 1944 and the proceeds of sale thereof, pursuant to the express terms of the contract of sale of the ranch, of which the mortgagee had full knowledge, which reserved interest and lien of the vendor is prior and paramount to the appellant's mortgage, and which interest the vendee could not impair by assignment or otherwise. The appellant took the vendee's assignment of that share of the crop with full knowledge of the terms of the contract, and is bound thereby.

The case of Allen v. Wilson, 178 Cal. 674, 174 P. 661, upon which the appellant relies in support of its contention that a lien on real property does not exist when the vendor retains the title thereto under an executory contract to sell the land, is not in conflict with what we have said regarding the lien which may be created by

the express terms of the contract. In that case P. J. Wilson sold certain lots in Los Angeles to E. L. Barrett, upon an executory contract. The vendee took possession of the lots and, with full knowledge of the vendor, tore down three buildings and constructed a large new house on the premises. The plaintiff, Allen, who furnished materials and labor for the construction of the dwelling house, brought suit under Section 1183 of the Code of Civil Procedure to foreclose his mechanic's lien. No reservation of an express lien by contract was involved in that case. It merely determines that the mechanic's lien was valid and enforcible since the building was constructed by acquiescence and knowledge of the owner of the land as provided by Section 1192 of the Code of Civil Procedure.

The appellant relies on the case of Triest & Co. v. Goldstone, 173 Cal. 240, 159 P. 715, which upheld the judgment of a trial court determining that the lessor of real property was estopped from denying the surrender of his lease by his knowledge of the change of lessees and his acceptance of rent from the new lessees which operated as a surrender of the original lease by operation of law. That case is not in conflict with the decision of the trial court in the present case. It is readily distinguishable from the facts of this case. In this case the contract of sale of the land specifically referred to the prior lease and reserved to the lessors the rental therein provided for. The entire conduct of the lessors and their continuing demands for the rent clearly indicate that they did not intend to surrender the lease or waive the rent. The appellant had full knowledge of that fact. Moreover, the Triest case holds that the question of the surrender of a lease "is a question of fact *to be determined in the first instance by the trial court.*" In the present case the trial court found that the lease had not been surrendered. That finding is controlling upon this court is there is any substantial evidence to support it, which we have held exists.

The facts of the Triest case were that plaintiff, in July, 1907, leased a building in San Francisco to Goldstone Brothers, a corporation, for ten years at $400 rental per month. In 1909 the corporation forfeited its charter and became defunct. The stockholders, consisting of four brothers, organized two separate partnerships, and divided portions of the leased building between the two partnerships, each of which thereafter occupied its separate establishment and paid the lessor $200 per month as rental therefor. That division of defendants' business and their separate obligations for rent of their respective places of business and the dissolution of the corporation were fully known to the lessor who acquiesced in the change of obligations by accepting rent from each partnership. The lessor had a place of business next door to one of the partnership enterprises. The lessor knew all about the entire transaction and the change of lessees. He recognized the separate liabilities of the different partnerships by accepting rent from each party for several years until 1912, giving separate receipts for the rent. The lessor never indicated by any act or assertion that it relied upon the original lease as a joint obligation for the $400 rental for the entire building. In 1912 one of the businesses was removed from the premises and that partnership thereafter refused to pay its $200 share of the rent. The lessor then commenced suit to recover the delinquent rent from each of the four brothers who were the original stockholders of the defunct corporation. The trial court found that the lessor, with full knowledge of the transaction, surrendered the original lease in November, 1910, when the corporation forfeited its charter, and then resumed possession of the premises, thereafter renting the separate portions of the building to other tenants. The court said in that regard: "On the 30th day of November, 1910, the plaintiffs resumed possession of the demised premises, and other persons became tenants of said plaintiffs of said premises." Under such circumstances the Supreme Court properly held that "the evidence is sufficient to sustain the finding of the court that there was such a surrender."

Before we could hold in the present case that the lessor surrendered his right to payment of one-fourth of the peach crop of 1944 as rental under the existing lease to Jackson, it would be necessary for us

to hold there is no evidence to support the trial court's finding to the contrary. The contract for sale of the property specifically referred to that provision of the Jackson lease. It is uncontradicted that the mortgagee had full knowledge of the provisions of the contract of sale in that regard and of the vendor's claim to his reserved share of the crop of 1944 and the proceeds therefrom. The mortgage was therefore accepted by the appellant subject to that express lien.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.




78 Cal.App.2d 323

**KINDSCHER v. DYER et al.**

**Civ. 3531.**

District Court of Appeal, Fourth District, California.

Feb. 28, 1947.

**1. Appeal and error ⇐931(1)**

Appellate court, in reviewing the facts, must accept evidence believed by the trial court as true.

**2. Automobiles ⇐204, 206**

A motorist must, at all times, use ordinary care to avoid colliding with another, and he must be alert and watchful so as not to place himself in danger, and, while he may assume that others will use ordinary care, he cannot for that reason omit any of the care which the law demands of him.

**3. Automobiles ⇐244(44, 58)**

Evidence supported finding that plaintiff was guilty of contributory negligence contributing proximately to cause of plaintiff's truck and defendants' semi-truck and trailer sideswiping each other while passing in opposite directions, where it was found that if plaintiff had been keeping proper lookout he could have observed defendants' truck pull out into plaintiff's lane of traffic while attempting to pass another truck traveling in same direction and could have avoided the accident by turning his truck to his right.

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Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Logan G. Kindscher against E. O. Dyer and another, doing business as Dyer Trucks, and others, for damages arising out of a collision between plaintiff's truck and defendants' semi-truck and trailer. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Waldo Willhoft, of San Bernardino, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

GRIFFIN, Justice.

This action is one for damages arising out of a collision between a truck and a semi-truck and trailer on highway 99, about 11 miles north of Bakersfield on April 6, 1944, between 6 and 7 o'clock a. m. Plaintiff was driving in a southerly direction in a "bobtail" truck owned by him, loaded with bee hives. The straightaway highway was of two lanes, 32 feet wide, with 4½ to 5 foot shoulders on each side and had a white center line painted thereon. Defendant Willis Moye was driving an unloaded flat-rack semi-truck and trailer, 45 feet over all in length with an 8-foot bed, belonging to the defendants E. O. Dyer and H. E. Dyer, in a northerly direction immediately behind another semi-truck and tanker trailer, driven by one Treadwell, traveling in the same direction. As plaintiff's truck approached the Treadwell truck and trailer, defendant Willis Moye turned out from behind Treadwell's truck with his truck and trailer, for the purpose of passing it, and in so doing, crossed over the center white line. Before defendants' truck and trailer had regained its right side of the highway, the trailer of his outfit hit plaintiff's truck. The bed of defendants' trailer passed over the bed of plaintiff's truck, cutting the ropes that held the bee hives, and thereby

spilled the bee hives over a large portion of the highway.

Plaintiff's claim is for loss of bee hives and their contents. The complaint alleged negligence on the part of Moye, and the answer set up the defense of contributory negligence on the part of plaintiff. Upon a trial, by the court, a jury having been waived, it found Moye not negligent, and in addition found that plaintiff was guilty of contributory negligence and gave judgment for the defendant.

On this appeal plaintiff argues (1) that Moye was negligent, as a matter of law, and that his negligence was the proximate cause of the accident, notwithstanding the finding of the court; (2) that plaintiff was not guilty of contributory negligence, even though the court so found.

Plaintiff Kindscher testified that he was a bee keeper residing in Redlands; that he left with 116 hives of bees on his truck from Colusa County about 5 p. m. on April 5, 1944; that he stopped for meals and rest periods en route; that as he was proceeding southerly on the highway indicated, his truck lights were not burning because it was light and the sun was shining; that no lights were burning on the approaching trucks; that 200 or 300 feet north of the place of collision he was traveling on his own side of the road at 35 miles per hour; that he noticed the Treadwell truck and trailer traveling about 35 miles per hour and that defendants' truck was traveling about 40 miles per hour quite closely behind it; that the first time he saw defendants' truck was when the defendant driver pulled out to go around the Treadwell truck; that he, plaintiff, was then about 200 feet from it and that he immediately swerved over to his right and onto the westerly shoulder, and that a tree, 8 feet from the westerly shoulder, was struck by the bed of his truck; that he used his brakes and slowed down to 20 or 25 miles per hour, and that he stopped about 250 feet down the highway so as to have his truck out of the way; that defendant driver pulled out onto the westerly portion of the highway, across the white line, and then tried to "duck back" onto the easterly one-half of it, but could not do so on account of the Treadwell truck; that his truck and defendants' trailer sideswiped each other; that defendants' trailer cut the ropes holding the hives on his truck and 97 of them were spilled along the highway.

His testimony was corroborated by the testimony of plaintiff's driver of a similar truck loaded with hives of bees who was proceeding approximately 200 to 300 feet behind plaintiff. He testified that he was driving about 35 miles per hour; that no lights were necessary and that he saw defendants' truck pull out into the westerly lane to pass another truck proceeding in the same direction; that plaintiff was traveling in that lane and swerved his truck onto the westerly shoulder to avoid an accident; that defendants' truck and trailer sideswiped plaintiff's truck; that plaintiff did not slow down until the minute of the impact; that he then applied his brakes and that the pulling out and the impact were nearly simultaneous.

Defendant truck driver testified that between 6 and 7 a. m. he was driving about 150 to 200 feet behind the Treadwell truck and about 35 to 40 miles per hour; that Treadwell was traveling about 30 miles per hour; that Treadwell gave him the light signal that all was clear and that he "pulled out" and looked to see if it was clear ahead; that he saw plaintiff's truck about 250 or 300 yards north traveling about 40 or 45 miles per hour; that when he first pulled out he didn't know just how fast plaintiff was going but he figured he had plenty of room and time to get around the Treadwell truck; that it was light but all the trucks still had their lights burning; that as he was passing the Treadwell truck the driver of that truck slowed up and gave him, the defendant driver, the signal with his lights to pull over into the right lane again; that he had already started "pulling over a little bit, because I seen this other truck pulling into me"; that all but about 10 or 12 feet of his outfit had passed the Treadwell truck when the collision occurred; that the Kindscher truck kept coming down the road on its own side; that he thought plaintiff was "pulling in towards me all the time," so he started pulling the other way; that after the accident the Kindscher truck was clear off the westerly shoulder and had knocked a tree down, which was

about 8 feet west of the shoulder; that bee hives were scattered over the westerly portion of the highway; and that the highway at that point was 32 feet wide with a 4-foot shoulder on each side.

It is argued that since the highway was 40 feet wide at that point there was room for Mr. Kindscher to have pulled over to his right and have avoided hitting defendants' trailer.

Treadwell testified that he was proceeding northerly and saw a truck approaching him about 150 yards from the north and saw defendants' truck and trailer, through his rear view mirror, gaining on him "pretty fast"; so that when he was about 30 feet behind him, he gave a light signal that the road was clear and that defendant started around and did not make it because plaintiff's truck "crowded him too fast before he got around"; that the center of defendants' trailer was still on the white center line and about even with his cab and the truck portion had pulled over in front of him when the trailer was struck; that he didn't notice any slowing down of plaintiff's truck until after the collision; that it stopped about 150 to 200 feet south of the point of collision; and that he had his lights burning because it was just between dawn and sunup.

This is the substance of the testimony on the subject of defendants' negligence and the contributory negligence of plaintiff. It is difficult, under the evidence, to see how defendants could claim that the driver of the Dyer truck was not negligent and how the trial court could so find. If this were the only question presented, a reversal of the judgment might be indicated, but we still are confronted with the additional finding that plaintiff was guilty of contributory negligence and that such negligence contributed proximately to the accident. We must therefore examine the evidence in that light to see if there is any substantial evidence supporting such a finding.

There is evidence that defendants' truck did pull out into plaintiff's pathway while plaintiff's truck was about 300 yards north of it; that plaintiff did not see defendant driver until he was about 200 feet from the truck; that plaintiff continued to come toward defendant driver and instead of turning out to his right on the westerly shoulder, he was "pulling into me." There was evidence that the road-bed, including the shoulders, was over 40 feet in width at that point and that there would have been sufficient room for three trucks abreast to pass each other. The trial court, of course, had the right to disregard plaintiff's testimony and believe other testimony and defendants' argument to the effect that plaintiff had traveled a long distance at night; that he was no doubt tired and sleepy and was in a hurry to get his bees in Redlands before the heat of the day set in and that he was guilty of contributory negligence in not seeing or observing defendants' truck in the position indicated and also that he failed to slow up or avoid a collision by not turning his truck to his right and traveling on the right-hand shoulder in passing the two oncoming trucks when a clear way was open to him to do so.

In Gillette v. City of San Francisco, 58 Cal.App.2d 434, 443, 136 P.2d 611, the question arose as to the ability of a person to see that which was straight ahead of him, and quoting from Hoy v. Tornich, 199 Cal. 545, 250 P. 565, 569, the court said: "If the defendant in this case was looking straight ahead, as he testified that he was, he must have seen the plaintiff."

[1] There is evidence, if believed by the trial court, and we must, in reviewing the facts, accept such evidence as true, that plaintiff failed to keep an adequate lookout and to see that which was clearly visible in front of him and that he had the opportunity of avoiding the accident if he had looked and had exercised reasonable care for his own safety. O'Brien v. Schellberg, 59 Cal.App.2d 764, 770, 140 P.2d 159.

[2] A motorist must, at all times, use ordinary care to avoid colliding with another, and he must be alert and watchful so as not to place himself in danger, and while he may assume that others will use ordinary care, he cannot for that reason omit any of the care which the law demands of him. Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Mathers v. County of Riverside, 22 Cal.2d 781, 785, 141 P.2d 419.

[3] Even though we may believe that the evidence showed that defendant driver was in fact negligent, we are unable to hold, as a matter of law, that there is not sufficient evidence to support the trial court's finding that plaintiff was guilty of negligence contributing proximately to the cause of the accident. Under this rule, the appellate court is not allowed to substitute its judgment for that of the trial concur.

Judgment affirmed.

BARNARD, P. J., and MARKS, J. concur.




78 Cal.App.2d 458

## JIMINEZ v. LIBERTY FARMS CO.

Civ. 13237.

District Court of Appeal, First District, Division 2, California.

March 10, 1947.

Hearing Denied May 8, 1947.

**1. Workmen's compensation ⇐2084**

Where injury to employee, covered by insurance against employer's liability under Workmen's Compensation Act, is incurred under circumstances giving rise to right of recovery against employer under such act, such remedy is exclusive and employee cannot sue for damages. Labor Code, §§ 3201 et seq., 3601.

**2. Workmen's compensation ⇐709**

An employee, while occupying housing facilities furnished him by employer under contract, is within scope of employment under Workmen's Compensation Act. Labor Code, § 3201 et seq.

**3. Workmen's compensation ⇐734**

An injury, received by employee while being transported to or from work by employer as incident of employment, arises out of and in course of employment within Workmen's Compensation Act. Labor Code, § 3201 et seq.

**4. Workmen's compensation ⇐742, 2084**

A farm worker, employed by farming corporation under contract with growers' association, was subject to and acting under such corporation's orders as its employee at time and place of injury to him when its truck, driven by another employee of corporation at its direction, overturned while injured employee was being transported therein to ranch of farmer for whom corporation's farm manager arranged for such employee to work temporarily, so as to entitle him to recover compensation from corporation under Workmen's Compensation Act and preclude his recovery of damages therefrom. Labor Code, §§ 3201 et seq., 3601.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Luis Perez Jiminez against the Liberty Farms Company, a corporation, for injuries sustained when defendant's truck, in which plaintiff was being transported to work at a third party's farm, overturned. Judgment for plaintiff, and defendant appeals.

Reversed.

Joseph T. O'Connor, John F. Moran, and Harold H. Cohn, all of San Francisco, for appellant.

W. N. Mullen and Earl B. Myers, both of San Francisco, for respondent.

DOOLING, Justice.

[1] Respondent Jiminez, a Mexican national employed as a farm laborer, was injured when a truck belonging to appellant, in which he was being transported to work at the farm of a third party named Heuck, overturned. The appellant defended on the ground that respondent at the time of his injury was an employee of appellant and that his exclusive remedy against appellant was under the Workmen's Compensation Act. Labor Code, § 3201 et seq. If respondent's injury was incurred under circumstances giving rise to a right to recover against appellant under the provisions of the Workmen's Compensation Act that remedy is exclusive and the defense

urged by appellant must be sustained (Labor Code, sec. 3601; Baugh v. Rogers, 24 Cal.2d 200, 207, 148 P.2d 633, 152 A.L.R. 1043), since it is not disputed that respondent while in appellant's employment was covered by insurance against liability under the compensation act. The facts upon which the solution of this question depends are here stated:

Respondent came to the United States in April, 1943, under contract with the government of the United States (Farm Security Administration) to do farm work because of the war shortage of agricultural workers. The government distributed these Mexican workers only through associations with which the government made a cooperative employment agreement. The individual farmer had to apply for field workers to such an association. Appellant got respondent with other Mexicans from the California Asparagus Growers Association, of which it was a member, in April, 1943, immediately on respondent's arrival in the United States. Appellant's contract with the California Asparagus Growers Association ended at the end of the asparagus picking season, June 30, 1943. Appellant wished to keep the Mexicans for other crops (tomatoes and beans). As appellant could not find an association working in that field, Spreckels Sugar Company obliged by helping it to a contract with California Field Crops, Inc., for workers for sugar beet harvesting, under which contract it kept the same workers among whom was respondent. The introductory clause of the contract says that grower (appellant) shall furnish employment to the workers on terms and conditions specified by the government, and assume certain special obligations.

Of this contract paragraph (a) 1 requires the grower to keep the workers employed till the end of the beet harvest. (a) 2 permits use for agricultural purposes other than beet harvest on same conditions (with written consent of processor). (c) Requires the grower to furnish 8–12 hours work on every work day during the employment period and to pay $3.00 a day subsistence allowance to processor for every day that no work is furnished. (f) Provides that grower must furnish housing, water and firewood without charge and board without profit for a price not to exceed $1.50 a day. This was done by appellant, who charged a flat $1.50 per day. From his arrival in the United States until the accident respondent always lived on appellant's farm and had his meals there, at least breakfast and dinner. (g) Entitles workers to benefit of compensation law, California Field Crops to effect the compensation insurance, the grower to restitute the costs. This was done. California Field Crops insured the Mexican labor with Pacific Employer's Insurance Company, the insurance following the workers wherever they might be working, and appellant paid for it. (1) Requires the grower to keep record of work and wages for the processor, California Field Crops and the government. In accordance with this rule the Mexicans were all the time carried on the books of appellant even if they worked on another ranch. Respondent and the other Mexicans worked on appellant's farm under a straw boss, Martinez, an American who spoke Spanish and who in his turn stood under the general foreman of appellant.

At a certain time after August 9, 1943, there was no work for the Mexicans to do on appellant's farm, and Johnson, the manager, arranged with Heuck, a farmer in the district who was short of men, to use part of the Mexicans. This was done to oblige Heuck and also to insure against the possibility that appellant would have to pay $3 a day when there was not enough work. The agreement was not for any certain time. Appellant could take the Mexicans back whenever it wanted them and Heuck could presumably have sent back any man or men that he did not want. The men who went there were to go under the orders of Heuck's foreman. When respondent went to Heuck's farm he had always Martinez as foreman (straw boss) with him; Martinez told him that he had to go to Heuck's farm. On Heuck's farm he got all his orders from Martinez; there was nobody else there that spoke Spanish that could give him instructions. Appellant's foreman told Martinez to take his men over to Heuck's farm and go to work where

Heuck's foreman told him. While working for Heuck respondent was under the orders of Heuck's foreman, but the foreman only showed him where to work and then did not come any more. The foreman spoke English and Martinez interpreted the orders to the men. Nobody came from appellant to Heuck's to give Martinez orders. Martinez worked with the men but also supervised them and kept behind them to see to it that the work was done right. Heuck reimbursed appellant for all the work done for the Heuck ranch on bills rendered by appellant. Appellant made the payments to the men. They remained on appellant's payroll as this was required by the War Food Administration otherwise they would have been put on Mr. Heuck's payroll. Heuck was also billed for his share in the workmen's compensation premiums appellant had to pay. The Mexicans still boarded and ate breakfast and dinner at appellant's farm, for which $1.50 was deducted from their gross wages charged Heuck. They left at six in the morning, had to travel half an hour in each direction, worked ten hours, had an hour for lunch and were back at six in the evening for dinner. Respondent had worked that way on August 12, 14 and 16. The first two days somebody from the Heuck ranch picked the workers up with a truck from there; after that appellant supplied the truck. Appellant's foreman told Martinez to take his men in "our own truck." It was a friendly arrangement with Heuck; appellant did not get any direct compensation for the transportation.

On the day of the accident, August 17, 1943, respondent went at six o'clock in the morning with some fifteen other men who worked for appellant in appellant's truck from appellant's bunkhouse to Heuck's farm. One of these Mexican workers, Mendoza, was driving as directed by appellant's foreman. Somewhat less than half way from Heuck's farm the truck went off the road and turned over, by which accident several men, among whom was respondent, were hurt.

It is respondent's position that by the arrangement between Heuck and appellant respondent for the time being became exclusively the employee of Heuck, not in any way subject to the direction and control of appellant, and hence that the injuries to respondent did not render appellant liable to respondent to pay him compensation under the Workmen's Compensation Act. Pruitt v. Industrial Acc. Comm., 189 Cal. 459, 209 P. 31. In making this argument, which prevailed in the trial court, respondent treats the case as if respondent had already arrived at Heuck's ranch at the time of the injury to himself. He points out that in working at Heuck's ranch respondent was under the direction of Heuck's foreman and argues that the trial court could properly find that appellant had relinquished to Heuck all power of direction and control over respondent in his conduct of such work, reserving to itself no such power.

The salient facts are, however, that at the time of the injury respondent had not arrived at Heuck's ranch but was being transported to Heuck's ranch in appellant's truck by appellant's employee (another Mexican national) at appellant's direction. No work of testimony is pointed to that during the time of such transportation Heuck had any right or power of direction or control over appellant, let alone the exclusive right and power.

As between Heuck and appellant appellant must be regarded as the general employer of respondent and Heuck as respondent's special employer. Appellant had bound itself by its contract with California Field Crops, Inc. (par. (a) 1) that "the period of employment as to each worker shall * * * continue * * * until the completion of the harvesting of such acreage, or so much thereof as the Grower actually causes to be harvested * * *." It had bound itself to pay "for each work day during which the Grower does not furnish such employment of at least eight (8) hours * * * the sum of Three Dollars ($3.00) as a subsistence allowance for such worker" (par. (b) ); and it had further bound itself "to furnish without charge to the worker * * * the housing facilities described in the application * * *" (par. (f) ). Respondent in his turn had bound himself by his contract with the Government of the United States of America

(par. 12): "The worker will perform all work required of him with proper application and diligence during the term of this agreement, under the direction and supervision of the employers * * *."

[2, 3] Under its contract appellant did in fact furnish housing facilities to respondent. Under the so-called "bunk-house rule," while occupying these housing facilities respondent was still within the scope of his employment by appellant. Union Oil Co. v. Industrial Acc. Comm., 211 Cal. 398, 403, 295 P. 513; State Comp. Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 P. 168; Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; Employers' etc. Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089. On the morning of the accident at the direction of appellant respondent was in course of transportation in a conveyance furnished by appellant to his place of work on Heuck's ranch. It is equally settled that an injury to an employee received while he is being transported to or from work by his employer as an incident of his employment arises out of and in the course of the employment. California Casualty Indemnity Exchange v. Industrial Acc. Comm., 21 Cal. 2d 461 and cases cited at page 463, 132 P. 2d 815.

[4] We can see no escape from the conclusion as a matter of law on the facts of this case that respondent not only was subject to, but acting under, the orders of appellant as its employee at the very time and place of his injury and was and is entitled to recover compensation for such injury from appellant under the Workmen's Compensation Act. A different question would be presented had respondent been injured after he reached Heuck's ranch or on one of the earlier days while he was being transported in Heuck's conveyance. Under those circumstances it might be more forcefully argued that for the time appellant had yielded all right and power of direction and control to Heuck. Even so, if appellant retained any right of direction and control, it would still be liable to respondent under the Workmen's Compensation Act (National Auto. Ins. Co. v. Ind. Acc. Comm., 23 Cal.2d 215, 219, 143 P.2d 481), even though Heuck might also become liable. Hartford A. & I. Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105. It is not necessary to invoke this rule, however, as it does not appear in this case that Heuck had any right or power to control respondent in any manner while he was being transported by appellant in appellant's own truck. We may add that the record indicates that respondent's rights to workman's compensation against appellant have been protected and preserved.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.




78 Cal.App.2d 328

**SCHRAEDER v. ROBINSON et al.**

**No. 13308.**

District Court of Appeal, First District, Division 1, California.

March 3, 1947.

Rehearing Denied April 2, 1947.

Hearing Denied May 1, 1947.

**1. Carriers ⇐228(5)**

In action against motor carrier for death of race horse evidence sustained finding that pneumonia resulting in horse's death was due to carrier's negligence in keeping the horse in van for almost 45 hours on a trip that was ordinarily made in from 15 to 16 hours.

**2. Carriers ⇐216**

A carrier must take notice of the propensities of domestic animals.

**3. Carriers ⇐228(6)**

In action against motor carrier for death of race horse, evidence sustained finding that shipper did not sign contract limiting maximum liability of carrier to $200 per horse.

**4. Carriers ⇐230(13)**

In action against motor carrier for death of race horse, that trial court permitted defendant to amend answer to include

defense that shipper had executed contract limiting maximum liability to $200 per horse and had admitted alleged contract in evidence did not constitute a finding that contract had been signed by shipper, particularly where shipper denied executing the contract and court found that it had never been executed by shipper.

**5. Appeal and error ⇐843(2)**

The Appellate Court is not called upon to construe an agreement which the trial court found had never been executed by the appellee.

**6. Appeal and error ⇐882(3)**

Where appellant's position in trial court was that plaintiff had signed an alleged agreement and appellant had supported the position by employee's testimony, appellant could not claim on appeal that employee's testimony was untrue and that someone had signed the agreement with plaintiff's authority.

**7. Evidence ⇐75**

Where only contention by defendant was that plaintiff had personally signed agreement the plaintiff was not called upon to deny giving anyone else authority to sign it for him.

**8. Carriers ⇐228(1)**

A shipper of race horse was not required to prove that horse was in good condition when delivered to carrier when there was direct proof that delayed transportation was the cause of pneumonia resulting in death.

**9. Carriers ⇐228(5)**

In action against motor carrier for death of race horse evidence sustained court's implied finding that race horse was in good condition when delivered to carrier.

**10. Carriers ⇐228(1)**

In action against motor carrier for death of race horse, testimony of veterinarians that delayed transportation was cause of pneumonia resulting in death of horse was sufficient to throw the burden of explanation on the carrier.

**11. Carriers ⇐229(5)**

In action against motor carrier for death of race horse, that destination was 300 to 350 miles from loading point raised no inference that value of the horse was different at the two places, and where the only testimony was that $25,000 was the fair market value of the horse at the time of its death it could not be said that trial court had applied the wrong measure of damages in awarding shipper $25,000. Civ. Code, § 3317.

**12. Damages ⇐139**

$25,000 damages for death of race horse committed to carrier for transportation was not so excessive under the evidence as to shock the sense of justice or raise a strong suspicion of prejudice or passion so as to warrant setting aside of damages awarded by trial court.

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Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Action by George A. Schraeder and Irene Schraeder against E. W. Robinson and others for damages on account of negligence resulting in death of race horse delivered to defendant for transportation. From a judgment for plaintiffs for $25,000, E. W. Robinson, individually, and doing business under the firm name and style of Robinson Truck Company, appeals.

Judgment affirmed.

Sullivan, Lane & Clarke, of Los Angeles, for appellant.

Norman S. Menifee, of Redwood City, for respondents.

BRAY, Justice.

Appeal by defendants from a judgment in favor of plaintiffs in the sum of $25,000 for the value of a race horse claimed to have died by reason of the negligence of defendants in transporting it. The judgment was against defendant E. W. Robinson individually, and doing business under the firm name and style of Robinson Truck Company, hereinafter referred to as defendants.

Plaintiffs, husband and wife, owned a thoroughbred race horse named Sir Grant, which defendants, who were engaged in the business of transporting horses, undertook to transport and deliver from Arcadia

in southern California to Bay Meadows. Upon its arrival at Bay Meadows, the horse was suffering from pneumonia, from which disease it died four days later.

The complaint sets forth two causes of action. The first alleged that the parties entered into a contract under which defendants were to ship and transport the animal between the two locations, and that the defendants so negligently and carelessly conducted such shipping and transportation that the horse became ill and died. The second cause of action alleged that the defendants had contracted to transport and deliver the horse within a period of approximately fourteen hours; that defendants had failed to deliver the horse until a period in excess of forty hours, had failed to provide any care or attention for the horse during that period, and as a result of neglect and of breach of the contract to deliver within the time specified, the horse contracted an illness and died. The defendants' answer set up general denials to both causes of action, and then set up the affirmative defense that the death of Sir Grant was due to an Act of God. During the trial the court permitted defendants by amendment to set up a second affirmative defense, namely, that plaintiff George Schraeder had executed a writing limiting defendants' liability to $200.

The court did not find specifically upon the second cause of action, but did find in favor of plaintiffs on the first cause of action, and against the defendants on both of the affirmative defenses.

The first contention of defendants on appeal is that the evidence is insufficient to support the court's findings, particularly the finding that the defendants "so carelessly and negligently conducted the transportation and shipping of said horse" that it became ill and died. In this behalf, defendants claim that the facts, which, on the point of time consumed, are not controverted, do not establish any negligence whatever.

The evidence of the plaintiffs was to the effect that on Saturday, September 22, 1945, plaintiff George Schraeder phoned defendant Robinson and arranged to have defendants' van pick up Sir Grant at Arcadia on Monday afternoon, and transport it to Bay Meadows. Three other horses then in plaintiffs' care, but not owned by him, were to be transported likewise. The agreed shipping price for all horses was $30 each. The horses were loaded on the van at Arcadia at about 3:30 p. m. Monday. Plaintiff Schraeder was told by defendants' driver that he had to pick up three more horses at Hollywood Park and that he would arrive at Bay Meadows early the next morning, and that the horses might "beat" plaintiffs there, unless plaintiffs, who were planning to drive up to Bay Meadows, left right away. The van containing the horses actually did not reach Bay Meadows until Wednesday afternoon. From the time the horses were loaded in the van at Arcadia on Monday afternoon about 3:30 o'clock until their arrival at Bay Meadows on Wednesday about 2:30 p. m., the horses never left the van. The defendants' driver testified that on the way up after he received the horses on Tuesday they were not watered, and were only fed once with some hay the driver took out of a field. All of the horses were sick on arrival, and Sir Grant was "very sick." Plaintiffs sent for a veterinarian who treated the horse, but in spite of treatment it died on Saturday. On two occasions, once on Tuesday afternoon and again on Wednesday morning plaintiffs called defendant Robinson, inquiring as to the whereabouts of the horses, and were told that they were on their way, and that Robinson could not account for the delay in not getting there.

Ordinarily the trip from Arcadia to Bay Meadows should not take over fifteen to sixteen hours. The evidence indicated that the delay here was due to the fact that the van, after getting the four horses from plaintiffs, then went out of the direct route north to pick up other horses, one at San Fernando, one at Santa Monica, and one at Malibu Beach. Also it stopped at Pebble Beach to deliver one of the horses, and at Los Gatos to unload another one, and finally on to Bay Meadows.

Defendant Robinson testified that it was understood between him and plaintiff Schraeder that the horses were to be shipped on what he called the "milkman's

route," which meant that the van would pick up other horses than those shipped by plaintiffs. Plaintiff Schraeder denied that there was any such conversation. This merely created a conflict of testimony as to whether plaintiffs had expressly contracted for a delayed shipment, which conflict the lower court resolved in favor of plaintiffs.

The only medical testimony was that produced by the plaintiffs. Two veterinarians, one of whom performed an autopsy on the dead horse, testified that the length of time the horse was in the van was the cause of the death of the horse; that ordinarily horses shipped the distance involved in this case sometimes ran a little temperature, but would not be "into a pneumonia" as this horse was; that it was the prolonged exposure in the van for about forty-five hours that caused the pneumonia condition.

The defendant Robinson testified that in most cases where horses are shipped as far as these horses were, the owner or his trainer either goes with the horses or makes some provision to feed and water the horses en route. Plaintiff Schraeder testified that there was no such custom on a trip of this nature, and that moreover he asked defendants' van driver if he should send a man along, and the driver said that it would not be necessary, as two men were going with the van so there would be no room for another man. However, this question seems not to be of great importance, as the medical testimony based the cause of the sick condition of the horses on the length of time they were exposed in the van, rather than on a failure to feed or water them.

[1] There was sufficient evidence to justify the court in finding that the sickness of Sir Grant was due to defendants' negligence in keeping the horse in the van for almost forty-five hours. Defendant Robinson admitted having had experience in the shipping of horses between Los Angeles and San Francisco for many years, and with the fact that, as testified to by the veterinarians, horses being shipped that distance frequently get "shipping fever." In view of the propensities of thoroughbreds to contract shipping fever, the delay in transportation and the great length of time which defendants kept the horse exposed on the van, certainly constituted negligence. This court cannot reasonably hold that as a matter of law, such delay was not negligence.

[2] So far as defendants' contention that the custom required that plaintiffs send a man along to look after the horses is concerned, the court found under the conflict of testimony against the defendants. The same is true as to defendant Robinson's statement that plaintiffs had agreed to a "milkman's route" because it was cheaper—$120 for the four horses, as against $240, for which "we would have gone direct right up." Plaintiff Schraeder denied this, and pointed out that as three of the horses were owned by others, and their transportation was to be paid by their owners, the difference in cost to plaintiffs for the transportation would not have been very great. Here again was a conflict of testimony which the lower court resolved against defendants. Even though plaintiffs had contracted for the "milkman's route," the testimony of Schraeder and the two veterinarians was very definite that the length of time this particular trip took was an unreasonable period to leave the horses in the trailer without removing them from the van. That this constitutes negligence is elementary. As stated in Swiney v. American Express Co., 144 Iowa 342, 115 N.W. 212, 214, 122 N.W. 957, the carrier must take notice of the propensities of domestic animals. (As pointed out before, defendant Robinson testified that he knew of the propensities of thoroughbreds to acquire shipping fever.) In that case it is said: "* * * if the shipment be of live stock, and it die of disease or inherent weakness, or become sick without fault, or receive injury through its own vicious propensities, in such case the law very properly places the loss upon the owner, and not upon the carrier. Blower v. Railroad Co. L.R. 7 C.P. 662; Kinnick v. [Chicago, R. I. & P.] Railroad Co., 69 Iowa 665, 29 N.W. 772; Betts v. [Chicago, R. I. & P.] R. Co., 92 Iowa 343, 60 N.W. 623, 26 L.R.A. 248, 54 Am. St. Rep. 558. But this principle is not to

be so extended as to relieve the carrier from the duty to take notice of the ordinary weakness, character, and propensities of domestic animals, and to make such provision against loss or injury therefrom as may reasonably be done in furnishing the means of transportation and providing for the protection of the property during transit. Kinnick v. [Chicago, R. I. & P.] Railroad Co., supra; Betts v. [Chicago, R. I. & P.] R. Co., supra. It logically follows from these rules, and from the fact that ordinarily a carrier alone has knowledge of the manner in which the shipment has been forwarded and cared for, that where property whether dead freight or live stock is found to have suffered loss or damage in transportation, especially where the shipment is not accompanied by the shipper, or a caretaker in his service, the burden is upon such carrier to show facts which relieve it from liability."

Defendants' second point is that finding No. VI of the trial court is not supported by the evidence. Here the court found that plaintiff Schraeder did not make or execute a contract limiting the maximum liability of the defendants in transporting the horses to $200 per horse.

[3-5] The circumstances concerning this alleged contract were these: John G. Murray, defendants' driver, who delivered the horses at Bay Meadows, testified that plaintiff Schraeder signed this alleged contract in his presence; that he had made out the contract in the van at Bay Meadows, and that he antedated it as of the day when the horses were first loaded at Arcadia. Plaintiff Schraeder denied that he had ever signed such a document, and when it was exhibited to him in court, testified that the signature was not his, and that he had never seen the contract until it was shown him by his attorney after the suit was filed. It is obvious that the court believed the plaintiff's testimony on this point, and did not believe the testimony of the witness Murray. After Schraeder had testified that the signature was not his, no evidence on the subject in addition to the testimony of the driver was offered by defendants. Defendants stress considerably the fact that the court, during the trial, admitted this alleged contract in evidence, and further permitted defendants to amend their answer to set up the defense of this alleged contract. Defendants seem to think that by the mere admission of the contract into evidence and the allowing of the amendment, such act upon the part of the court constitutes a finding that the contract was signed by Schraeder. No authorities are cited upon this point; and it is obvious that such is not the result of permitting the contract to be admitted into evidence or permitting the defendants to set up a defense in the pleadings based upon such alleged contract. The court positively in its findings of fact found that this contract was never executed by Schraeder. In defendants' brief the statement is made that the reviewing court is not bound by the construction of the contract by the trial court, but must make the final determination in accordance with the applicable principles of law, citing La Lumia v. Northern Cal. Packing Co., 75 Cal.App. 2d 917, at page 922, 172 P.2d 94. Neither this case nor defendants' contention is in point for the reason that this court is not called upon to construe an agreement which the lower court has positively held was never signed by the party to be charged.

[6, 7] Defendants' opening brief contains this language: "* * * the record does not contain any denial on Mr. Schraeder's part that he gave authority to anyone else to sign the contract." Just what is defendants' contention in this behalf is not clear. The driver, Murray, testified that he saw Schraeder sign the contract in his presence. Schraeder denied doing so. There was no contention made in the lower court that anyone other than Schraeder signed the document. It does not lie with the defendants to claim now that the driver's testimony is untrue and that someone signed the agreement with Schraeder's authority. Nor was Schraeder at any time called upon to deny giving such authority when the only contention made was that he personally had signed it.

[8] Defendants' third point is that the record is devoid of any proof that Sir Grant was in good physical condition at the time he was turned over to defendants for shipping, and that the fact that the other horses shipped with Sir Grant all had shipping fever on arrival, and yet recovered, while Sir Grant died, indicates that Sir Grant was not in good health at the time of acceptance for shipment. Defendants cite Merchant Shippers Ass'n v. Kellogg Express & Draying Co., 28 Cal.2d 594, at page 598, 170 P.2d 923, as authority for their contention that the burden of proof was on plaintiffs to prove that Sir Grant was in good condition when delivered to the carrier. But as pointed out in that case, 28 Cal.2d at page 596, 170 P.2d at page 926, that rule does not apply where there is evidence of an intervening cause of injury. In the case at bar there is direct proof that the delayed transportation was the cause of the illness, not only of Sir Grant but of all the other three horses who were initially placed in the van with him.

Moreover, the last mentioned case refers to 13 C.J.S., Carriers, § 254(d), at page 538. That reference states: "The burden is on the plaintiff to show that the goods were in good condition when delivered to the carrier, but when the facts raise a presumption that the goods were in good condition when delivered to the carrier, the latter has the burden of showing that they were not in good condition. *If the goods were open to inspection, the burden of proving their bad condition when the carrier received them is on the carrier.*" (Italics added.) (See also 10 C.J. § 571, page 371, and long list of cases cited under note 65.)

Certainly defendants could tell by inspection when the horses were turned over to them for transportation whether or not they were in good condition; and assuming, as suggested in defendants' brief, that Sir Grant was predisposed to shipping fever (of which there was no evidence), the carrier would not be relieved from responsibility for a long-delayed transportation because of that fact.

In Swiney v. American Express Co., supra, 144 Iowa 342, 115 N.W. 212, 122 N.W. 957, a valuable Poland China sow was injured in transit between Milwaukee, Wisconsin and Webster City, Iowa. The defendant shipper there made the contention that the plaintiff should have alleged that the animal was in good condition when delivered for shipment. The court held, 144 Iowa 342, 115 N.W. at page 215: "We find no authority for the proposition that an express allegation of good condition at the time of its shipment is necessary to the statement of a good cause of action against the carrier. On the contrary, the practically universal holding is that the essential facts necessary to make a prima facie case is the ownership of the property, its delivery to and acceptance by the carrier for transportation, and loss or damage suffered thereby in transit. Proof of the alleged injury will usually, if not always, involve the necessity of showing the condition of the property when shipped, not because the condition at the date of shipment is an essential element of the right of action, but as a material matter of evidence from which with other facts the jury may find whether the property sustained any injury or loss en route. Indeed the rule is frequently stated that the good order of the shipment is to be presumed from its acceptance by the carrier and the issuance of a receipt or bill of lading therefor specifying no defects. 6 Cyc. 517, 518. There was no error in overruling the motion in arrest."

To the same effect is the following language in Adams Express Co. v. White, 132 Md. 626, 104 A. 110, 111: "The second prayer asked that a verdict be returned for it, because there was no evidence to show the condition of the machine when it was delivered to the defendant. The refusal of this prayer was correct. There is a well-established rule that in cases of this character a presumption arises from the fact of the receipt of the goods by the carrier without objection or exception noted in the shipping receipt that as far as the condition was apparent on ordinary inspection the goods were in good condition. See 10 C.J., [page] 371, and long list of cases under note 65. The bill of lading, or shipping receipt, contained no statement as to the condition of the machines when receipted for.

Neither did the evidence in the record rebut in any way the presumption."

[9, 10] While there is no direct evidence as to the horse's condition at the time of delivery to the carrier, there are certain inferences which fairly may be drawn from the testimony. Dr. Whitman, the veterinary who saw the horse's condition after arrival at Bay Meadows and also performed the autopsy on it, testified that except for the pneumonia conditions which caused death, the horse was apparently otherwise in sound condition; that shipping fever could develop in an hour or so in a shipping van. He further testified that the horse was not in a poor condition but in a good condition to get pneumonia. While this is a rather perplexing statement in itself, it is evident from the record that the veterinary meant, and all parties understood him to mean, that in his opinion the general condition of the horse was such as would not predispose it to that illness, and that the horse ordinarily would not contract pneumonia on a trip taking the usual length of time between Arcadia and Bay Meadows. While this method of trying a case is not to be commended, this expert testimony, together with the rule above cited from 13 C.J.S., Carriers, § 254, at page 539, and 10 C.J., page 371, and the cases mentioned herein, to the effect that the burden was cast upon the defendants to show that the physical condition of Sir Grant was not good when defendants received him for shipping, fully support the court's implied finding that the horse was in good condition at the time of delivery to the carrier. The testimony of the veterinarians as to the cause of death is sufficient alone to throw the burden of explanation on the carrier.

[11] Defendants' fourth point is to the effect that the court applied the wrong measure of damages in determining the value of the horse. The only testimony concerning value was that given by the plaintiff Schraeder himself, and by plaintiffs' witness William R. Buster, who qualified as a trader in race horses. Both witnesses placed $25,000 as the fair market value of the horse at the time of its death. Neither witness was asked whether such was the market value at any particular place. In defendants' brief it is stated: "It is very possible that Mr. Buster and Mr. Schraeder of Arcadia were of the opinion that the horse was worth $25,000, and it is very possible that no one at Bay Meadows would consider the horse to be of that value or anywhere near that value," citing section 3317 of the Civil Code, which provides that the detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the market value at the place where it ought to have been delivered. Defendants then contend the market value should have been established as of Bay Meadows, rather than generally. There is nothing in the record to show that the market value as testified to was not the market value in the county where the witnesses were testifying, to wit, San Mateo, in which county Bay Meadows is located; and it is a fair inference from the testimony of these witnesses that their valuation was the fair market value of the horse to persons who customarily dealt in that type of property, regardless of the place at which a sale might take place. It is significant that defendants offered no testimony whatever on the question of value, either at Bay Meadows or anywhere else. Plaintiff Schraeder, as the owner of Sir Grant, was qualified to testify as to the value of the horse (Shotwell v. Bloom, 60 Cal.App.2d 303, 140 P.2d 728), and Buster, who was properly qualified as a horse trader familiar with Sir Grant's ancestry and potentialities, was also a competent witness (9 Am.Jur. p. 954; Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am.St.Rep. 68. The mere fact that Bay Meadows is some 300 to 350 miles from Arcadia raises no inference that the value of a race horse is any different at one California race track than at another.

[12] Defendants' fifth point is that the judgment of $25,000 for the death of the thoroughbred horse is excessive, exorbitant and unreasonable. Defendants offered no testimony whatever upon the question of the value, nor did they cross-examine at any length either the plaintiff Schraeder or the horse trader Buster on this subject. The only examination made by defendants

on this subject was the questioning of plaintiff Schraeder as to the earnings the horse had made at the tracks, and asking Buster if the horse had ever won a race. The plaintiff Schraeder testified that the horse had run in eight races including one at Del Mar, where he finished "in the money;" on one occasion ran second at Santa Anita, and on three occasions came in fourth; and that the total earnings of the horse had been about $1000. Moreover, Schraeder testified that when the horse was a yearling, he had refused $10,000 for it; and on the day he loaded the horse he had been asked by the Cameo Stock Farm to place a value upon it and the other horses, and that he had placed a value of $25,000 on Sir Grant. Both plaintiff Schraeder and Buster testified that Buster had offered plaintiff $25,000 the day the horse was loaded at Arcadia. Defendants say, "it is unreasonable and highly improper for the trial court to assume that a horse with such a record is worth $25,000 or any fraction thereof." However, there is no testimony in the record of any value other than $25,000. Buster had bought and sold race horses over a period of time, and he not only placed that value on the horse, but actually had offered to buy it for that sum. While to a layman $25,000 seems a large sum to pay for a horse, the court had before it no evidence to the contrary, and there is no manner in which this court can determine the value of a race horse other than from the testimony introduced below. The small earnings of the horse, which was only a two-year-old, would not necessarily mean that the animal was not extremely valuable. Its blood lines, its potentialities, and the form, speed, courage and stamina which it had displayed as a young horse would bear great weight in labelling it as an exceptional prospect of considerable monetary value. Buster described the ancestry of the horse and stated that many of the horses it had run with had sold for more than $25,000, and that the horse was bred for distance and "was never beaten from behind."

Defendants in their opening brief cite cases such as Hart v. Farris, 218 Cal. 69, 21 P.2d 432, to the effect that when the damages awarded in the lower court are so disproportionate as to shock the sense of justice and raise a strong suspicion that the award was based on prejudice or passion, the appellate court must reverse the judgment. There is no doubt but that that is the law.

In a letter memorandum subsequent to oral argument, defendants submit three cases as authority for the proposition that appellate courts may reduce awards of damage without any reference to passion or prejudice, where the excess of damage is not supported by the evidence. These cases are Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870; Ure v. Maggio Brothers Co., 32 Cal.App.2d 111, 89 P.2d 436; and Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987. While the Maede case was one involving a passion and prejudice finding, and hence not in support of this point, the other two cases do sustain the proposition contended for, and it undoubtedly is the law. But neither of these propositions of law are pertinent here for the reason, as hereinbefore pointed out, that this court cannot say on the evidence in this case either that the award shocks the sense of justice and therefore raises a strong suspicion of prejudice or passion, or that the award is excessive. The only manner in which the trial judge could have awarded a lesser amount would have been to disregard completely the evidence in the case and arbitrarily award a lesser sum than a horse trader presumably fully familiar with the value of race horses, a subject not generally known to the layman, testified was the market value of the horse, and the amount which he himself had offered for it; and likewise, this court would have to make such a reduction without any evidence to justify its action.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

78 Cal.App.2d 448

**BELL v. SCUDDER, Real Estate Com'r.**

**Civ. 7262.**

District Court of Appeal, Third District, California.

March 8, 1947.

Hearing Denied May 1, 1947.

**1. Brokers ⇐9**

Owner's letter to broker disclosing decision to reduce price at broker's request to stated amount plus five per cent commission to broker constituted a recognition of continuing existence of agency despite previous request by owner that land be withdrawn from market.

**2. Brokers ⇐3**

Evidence that broker while purporting to act as owners' agent for sale of land on five per cent commission basis procured personal option to purchase land for $8,500 without disclosing to owners that he already had a purchaser who had agreed to and subsequently did buy the land for $10,000 warranted renewal of broker's license subject to suspension for 60 days on account of broker's failure to establish good faith and reputation as required by statute. St.1937, p. 2124, § 12: Business and Professions Code, § 10175 et seq.

**3. Brokers ⇐9**

Evidence supported conclusion that real estate broker's agency to sell land for a commission of five per cent was not terminated by owners, notwithstanding letter from owner requesting withdrawal of land from market.

**4. Brokers ⇐19, 34**

Real estate broker employed to sell land stands in a fiduciary relationship to owner and is bound to exercise highest degree of good faith toward owner and may not secure an advantage over owner by misrepresentation, deceit or concealment of essential facts of the transaction.

**5. Brokers ⇐31**

Where real estate broker obtains a secret benefit from transaction, he has the burden of showing that it was not procured by unfair means or deception.

**6. Brokers ⇐31**

Where real estate broker employed to sell land for commission of five per cent procured personal option to purchase the land for $8,500 and sold it for $10,000, he had the burden of proving that option was fairly procured without deception or concealment of essential facts of transaction.

**7. Brokers ⇐31**

Where real estate broker employed to sell land on commission basis is given an option running concurrently with agency to purchase property, he may not take advantage of such option and gain a profit without first fully informing owner that he has a purchaser who has agreed to pay a higher price than that which owner has agreed to accept.

**8. Principal and agent ⇐69(3)**

An agent before dealing with principal on his own account must disclose to principal all material facts fully and completely, including, in addition to fact that he is dealing on his own account all facts which agent should realize would be likely to affect the judgment of principal in giving his consent to agents entering into the particular transaction on the specified terms.

**9. Mandamus ⇐187(9)**

In mandamus proceeding to compel Real Estate Commissioner to renew unconditionally broker's license which had been renewed subject to suspension for 60 days on account of lack of good faith in sale of a particular farm, trial court's failure specifically to find that broker acted as agent and broker in sale of such farm was harmless, where evidence abundantly showed such agency and bad faith and lack of characteristics required by statute. St. 1937, p. 2124, § 12.

**10. Appeal and error ⇐934(2)**

Finding should be construed to support and uphold the judgment rather than to defeat it.

**11. Appeal and error ⇐1071(6)**

Where judgment is supported by adequate findings it is immaterial that there is no specific finding on some other issue

which, if made in support of judgment, would not require a different conclusion from that which was reached by the court.

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Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in mandamus by J. H. Bell against Hubert B. Scudder as Real Estate Commissioner of the State of California, to compel respondent to renew unconditionally plaintiff's real estate broker's license. From a judgment discharging a preliminary writ of mandamus, plaintiff appeals.

Judgment affirmed.

Geary & Tauzer, of Santa Rosa, and A. Dal. Thomson, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., of San Francisco, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment of the Superior Court discharging a preliminary writ of mandamus which was issued to require the Real Estate Commissioner of California to show cause why he should not unconditionally renew the broker's license.

Upon petitioner's application for renewal of his license, the Commissioner gave written notice of a hearing on the question of the broker's asserted "dishonest dealing" and lack of good faith in procuring a personal option to buy a farm belonging to his former clients, Mr. and Mrs. King, for $8,500 without disclosing the fact that he already had a purchaser who agreed to and subsequently did buy the land for $10,000. At the Commissioner's hearing, involving the question of a lack of good faith in that transaction, the broker's license was renewed on condition that it be suspended for sixty days. The petitioner then applied for a writ of mandamus to require the Commissioner to issue the renewal of his license unconditionally. At the trial, the transcript of testimony and proceedings before the Commissioner was, by stipulation, received in evidence. The transaction regarding the purchase and sale of the King property was fully disclosed in that record. No further evidence on that subject was adduced at the trial. The only additional evidence was the introduction of two deeds. The Superior Court adopted findings favorable to the respondent.

It was determined by the trial court that the Commissioner did not exceed his jurisdiction in directing the issuance of the broker's license subject to its suspension for sixty days, on account of petitioner's failure to satisfactorily establish his good faith and reputation pursuant to section 12 of the Real Estate Act, as amended in 1937, Stats. 1937, p. 2124, and that the evidence regarding the purchase and sale of the King property was adequate to support the Commissioner's suspension of the renewed license for the period of sixty days.

Judgment was accordingly rendered dismissing the petition for a writ of mandate. From that judgment this appeal was perfected.

[1] The evidence is conflicting with respect to the good faith of petitioner in the sale of the King property. The record shows that petitioner has been a real estate broker in Santa Rosa for more than twenty-five years. Several prominent persons testified to his good reputation. There is no evidence to the contrary, except his conduct in the King transaction. This case hinges entirely on that transaction. Mrs. Rose Prinz, a licensed saleswoman, was employed by the petitioner. She had worked for him in that capacity for twenty-one years. Mr. C. Rapley, a licensed salesman, had served him, as such, for about three years. Mr. and Mrs. Manuel King owned a 14-acre farm near Healdsburg. December 16, 1942, Mrs. Prinz wrote a letter to Mr. King soliciting the privilege of selling their ranch, for a stipulated commission, in behalf of her employer. She asked for a description of the property and the lowest cash price. December 27, 1942, the Kings sent to the petitioner their written authorization to act as their agent for a term of sixty days, to sell the property for the sum of $10,500 for the agreed commission of 5% in the event of a sale. The listing of that property was placed in the files of the petitioner. In the latter part of February, 1943, Mrs. King wrote a letter

to Mr. Bell requesting the withdrawal of the property from the market. The listing, however, was not removed from the files, but was thereafter used by petitioner and his salesmen in an effort to sell the property as an agent of the Kings. There is evidence that the continuation of that agency was recognized by both parties. April 14, 1943, in response to an inquiry by Mrs. Prinz, the Kings wrote a letter to her, saying that a party whom the agent sent to inspect the property "did not show up," and stating that, at petitioner's request, they had decided to "reduce the price to $8500.-00 net to us your commission to be added to this price." That letter constitutes a recognition of the continuing existence of the agency.

July 12, 1943, A. L. Fritchey and his wife met Mr. Bell in his office in Santa Rosa and told him they wanted to buy a chicken ranch. They were introduced to his salesman, Mr. Rapley, who first showed them other properties, which were rejected because they were too high priced. The salesman then procured from their files the listing of the King property, which Mr. Fritchey testified the salesman told him had been held at $12,000 or $12,500, but which "has recently been reduced to $10,-500," and he said "I want to show it to you." After seeing the property the Fritcheys told Mr. Bell "I might pay $10,000." Mr. Bell replied, "Well, I don't know, we will have to get in touch with the Kings to find out if they will reduce the price to $10,000." He added that, "So far as I am concerned, * * * we only make five per cent commission and I would be willing to waive my $25 which covers the $500" difference in price. The Fritcheys then went to Glendale. The Kings never met the purchasers until the sale had been completed. The saleswoman, Mrs. Prinz, phoned Mrs. King, saying, "We think we have your ranch sold. * * * The man will—only wants to give eight thousand dollars. * * * Will you take eight thousand dollars?" Mrs. King replied, "Absolutely not." Mrs. Prinz then said, "Well, that is all right, that is all right, I can work him up the other five hundred." Mrs. Prinz then asked Mrs. King to send a telegram to J. H. Bell saying they would take $8,500 for the property, so they could show the message "to the man who was buying, because eight thousand was all he wanted to give." In response to that request, Mr. King sent a telegram to Mr. Bell, July 15, 1943, saying, "Will accept $8500 net, * * *." The following day Mr. Bell sent a telegram to the Fritcheys at Glendale, saying, "Your offer for King property accepted. Wire 10 percent deposit. Can complete deal in fifteen days." The Fritcheys telegraphed Mr. Bell, "Agreeable to accept King proposal as discussed with your firm." At the request of petitioner the Kings saw Mr. Bell in his office on July 17th. Mrs. Prinz was not present. Mr. Bell told them "He had the place sold to a man from Chicago, it was positively sold, and for us to give him fifteen days' option on the place to get the thing straightened up." The Kings suggested that it was strange they had been paid no deposit. Mr. Bell replied, "If that is what you want we will give you a deposit," and he took from his pocket an envelope and handed them $50. That same day, at the request of petitioner, an option to purchase the property by J. H. Bell for $8500, within fifteen days, was prepared in his office and signed by the owners and Mr. Bell. The property was conveyed to the Fritcheys for $10,000 August 2, 1943, through the Sonoma County Abstract Company. The Kings received only $8,500. The balance of the $10,000 purchase price was paid to and retained by J. H. Bell, without the knowledge of the Kings.

At no time during the transaction were the Kings informed that petitioner actually sold the property for the sum of $10,000, or that he claimed the right to the difference between that sum and $8,500, as commissions for the sale, or otherwise. The Kings never met the purchasers until after the sale was consummated. They were led to believe that the property was sold for $8,500, plus the broker's stipulated 5% commission. In support of the judgment, we may assume the contract with Mr. Bell to sell the property for $8,500, plus 5% commission, pursuant to King's letter of April 14, 1943, was a modified renewal of the original contract, and that the agent was bound, in the exercise of good faith, to

disclose to the owners the entire facts of that transaction.

It is true that both Mrs. Prinz and Mr. Bell testified that the former personally negotiated with the Kings to buy the property for herself, and that the latter was going to help her finance the transaction. But that plan was never divulged to the Kings. That theory was contradicted by the evidence of Mrs. King, who testified that Mrs. Prinz told her, "We think we have your ranch sold. * * * The man will—only wants to give eight thousand dollars." Mrs. Prinz fraudulently persuaded Mrs. King to send a telegram to Mr. Bell, saying she would accept $8,500, so they could show the message "to the man who was buying, because eight thousand was all he wanted to give." When Mrs. King positively told Mrs. Prinz they would not accept $8,000, the saleswoman replied, "Well, that is all right, * * * I can work him up the other five hundred." Mrs. Prinz told Mrs. King, when she was asked if the sale was to be made to Mr. and Mrs. Thompson, who were previously discussed as prospective purchasers, that it was not being sold to the Thompsons. She added, "No, this party is from Chicago." Mrs. Prinz received no part of the purchase price.

[2] The foregoing evidence is ample to support the judgment of the trial court, and the order of the Real Estate Commissioner suspending the renewed license for a period of sixty days, for failure on the part of petitioner to fulfill the requirements of Section 12 of the Real Estate Act. Rattray v. Scudder, 28 Cal.2d 214, 169 P.2d 371, 164 A.L.R. 1356.

[3] There is evidence to support the conclusion of the court that the agency of Mr. Bell to sell the property for a commission of 5% was not terminated by the owners, in spite of the fact that Mrs. King wrote him a letter the latter part of February, 1943, signifying her desire to withdraw it from the market. The listing of the property had not been taken from petitioner's files. He was evidently still trying to sell the property, as their agent, and had notified the Kings that he had sent a prospective purchaser to inspect the property. That party, however, did not appear, for on April 14th, about six weeks after the withdrawal letter was sent, upon request of Mrs. Prinz, petitioner's saleswoman, Mrs. King wrote the real estate firm that they decided to "reduce the price to $8,500.00 net to us your commission to be added to this price." The last mentioned letter refutes the petitioner's contention that the agency was terminated. Clearly that letter implies that the owners assumed the agency was still in force, and that the real estate commission was thereby fixed at 5% of the selling price. Regardless of the information contained in the last mentioned letter that the owners had agreed to take $8,500 net, plus 5% commission, the broker negotiated a sale for $10,000, by misrepresenting to the purchasers that the owners had held it at $12,500, but had recently reduced the price to $10,500. He told the purchasers he was getting only 5% commission for the sale. While that transaction was pending, Mrs. Prinz, the saleswoman, phoned Mrs. King that the purchaser "only wants to give eight thousand dollars." That statement was not true. No suggestion was made to the owners that the broker desired to buy the property in his own behalf. All communications tended to deceive the owners into believing that the broker was negotiating for the sale with a bona fide purchaser other than himself. The real selling price was never communicated to the owners. At the request of Mrs. Prinz, Mrs. King sent them a telegram consenting to sell the property for $8,500. The Kings were notified that their offer to sell for $8,500 had been accepted, and that the deal would be completed within fifteen days. They then went to Mr. Bell's office on July 17th to close that sale. Mr. Bell told them "he had the place sold to a man from Chicago." He then asked them for a fifteen-day option "to get the thing straightened up." Upon demand, he paid them a deposit of $50, which he took from an envelope he was carrying in his pocket. Misled by the misrepresentations and failure to disclose the real facts of the actual transaction, the Kings then executed the option to purchase, which was drawn in the name of Mr. Bell, in his own office. They had no knowledge of the fact that he was selling the property

to the Fritcheys for $10,000. He failed to inform them of that fact. He pretended to both parties that he was acting as the agent for the owners in the sale of the land. That evidence furnishes ample proof of a lack of good faith which warranted the Commissioner in suspending his renewed license for sixty days.

[4-6] The relationship between the broker and the owners of the land was fiduciary in its nature. The broker was bound to exercise the highest degree of good faith toward the owners. The authorities are uniform to the effect that such an agent may not secure an advantage over his principal by misrepresentation, deceit or concealment of essential facts of the transaction. Calmon v. Sarraille, 142 Cal. 638, 641, 76 P. 486; Weiner v. Mullaney, 59 Cal.App.2d 620, 638, 140 P.2d 704; Thompson v. Stoakes, 46 Cal.App.2d 285, 289, 115 P.2d 830. When the agent obtains a secret benefit from the transaction, the burden is on him to show that it was not procured by unfair means or deception. Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587. In the present case the burden was on petitioner to show that the option to purchase the land in his own name was fairly procured without deception or concealment of the essential facts of the transaction. The evidence in this case supports the conclusion that the broker obtained the option by concealing from the owners the true facts and by misrepresentation of material facts. Rattray v. Scudder, supra.

The cases cited and relied upon by petitioner to rebut the conclusion that he was guilty of bad faith in the real estate transaction are not in conflict with the foregoing authorities. Those cases are all distinguishable on the facts involved. They do not show a continuation of the broker's agency to sell land, as the facts of this case do. They disclose absolute terminations of the fiduciary relationships of the parties. They do not show misrepresentations and deceptions as the present case does.

The recent decision in the Rattray case, supra, is determinative of all the essential issues of this case. The facts of that case are remarkably similar to those of the present action, except that, upon a petition for a writ of mandamus, the trial court there reversed the order of the Real Estate Commissioner denying petitioner's application for renewal of his license, and directed its issuance. The Supreme Court reversed the trial court and sustained the order of the Commissioner. In this case the trial court sustained the order of the Commissioner granting a renewal of the license, conditioned upon its suspension for a period of sixty days, pursuant to the provisions of the Business and Professions Code, § 10175 et seq., as disciplinary penalty for violating the trust imposed on the real estate agent and for failure to show good moral conduct.

In this case the record leaves no doubt that the petitioner was acting as the agent of the owners in the sale of the King property which was the subject of investigation by the Commissioner. It is clear that the agent procured an option in his own name by means of misrepresentations, and that he failed to disclose to the owners that he then had a purchaser of the land for a price which was $1,500 in excess of the price which he induced them to accept. It is evident that the owners would not have accepted $8,500 for their ranch if they had known that their agent was selling it for $10,000. Such misrepresentations and concealment constitute a breach of trust and fraud.

The Rattray case determines that, [28 Cal.2d 214, 169 P.2d 374], "A real estate license can be denied if the applicant fails to furnish proof of 'honesty, truthfulness and good reputation.' (§§ 10150, 10152.)" Certainly, if a license may be denied on that ground it can be suspended for a brief period of time, for the same reason. In support of the statement of law, in that case, that "Violation of his [a real estate agent's] trust is subject to the same punitory consequences that are provided for a disloyal or recreant trustee," the Supreme Court announces the well established principle, supported by numerous authorities, that: "Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision."

Regarding the evidence of fraud and concealment in that case, which is also applicable to the facts of this case, the court said: "He not only failed to disclose the truth but made the misrepresentation that he was unable to sell the property at the price placed upon it by Humston. Even if plaintiff had not been Humston's broker and under no fiduciary duties, once he discussed the question whether a higher price was obtainable, he had to 'speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading.' "

[7] After holding that "A broker employed to find purchasers for the property of his principal can be given an option, 'running concurrently with the agency' to purchase the property," the Supreme Court says that, under such circumstances, the broker may not take advantage of his option and gain a profit thereby without first fully informing the owner that he has a purchaser who has agreed to pay him a higher price than that which the owner has agreed to accept. Upon that principle the court quotes with approval from 8 American Jurisprudence, at page 1040, § 93, as follows: "If a broker employed to sell property is also given * * * an option to purchase the property himself, he occupies the dual status of agent and purchaser and he is not entitled to exercise his option except by divesting himself of his obligation as agent by making a full disclosure of any information in his possession as to the prospect of making a sale to another."

[8] Upon that same subject the court quotes with approval from Section 390(a) of Restatement of the Law of Agency, as follows: "Before dealing with the principal on his own account, * * * an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material * * * if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account * * *, but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal."

The foregoing principle is sound law. It protects the owners of land from fraud and deceit which too frequently result in substantial loss. Any other rule would violate the established law with respect to fiduciary relationships, and enable an agent to fraudulently procure an option from his principal for the purpose of secret personal enrichment. Such conduct may not be countenanced by the law.

The foregoing decision fits the facts of this case exactly. It is determinative of this action.

[9-11] Finally, the appellant contends that the trial court failed to adopt a specific finding that he was acting as the broker and agent of the owners of the land in procuring the sale to the Fritcheys. The court did not adopt a specific finding on that issue. But the court did determine that the Commissioner's findings that Mr. Bell did not show good faith in that transaction of sale to the Fritcheys, and that he failed to meet the requirements of Section 12 of the Real Estate Act, were true. The failure to find that petitioner was acting as the agent and broker in the sale of the land to the Fritcheys is harmless. The crux of this case is the failure of petitioner to establish to the satisfaction of the Commissioner his good reputation as a broker. The evidence which was adduced abundantly shows bad faith and a lack of the characteristics required by said section of the Real Estate Act. Findings should be construed to support and uphold the judgment, rather than to defeat it. Ensele v. Jolley, 188 Cal. 297, 303, 204 P. 1085. It is apparent, in support of the judgment, that if a specific finding had been adopted on the issue of the agency of the petitioner, it would have been adverse to him. When there are adequate findings to support the judgment, it is immaterial that there is no specific finding on some other issue which, if made in support of the judgment, would not require a different conclusion from that which was reached by the court. Wolfsen

v. Smyer, 178 Cal. 775, 786, 175 P. 10; Angelus Securities Corporation v. Luton, 47 Cal.App.2d 262, 268, 117 P.2d 741. There is an abundance of evidence to show that appellant acted as the agent of the owners in the sale of the land.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.




78 Cal.App.2d 441

**SHARPE v. WESLEY.**

**Civ. 7287.**

District Court of Appeal, Third District, California.

March 7, 1947.

**1. Bastards ⇐78**

Under codal provision that in action to enforce obligation to support illegitimate child, the court should have power to enforce performance thereof the same as in suit for divorce by wife in action between parents over custody of illegitimate child, trial court had power to order father to pay attorney's fees for mother since "support and education" of child was involved and court would have power to make such an order in a wife's suit for divorce. Civ. Code, §§ 137–140, 138, 196a.

**2. Parent and child ⇐2(3)**

The question of custody involves the right of the child as well as the right and duty of the parents and is a matter primarily for the benefit of the child and not the parents. Civ.Code, §§ 137, 138, 196a.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by R. H. Sharpe against Alice Wesley and another to enforce compliance with terms of written agreement relating to the care and custody of child, wherein a consent decree was entered embodying in substance the provisions of such agreement and an order was subsequently made denying the plaintiff all right of visitation and custody, as well as an order requiring the plaintiff to pay the named defendant pendente lite attorney's fees in the sum of $150. From an order denying plaintiff's motion to vacate order allowing attorney's fees, plaintiff appeals.

Order affirmed.

Alfred E. Frazier, of Red Bluff, for appellant.

Curtiss E. Wetter and Rawlins Coffman, both of Red Bluff, for respondent.

PEEK, Justice.

In August, 1942, appellant, the putative father of respondent's minor son, brought suit against her and her husband, to enforce compliance with the terms of a written agreement alleged to have been executed previously by appellant and respondent. The complaint alleged plaintiff's performance of the conditions imposed upon him by the terms of said agreement, including those pertaining to support and care, and charged defendants with refusing to permit him to enjoy his right of visitation and custody thereunder. To said complaint defendants filed an answer and "counterclaim", admitting the making of the agreement but asserting that plaintiff had failed to live up to his obligations thereunder, both as to support and care, that he was an unfit and improper person to have the custody of the child at any time, and concluded with a prayer that they be given exclusive custody of said minor and for such other relief as the court might deem proper. Thereupon appellant filed an "answer to defendants' answer and counterclaim", in which he denied the assertions made against him and reiterated his prayer for the relief asked in his complaint. Upon stipulation of the parties, a consent decree was entered, embodying in substance the provisions of said agreement. Thereafter, in September, 1944, an order was made modifying said decree so as to deny to appellant all right of visitation and custody. In September, 1945, appellant procured an order to show cause why the judgment should not be modified to grant to him permanent custody and control of said minor. Prior to the

hearing thereon, and upon respondent's motion, a minute order was made requiring appellant to pay to respondent pendente lite attorney's fees in the sum of $150. In connection with appellant's motion to vacate such order it was stipulated that the same was made on the ground that it was in excess of the power of the court, that appellant was not in default of any of the payments for support of said child, and that the only issue before the court in the pending proceeding, i. e., the order to show cause, related to a change in the custody of the child. The trial court denied appellant's motion to vacate the order allowing attorney's fees, and the appeal herein is solely from said order.

Although there is nothing in the transcript to so indicate, it appears from the briefs on file that said order of the trial court was predicated on Civil Code, § 196a, which reads as follows: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of his mother; provided, that such application or consent shall not be necessary if the mother is dead or incompetent, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

Appellant's argument in support of his contention that the trial court erred in making such order is that by virtue of the stipulation of counsel the only question presented in the pending proceeding relates solely to the custody of the child, and that, as no question of support is involved, said section is inapplicable for the reason that the provisions thereof are specifically restricted to the "support and education suitable to his circumstances" which a father or mother may be compelled to give such a child, and therefore the order of the trial court awarding attorney's fees to the mother was improper. By his closing brief appellant has added the further argument that respondent's resistance to his petition for modification of the order of custody is made solely for her own benefit in that she can offer nothing to the child but a home of poverty without a father, whereas he is able to give the child a home with good surroundings and the loving care of his present wife.

These contentions appear to be premised upon a supposed distinction between an obligation to "support" an illegitimate child and the right to its "custody". However, under section 196a and related sections of the Civil Code therein specifically mentioned (137, 137.5, 138, 139 and 140), the terms "custody", "support", "care", "education", "maintenance", and others of similar connotation, are not susceptible of individual or separate legal treatment. See Harlan v. Harlan, 154 Cal. 341, 349, 98 P. 32. Section 138 of the Civil Code is illustrative of the close interrelationship between support and custody, and of the power of the court to make such orders concerning the rights and duties relating to them, or either of them, as may seem necessary and proper. Said section reads in part: "The court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children * * * make such order for the *custody, care, education, maintenance* and *support* of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." (Italics added.)

[1, 2] In other words according to the plain language of section 196a the court, in a suit to enforce the obligation of a father to support an illegitimate child, has the same power to enforce that obligation as it has to order the performance of a husband's obligation in a suit for divorce by a wife under the sections of the Civil Code enumerated in said section, including sections 137, 137.5 and 138. Carbone v. Superior Court, 18 Cal.2d 768, 770–771, 117 P.2d 872, 136 A.L.R. 1260; Andrade v. Newhouse, 54 Cal.App.2d 339, 345, 128 P.2d 927. Since under the sections last mentioned the court has the power to require a husband to pay attorney's fees pendente lite in an action by the wife, even though the particular issue in the proceeding on account of which at-

torney's fees are sought relates principally to custody (Ott v. Ott, 127 Cal.App. 325, 326, 15 P.2d 897; Jacobs v. Jacobs, 68 Cal. App. 725, 731, 230 P. 209, certiorari denied 268 U.S. 696, 45 S.Ct. 514, 69 L.Ed. 1162; 1 Cal.Jur., pp. 990, 991, sec. 44), it follows that by virtue of the specific inclusion of the enumerated sections this same power exists in a suit brought under section 196a of said code. Arais v. Kalensnikoff, 10 Cal. 2d 428, 434, 74 P.2d 1043, 115 A.L.R. 163. The question of custody involves a right of the child as well as a right and duty of the parent (20 Cal.Jur., p. 416, sec. 14), and, contrary to appellant's argument in this regard, is a matter primarily for the benefit of the child and not the parent. Ott v. Ott, supra, 127 Cal.App. at page 326, 15 P.2d 897.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




78 Cal.App.2d 181

## E. J. STANTON & SONS v. LOS ANGELES COUNTY et al.

Civ. Nos. 15469–15471.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1947.

Hearing Denied April 17, 1947.

**1. Commerce ⇐77**

The legal concept of "original package" within constitutional protection against state taxes on imports is an aggregation of articles imported and is generally applied to a bundle or box packed with some commodity with view to its safety and convenient handling in transportation and does not necessarily mean that goods shall be inclosed in tight or sealed receptacle. U.S.C.A.Const. art. 1, § 10, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Original Package".

**2. Commerce ⇐77**

The phrase "original package" within constitutional protection against state taxation of imports, refers to the unit transported by shipper and delivered in exact condition in which it was shipped, and is an aggregation of goods put up in whatever form and as a unit transported from a foreign land to the United States or from one state to another. U.S.C.A.Const. art. 1, § 10, cl. 2.

**3. Commerce ⇐77**

That one article in a cargo could be shipped alone does not for that reason render each item in such shipment a separate original package so as to preclude state from taxing such imports. U.S.C.A.Const. art. 1, § 10, cl. 2.

**4. Commerce ⇐77**

Where imported lumber was sorted according to size, etc., and stored in importer's bins, upon sale of portion of shipment, remainder became subject to state taxation since the constitutional protection against state taxes on imports applies only to original packages. U.S.C.A.Const. art. 1, § 10, cl. 2.

**5. Appeal and error ⇐1010(1)**

The rule that appellate court cannot upset findings if there is any substantial evidence in record to support them applies only to findings upon contradictory evidence or where counter inferences can be drawn from uncontradicted proof, but where there is no conflict, finding is mere conclusion of law.

**6. Appeal and error ⇐1008(3)**

Where findings were not essential to intelligible decision and there was no witness except the assistant secretary and traffic manager of importer which claimed that state could not tax imported lumber, and all exhibits came from importer's files whose contents did not contradict the witness, findings were not binding upon appellate court.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Actions by E. J. Stanton and Sons against the County of Los Angeles and another to

recover taxes paid under protest on lots of lumber in possession of plaintiff. From judgments for plaintiff, defendants appeal.

Reversed with directions.

Harold W. Kennedy, County Counsel, Gordon Boller, Deputy County Counsel, Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for appellants.

Stanton & Stanton, of Los Angeles for respondent.

MOORE, Presiding Justice.

The question involved is whether respondent as importer had so treated certain taxed lumber as to incorporate it into the mass of property in this state thereby removing it from the inhibition of the federal constitution against a state's assessing duties on imports.

The three judgments appealed from resulted from three actions to recover taxes paid under protest on several lots of lumber in possession of respondent on the first Monday in March of 1939, of 1940 and of 1941 to H. L. Byram, the county tax collector of Los Angeles county who was on the date of each payment agent for the city of Los Angeles for the purpose of collecting taxes. Since the rates of assessments and the question of the city's obligation to pay the total amounts sued for are not pertinent to this decision further mention thereof will not appear. The justice of the taxes will appear from the record in the light of the authorities.

Respondent has been for 50 years engaged in the wholesale and retail lumber business in Los Angeles county. One of its activities has been the importation of hardwoods from Central and South American republics, Australia, the Philippines and other oriental lands. Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, trade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the lumber was tallied by counting the various stacks to ascertain the dimensions and "board measure of the different lumber." No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the "broken lots" remaining after sales had been made from a cargo were taxed. Some of these remained on respondent's premises at the harbor, while others were transported to its yard at Vernon where it was "detailed to various bins" in which it was stored after being tallied and sorted. By the method long in use by respondent each shipment is placed in a separate bin where it is segregated for color and thickness. All lumber is measured by board feet except lignum vitæ which is measured by weight. It is stacked with laths between the layers of lumber to preserve it from fungus and rot and not to process it. It is not kiln-dried prior to sale. The taxed lumber, says respondent, consisted of "portions of shipments remaining after sales by plaintiff of portions of the original shipment * * * all lumber was kept in piles where only lumber from one shipper was present. * * * The bin depleted by sales is filled by the addition of more of the same type of lumber from the same importer. * * * Lumber is sold from these bins by a carload, a truckload or several carloads. The number of sales from any particular bin varies from a few to a single sale." Such was substantially the stipulation at the trial.

The controversy revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation. Respondent contends that so long as any parcel of the entire lot remains in the possession of the importer it is not subject to state taxation prior to sale; that each parcel or board is marked so as to distinguish it from all others and is therefore in itself an original package. Appel-

lants argue that by the sorting, segregating and tallying of the timbers, and by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation. As proof of the incorporation of the remnants of shipments into the mass of the county's property it was developed that it might be a number of years before a particular cargo is entirely sold out, and if a few odd pieces are left in a bin a new shipment of the same type from the same producer is put into the same bin.

The law governing the exemption of importations from local taxation had its genesis in section 10 of Article I of the organic law of the United States.[1] The inhibition against a state's assessment of imports for taxation was the result of the long period of conflict among the newly liberated states in their endeavor to maintain a union and at the same time to preserve the state in its pristine vigor. To achieve these ends under the new government section 10 was made a part of the constitution forbidding a state to lay imposts or duties on imports. Because of the brevity of the inhibiting clause controversies readily developed with the result that the decision of Brown v. Maryland, 12 Wheat. 419, 1827, 6 L.Ed. 678, first held that "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported," an import is not taxable by the state. In that decision, which is a landmark in the development of nationalistic trends, some pronouncements were made that still must guide the courts in dealing with the fundamentals of taxation, namely: (1) a duty on imports is a tax on the article which is paid by the consumer; (2) the object of importation is sale which is the motive for paying the duties; (3) the tax by the state finds the article already incorporated with the mass of property by the act of the importer; (4) when by the act of the importer the import has become incorporated with the mass of property in the state it loses its distinctive character as an import and becomes subject to the taxing power of the state; (5) while the import remains the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it by the state is too plainly a duty on imports to escape the constitutional inhibition against taxing imports.

Subsequent decisions and text writers have followed the construction of Brown v. Maryland and have further clarified section 10 as well as the language of the Chief Justice. The meaning of his phrase "original form or package" is determinative of the instant contest. While respondent says each board is a separate package and is in its original form, appellants contend that the package of lumber is the bulk transported in the ship's hold. In this they are generously supported. The article in Corpus Juris Secundum (15 C.J.S., Commerce, § 28, page 310) declares that imports become subject to state regulation when the larger receptacle is broken for the purpose of selling and delivering the smaller units, and that they are no longer in the original package when they are sold; that an original package is an aggregation of goods put up in whatever form, covering or receptacle for transportation and as a unit transported. The import is subject to state taxation if the container is opened and smaller packages removed therefrom are offered for sale, or if the recipient of the package has an unexecuted intention to open it and sell its contents. (11 Am.Jur., p. 56, §§ 60, 62.) A large box containing bundles or parcels is the original package and when opened each parcel loses its character as an import, becomes a part of the general mass of property and is subject to local taxation. F. May & Co. v. New Orleans, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, 1170.

[1, 2] The legal concept of "original

[1] Article I, section 10, clause 2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

package" is an aggregation of articles imported. The purpose of wrapping the articles ordinarily found in a package is to unify them as a single import and to prevent their loss or destruction. When removed from the wrapper they cease to be imports and become a part of the property mass of the state. The term "original package" is generally applied to a bundle or box " 'packed' with some commodity with a view to its safety and convenient handling in transportation * * * It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle * * * It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer." Cook v. Marshall County, 119 Iowa 384, 93 N.W. 372, 373, 374, 104 Am. St.Rep. 283. Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or the original package. Such articles as those last mentioned, or lumber as in the instant case, require neither bundling to facilitate their handling nor wrappers to protect them from the elements. Indeed, to bundle timbers would impair the facility of handling a shipment. The phrase "original package" refers to the unit transported by the shipper and delivered in the exact condition in which it was shipped. McGregor v. Cone, 104 Iowa 465, 73 N.W. 1041, 39 L.R.A. 484, 65 Am. St.Rep. 522. As governed by interstate commerce rules the original package retains its form and contents until received by the consignee in the same condition as when shipped, but ceases to be original when broken for sale of its smaller units. In re Agnew, 89 Neb. 306, 131 N.W. 817, 35 L.R.A.,N.S., 836, Ann.Cas.1912C, 676. It is an aggregation of goods put up in whatever form and as a unit transported from a foreign land to our shores, or from one state to another. Austin v. State, 101 Tenn. 563, 48 S.W. 305, 50 L.R.A. 478, 70 Am.St. Rep. 703; 26 A.L.R. 971, 974.

[3] While no reported case involves the classification of a cargo of lumber, some light may be shed upon it by the adjudication as the original package of sealed cases of beer (Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128); casks containing a dozen bottles of tonic (Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184); crates containing 20 pails each of lard (State v. Armour & Co., 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771, Ann.Cas.1916D, 548); packages containing two or more five gallon cans of gasoline (Askren v. Continental Oil Co., 252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654); packages containing three or more barrels and crates enclosing bottles of liquor (Guckenheimer v. Sellers, C.C., 81 F. 997). An open box holding bottles of liquor is an original package in interstate commerce. Collins v. Hills, 77 Iowa 181, 41 N.W. 571, 3 L.R.A. 110. In an action to enjoin a newsdealer from selling a certain publication prohibited from sale it was held that when the newspapers were received by the defendant in bulk or in bundle and placed on the newsstand for sale they became commingled with the mass of property in the state. State Ex rel Black v. Delaye, 193 Ala. 500, 68 So. 993, 995, L.R.A.1915E, 640. Even though a large receptacle is uncovered, leaving exposed the individual articles such as bales, cartons, crates and cases of dry goods which constitute the shipment, still such receptacle is the original package in contemplation of the constitutional restraint upon local taxation of an import. (11 Am.Jur., p. 55, § 60.) The fact that one article in a cargo could be shipped alone does not for that reason render each item in such a shipment a separate, original package. In re Harmon, C.C., 43 F. 372.

[4] From the authorities above quoted the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. Although a cargo in bulk may arrive at the port of entry in irons, or

wrapped and tied with hemp ropes, or encircled with a silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package. A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber.

The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) the United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitæ logs; (4) the consular cetificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the "original form" in which it was shipped.

Respondent says that each plank was an original package because it bore individual markings which made it distinguishable "as original packages of import." Such marks merely identified the producer, who varies them for different shipments. They are put upon the boards to enable the carrier to unload the shipment without mixing the cargoes going to different importers.

The conduct of respondent in the grading of the lumber, in piling and separating it with respect to thickness at the yards, in keeping the light from the dark, in classifying it as firsts, seconds, select number 1 and common, and in passing it through two or more sorting operations "making it readily available for sale" before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitutional inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer "otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

There is nothing said in the case of F. May & Company v. New Orleans, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, that supports the contention of respondent. May & Co. imported merchandise from Europe. The importer made sales of packages of towels or of lace in the same parcels in which they were wrapped by the manufacturer, and contended that each of such parcels was an original package. The question for decision was whether the manufacturer's package or the box in which

the packages were placed for shipment was the "original package." Both the Supreme Court of Louisiana and the United States Supreme Court held that the "original package" was that in which the goods were shipped to and received by the plaintiffs and not the smaller parcels put up by the manufacturer and packed in the box delivered to the carrier. The plaintiff argued that the importer might sell each separate package either from the box in which it was transported or from the shelves or counters in his store without being subjected to local taxation in respect of any package so brought into the country, provided such separate package be offered for sale in the form in which it was when placed in the box, case, or bale by the European manufacturer or packer. The court declared that such argument means that the power of the state to tax goods imported from other countries depends upon the particular form in which the foreign manufacturer or packer, of his own accord or by direction of the importer, has put them up in order to be sent to this country; that if such contention were the law then each article of merchandise, such as a watch done up in a separate case, would be an "original package" and could not be regarded as a part of the property of the state subject to local taxation so long as it remained in that form and unsold in the hands of the importer. It was held that when the goods placed in the hands of agents for sale, in separate parcels, have been so acted upon by the importer they have ceased to be imports and have become part of the mass of the property of the state, liable to local taxation; that the "original package" was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it each parcel when removed from the box "lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

There is no material difference between the facts there adjudicated and those at bar. The principle involved in the two cases is identical. While the laces imported by May & Company were inclosed in cartons by the manufacturer, they were packed in wooden boxes for the ocean journey by the packer in the employ of the manufacturer. Likewise here, after the boards, planks and logs comprising the shipments to respondent had been sorted and arranged for sale, and especially after portions thereof had been sold and the remnants commingled in bins for further sales, they occupied the same status as the parcels of May & Company after being removed from the wooden boxes and offered for sale by the parcel. Certainly a mahogany timber containing ten board feet is as much an item of merchandise as a carton of lace, and as one of five thousand planks in a cargo it can not reasonably be termed an "original package."

The case of Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710, involved a shipment of 100-pound bags of nitrate. They were kept intact in a public warehouse in Mobile until removed by the ultimate consumers. It bears no resemblance to remnants of depleted cargoes of lumber sorted, classified and stored for sale, and is otherwise not authority for exempting respondent's depleted shipments from a local tax.

Neither does it appear that the cases of Re Taxes, Pacific Guano & Fertilizer Co., 32 Hawaii 431; Low v. Austin, 13 Wall. 29, 20 L.Ed. 517, and Southern Pacific Co. v. City of Calexico, D. C., 288 F. 634, 642, shed any light upon the issue presented by the instant action. In each of those cases it is made clearly to appear that the imported merchandise was taxed after United States customs duties had been paid and while the merchandise lay in the warehouse of the importer, either in the same form in which it had been discharged by the carrier at the port or in the original packages in which it had been wrapped or crated by the shipper at the point of origin. In the Hawaii case the property taxed was phosphate rock in bulk, kept intact in bins in a warehouse separate from the general mass of property in the territory. In the Low case the wine was stored in a warehouse of the importers "in the original cases in which the wines were imported

where they remained for sale." In the Southern Pacific case the cotton had been produced, ginned and baled in Lower California. Each bale was marked or stenciled with the owner's initials and thus hauled into California and placed in the warehouse of the importer unchanged in any way until the first Monday in March, 1922, when it was assessed for taxation. The fact that the bales were further compressed "did not substantially change the form, aspect, or container of the thing imported. True it is that the cover was temporarily removed; but * * * merely for the purpose of enabling the self same article, in no wise changed in character or extent, to be compressed into a smaller space, that it might be shipped more economically."

In Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La. 604, 138 So. 117, it was merely held that the circumstance of pumping the oil into tanks of one thousand barrel capacity did not cause the liquid to lose its character as an import; that the only practical way of importing oil is in bulk; that in order to deliver the oil it may be pumped from the ship into the tanks on land, which process would not destroy its original bulk form of importation.

Respondent argues in extenso that the protection of an import from state taxation inheres in the article in its original package, citing United States v. 65 Casks, D.C., 170 F. 449; Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224; May v. New Orleans, supra; Champlain Realty Co. v. Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195, and License Cases, 5 How. 504, 12 L.Ed. 256, 258; etc. There is no question as to the soundness of the proposition. The authorities cited by respondent base their holdings upon the finding of what constituted the original package. In the 65 Casks case each cask contained 50 gallons, was marked to the consignee and if separated from the car could have been shipped alone without inconvenience. In the Austin case the cigarettes were put into pasteboard boxes, ten each. They were separately stamped and labeled. After purchase thereof the manufacturer piled upon the floor of its warehouse the number of packages sold and notified the express company to remove them. This was done by the latter company's placing the packages in one of its open baskets and transporting them to the place of business of Austin in Tennessee where the company's agent laid out the detached cigarette packages on Austin's counter. In the latter's defense it was contended that each "pack" of cigarettes was an original package as defined in Brown v. Maryland. The court in affirming the conviction for selling a "pack" in violation of a statute forbidding the sale of cigarettes said [179 U.S. 343, 21 S.Ct. 138]: "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. * * * No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of a particular size."

The Champlain case involved the question as to whether the logs of pulpwood floating down West River from a point in Vermont at the time of taxation were in transit to plaintiff's mill in New Hampshire and therefore throws no light upon the liability of respondent for local taxes on its remnants of shipments of lumber under section 10. The License Cases merely followed Brown v. Maryland in declaring an import is protected against local taxation while "in the hands of the importer for

sale, in the form and shape in which they were introduced."

Respondent cites the decision of this court in Dant & Russell v. Board of Supervisors, Cal.App., 128 P.2d 389, wherein we held in conformance with respondent's contention here that the shipment of thousands of pieces of lumber did not take from one piece its character of "original package." A hearing was granted by the Supreme Court which affirmed the decision we had reversed. 21 Cal.2d 534, 133 P.2d 817. While the affirmance was based upon the theory that the mahogany taxed was a shipment in interstate traffic (from the Philippines) and for that reason not liable to state taxation, the application for the hearing was based upon the county's claim that each board in the cargo was not an original package. The order of transfer having "blacked out" our opinion (In re Kent's Estate, 6 Cal.2d 154, 156, 57 P.2d 901) it has no authoritative value or standing in this discussion. In our defunct decision we declared that the "case of Mexican Petroleum Corporation v. City of South Portland, 121 Me. 128, 115 A. 900, 26 A.L.R. 965, * * * cited by respondent [the county] and * * * urged in the trial court * * * has been expressly disapproved as the law in this state. (See Philippine Refining Corporation v. Contra Costa County, 24 Cal.App.2d 665, 669, 76 P.2d 163, * * *)" The Maine court decision has been suggested by neither party to this action. It does not bear upon the issues. It was "decided without reference to the commerce clause" (ibid, at page 669 of 24 Cal.App.2d, at page 165 of 76 P.2d) whereas respondent herein based its action on section 10, and the issue thereby created was controverted by appellants at all stages.

[5, 6] Respondent invokes the rule (In re Bristol's Estate, 23 Cal.2d 221, 223, 143 P.2d 689) that the appellate court is powerless to upset findings if there is any substantial evidence in the record to support them. Such rule applies only to findings upon contradictory evidence or where contrary inferences can be drawn from uncontradicted proof. Where there is no conflict the finding is no more than a conclusion of law. (San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416. Findings herein were not essential to an intelligible decision. There was no witness except the assistant secretary and traffic manager of respondent. All exhibits came from respondent's files and their contents do not contradict the witness. The judgments appealed from are in a situation analogous to if not identical with one based upon stipulated facts. Therefore the "findings" are not binding upon this court. Consequently, in our discussion of the issues we have proceeded from the testimony in the reporter's transcript and the documentary exhibits. So proceeding, we have derived conclusions contrary to those reached by the trial court.

It is therefore ordered that all three judgments be and they are reversed with directions to enter judgments in favor of appellants as prayed.

McCOMB, and WILSON, JJ., concur.




78 Cal.App.2d 490

**MORRIS et al. v. RICHARD CLARK MISSIONARY BAPTIST CHURCH et al.**

**Civ. 13257.**

District Court of Appeal, First District, Division 2, California.

March 11, 1947.

**1. Religious societies ⇐4, 5**

The number of church trustees and their tenure as stated in the articles of incorporation control over inconsistent provision in by-laws. Civ.Code, § 303, subd. 4, §§ 593 et seq., 595, subd. 4.

**2. Religious societies ⇐9**

Where terms of office of church trustees had expired, the church members could elect any persons they chose to fill vacant offices, and trustees whose terms of office had expired could not complain of failure to reelect them or that no proper charges

had been made against them or that they had not been fairly tried. Civ.Code, § 303, subd. 4, §§ 593 et seq., 595, subd. 4.

3. Mandamus ⇐140

A judgment requiring former church trustee to return church records and books to the church authorities was proper irrespective of whether trustee's removal was regular.

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Action by C. R. Morris, Mrs. J. W. Bland, Robert Barron and others against the Richard Clark Missionary Baptist Church and others for a writ of mandamus directing that plaintiffs be reinstated as trustees of the defendant church wherein the defendant church filed a cross-petition to compel deposed trustee to return books and records. From a judgment for defendants, the three named plaintiffs appeal.

Judgment affirmed.

Lawrence Sledge, of Oakland, for appellants.

Hildebrand, Bills & McLeod and Albert H. Davidson, all of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued in mandamus to compel their reinstatement as trustees of defendant church. The defendant church alone appeared and filed a cross-petition to compel the deposed trustees to return church books and records in their possession. The trial court entered judgment for defendant on both the petition and cross-petition.

The church was duly organized under the state law in 1913. Its articles of incorporation provide that there shall be seven trustees who shall serve for a term of one year, or until their successors are elected and installed. Thereafter the corporation adopted by-laws providing that there should be nine trustees who shall serve during good behavior. Acting under the by-laws the church at the time this controversy arose was operating with nine trustees. At a meeting of the church members, duly called, they agreed to abide by the articles of incorporation and six of the nine incumbent trustees who had served more than one year were removed and four other members were elected to complete the list of seven, with three of those who had not served one year holding over.

The controversy arises over an incident occurring during a Sunday morning service when the nine trustees were assembled in an anteroom counting the money received in the morning collection. Two of the trustees engaged in a physical encounter during which they fell through the door into the church auditorium, interrupting the pastor's sermon. At the close of the service the pastor referred to the incident and called a special church meeting of all members for the following Wednesday evening. "His announcement was, 'everybody come out to settle a ruckus.'" At the meeting held pursuant to this call the Sunday morning incident was referred to at length. One of the participants in that affair apologized to the members and his apology was accepted. Plaintiff Morris, another participant, denied any wrongdoing and his qualified apology was rejected. Thereupon the pastor announced that he was advised that the articles of incorporation fixing the number of trustees at seven and their period of office at one year were controlling and that six of the present members had served for more than one year. Nominations were then requested for four new trustees. Four persons were suggested by the pastor and, upon motion, were elected by the members by a large majority.

The trustees who were removed from office by that action bring this proceeding in mandamus on the theory that they were entitled to a notice of charges of misconduct and a trial before the church membership on the question of "good behavior." Their case rests on the theory that the by-laws control over the articles of incorporation and that the notice of the special meeting given by the pastor was an insufficient statement of charges for the purpose of removing the trustees. But the issue is broader than that stated by appellants. If the church membership is controlled by the articles of incorporation as to the term of its trustees there were six members of the board whose terms had expired by opera-

tion of law—two of whom had been holding office illegally. Then no formal charge of misconduct and no trial were necessary. The trustees were merely holding until their successors were elected and installed.

[1] We are satisfied that the articles controlled and that the election of the new trustees was regular and valid. The church was incorporated under the provisions of section 593 et seq. of the Civil Code. Section 595(4) provides that the number of trustees shall be stated in the articles of incorporation which shall remain "until changed by an amendment to the articles or by a by-law adopted pursuant to authority contained in the articles." Section 303 subd. 4 relating to corporations in general permits a change in the number of directors by an amendment to the by-laws "unless the articles forbid." The trial court found that the articles provided for seven directors to serve for one year or until their successors were elected and installed. The articles did not authorize the church to change the number or the manner of election through its by-laws, and the appellants do not contend otherwise. Upon the record, the trial court properly made the conclusion of law that the portion of the by-laws providing for nine directors was void. Bornstein v. District Grand Lodge No. 4, 2 Cal.App. 624, 627, 628, 84 P. 271; 6a Cal.Jur. pp. 319, 320; 13 Am.Jur. pp. 286, 287.

[2] Since the church was limited to a board of trustees consisting of seven members the membership was at liberty to elect four new trustees in lieu of those whose terms had expired under the provisions of the articles. To accomplish this purpose it was not necessary to give any reason for a failure to reelect any one of the former trustees who are plaintiffs herein. For this reason it becomes immaterial whether these trustees were properly "removed", informed against, or "fairly tried", upon charges of misconduct. Their terms had expired by operation of law and neither charges nor trial were required.

[3] The portion of the judgment requiring Morris to return the church records and books to the church authorities is not subject to attack upon any reasonable ground. Even if his removal as trustee had been irregular he was not entitled to refuse to deliver the church records to the proper authorities.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.




78 Cal.App.2d 340

**PEOPLE v. MARTIN.**

**Cr. 1982.**

District Court of Appeal, Third District, California.

March 3, 1947.

Rehearing Denied March 18, 1947.

Hearing Denied April 21, 1947.

**1. Criminal law ⇐1202(1)**

A defendant pleading guilty to second-degree burglary and admitting prior conviction of robbery for which he had been imprisoned in state prison and prior conviction of burglary, could be adjudged an "habitual criminal," notwithstanding that at time of arrest on second-degree burglary charge he was at large on parole in connection with the prior burglary, where at time of such arrest he had served a term for prior burglary which would have been the entire prison term had he not violated his parole. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Habitual Criminal".

**2. Criminal law ⇐1202(1)**

The statute relating to punishment of habitual criminals was not enacted as an inducement to an ex-convict to commit his additional transgressions while on parole or while at liberty by reason of his escape from prison. Pen.Code, § 644.

**3. Criminal law ⇐996(1)**

A defendant who pleaded guilty to second-degree burglary committed while he was on parole in connection with conviction for prior burglary could not complain of provision in amended judgment of convic

tion for second-degree burglary that term of imprisonment in connection therewith should run concurrently with term of imprisonment in connection with prior burglary. Pen.Code, § 669.

**4. Criminal law ⇐980(2)**

A defendant pleading guilty to second-degree burglary could not complain that trial court failed to take testimony to determine degree of burglary of which defendant was guilty, where judgment recited the offense with which defendant was charged, his plea of guilty thereto, and a finding that offense charged was second-degree burglary.

**5. Constitutional law ⇐270**

The denial of defendant's written request for his release from state penitentiary to appear in person to urge his motion for writ of coram nobis was not a denial of due process.

**6. Judges ⇐49(2)**

A defendant applying for writ of coram nobis could not complain that trial court denying application did not understand nature of case and was merely guessing and so was prejudiced and unfair to defendant, by considering merely particular words, removed from their context, uttered by trial judge in discussing with prosecutor the propriety of writ.

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Appeal from Superior Court, Yolo County; W. T. Belieu, Judge.

Thomas F. Martin pleaded guilty to second-degree burglary, and admitted two prior convictions, and was adjudged to be an habitual criminal, and was sentenced accordingly. From an order denying defendant's motion for a writ of coram nobis, the defendant appeals.

Order affirmed.

Thomas F. Martin, in pro per.

Robt. W. Kenny, Atty. Gen. and Jas. O. Reavis, Deputy Atty. Gen., for respondent.

PECK, Justice.

By the first count of an information filed by the District Attorney of Yolo County, defendant and two codefendants were charged with the crime of burglary alleged to have been committed in said county on May 16, 1941. In the second count Martin was charged with having been convicted of the crime of robbery in Los Angeles county on October 19, 1931, for which crime he was imprisoned in the state prison at San Quentin. In the third count he was charged with the crime of burglary in the county of Los Angeles on May 14, 1936, for which crime he served a term in the state prison at Folsom. Upon arraignment in the Superior Court defendant entered a plea of not guilty to the offense charged in count one of the information and denied the prior convictions charged in counts two and three thereof. On August 12, 1941, the date set for the trial of said charges, defendant appeared with counsel, withdrew his former plea of not guilty and his denial of prior convictions, and admitted he had been previously convicted of the crimes charged in counts two and three of the information. By stipulation the district attorney and counsel for defendant agreed that the crime charged in count one was burglary in the second degree. Thereafter on August 14, 1941, the court by its judgment found defendant to be an habitual criminal under the provisions of section 644 of the Penal Code, and sentenced him accordingly.

On September 22, 1941, the Superior Court of said county made its order amending the prior judgment, stating that at the time of sentence the court had overlooked the fact that the term of imprisonment for the crime charged in count three of the information, to-wit, the burglary committed in Los Angeles county for which defendant was adjudged guilty on March 14, 1936, had not been completed by the defendant, and under the provisions of section 669 of the Penal Code determined that the unexpired portion of said term should run concurrent with the term of imprisonment on the judgment of conviction originally pronounced by the court.

No appeal or other action was taken by defendant either from the original judgment or from the order amending the same. Approximately four and one-half years later defendant filed in said Superior Court a petition for a writ of coram

nobis, and shortly thereafter filed what was termed by the trial court to be a supplement thereto or a motion to set aside that portion of defendant's judgment of conviction relating to his prior convictions and the order adjudging him an habitual criminal.

After a hearing, at which the trial court found it was unnecessary for defendant to be present, said motions were denied, and from the order entered in accordance therewith the defendant has appealed. A like appeal by one of his codefendants on substantially the same issues as are raised herein appears in People v. McCullough, 177 P.2d 816.

One of the principal contentions advanced by appellant as ground for a reversal of the order is that he was unlawfully adjudged an habitual criminal in that he had not served a complete term of imprisonment on the prior conviction set forth in count three of the information, but at the time of his arrest on the charge alleged in count one he was at large on parole and therefore had not served two prior terms of imprisonment within the meaning of section 644 of the Penal Code.

[1, 2] Such a contention is wholly devoid of merit. To so interpret said section would be to place a premium on the violation of a parole, a result entirely foreign to the purpose of the act. Certainly the statute was not enacted as an inducement to an ex-convict to commit his additional transgressions while on parole (People v. Keilly, 54 Cal.App.2d 764, 768, 129 P.2d 939), or while at liberty by reason of his escape from prison. People v. Carkeek, 35 Cal.App.2d 499, 502, 96 P.2d 132. At the time defendant herein was arrested and upon his affirmative plea adjudged guilty of burglary, "he had served a term for the offense for which he was on parole which would have been the entire prison term had he not violated the parole." In re Brady, 5 Cal.2d 224, 226, 53 P.2d 945.

[3] Although defendant also attacks the action of the trial court in amending the judgment of conviction to provide for a concurrent running of the terms of imprisonment as described above, no reasonable basis for such objection is apparent from the record or the briefs, and it is difficult to understand how appellant could have any cause for complaint in this regard. The record shows that the order made by the trial court was in accord with the provisions of said section 669 of the Penal Code.

[4] Likewise untenable is appellant's contention that the court erred in not taking testimony to determine whether he was guilty of second-degree burglary which he admitted. He relies on the case of People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585. While in that case this court did hold, upon the peculiar facts disclosed therein, that failure of the trial court to determine the degree of the admitted crime necessitated a remand of the case, nevertheless it was further held that a plea of guilty to the particular degree of the crime charged and a determination by the court of the degree were sufficient. It is the latter holding that applies to the situation in the present case. Here the judgment contains a recital of the offense with which the defendant was charged, his plea of guilty thereto, and a finding by the court that the offense charged was burglary in the second degree. Such determination was sufficient. See In re Hammond, 24 Cal.App.2d 18, 20, 74 P.2d 308; People v. Bayne, 136 Cal.App. 341, 346, 28 P.2d 1068.

[5] There is no merit in appellant's further charge that he was denied due process because he was not permitted to be present at the hearing of his motion. Substantially the same contention as that advanced by defendant herein was fully considered in the case of People v. Russell, 139 Cal.App. 417, 419, 34 P.2d 203, and held to be without foundation. There, as here, the defendant upon filing a motion to vacate a judgment of conviction made a written request that he be released from the state penitentiary at Folsom, where he was confined, for the purpose of appearing in court in person to urge the motion. The trial court denied the request, and on appeal it was urged that his constitutional rights to appear and defend in person were denied him. In concluding otherwise the court stated at page 420 of 139 Cal.App., at page 204 of 34 P.2d: "As there is no constitutional nor statutory right of a defend-

ant to demand his presence at a proceeding brought to review or set aside a judgment, the failure of the trial court to order his presence on the hearing of this motion was not error."

[6] Defendant's additional contention that the trial court was prejudiced and unfair to him in that the court did not understand the nature of the case and was merely guessing, is so obviously unfounded as to merit no more than passing notice. We have noted that in support of such contention defendant has quoted only a portion of the comments of the trial judge in discussing with the prosecutor the propriety of the writ sought by defendant and his supplemental motion. Defendant after thus removing the particular words from their context attempts to attribute meanings thereto entirely foreign to the purport of the discussion and the statements of the court.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




78 Cal.App.2d 344

**PEOPLE v. McCULLOUGH.**

**Cr. 1983.**

District Court of Appeal, Third District, California.

March 3, 1947.

**Criminal law ⇐1109(3)**

The misspelling in reporter's transcript of name of prosecuting attorney at hearing of motion for writ of coram nobis would not be considered under rule that clerical misprisions in a reporter's transcript which do not affect the substantial right of a party should be disregarded.

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Appeal from Superior Court, Yolo County; W. T. Belieu, Judge.

Edwin McCullough pleaded guilty to second-degree burglary, and admitted two prior convictions, and was adjudged to be an habitual criminal, and was sentenced accordingly. From an order denying defendant's motion for a writ of coram nobis, the defendant appeals.

Order affirmed.

Edwin McCullough, in pro per.

Robt. W. Kenny, Atty. Gen., and Jas. O. Reavis, Dep. Atty. Gen., for respondent.

PEEK, Justice.

As in the case of People v. Martin, Cal. App., 177 P.2d 813, this is an appeal from an order denying defendant's motion for a writ of coram nobis. McCullough, as did his codefendant Martin, pleaded guilty to burglary in the second degree and admitted two prior convictions as charged in the information. He was adjudged to be an habitual criminal and sentenced accordingly.

At approximately the same time as the filing of the petition for a like writ in the Martin case defendant herein made a similar motion, and from the order denying the same he too has appealed. The grounds upon which the motion was made and the contentions advanced on appeal are substantially the same as those urged by Martin in his appeal, and which we have held to be without merit. For a discussion thereof reference is hereby made to that opinion.

Although the matter was mentioned in the brief of the appellant in the Martin case, no issue was made of it therein, but in the present case defendant presses the assertion that the person whose name appears in the reporter's transcript as the prosecuting attorney who represented the people at the hearing of the motion for the writ was not a person authorized to practice law in the State of California. From an examination of the record it appears that this contention is based on nothing more than the fact that the name of the prosecuting attorney was misspelled in the reporter's transcript on appeal. This being so, the matter requires no further consideration. Clerical misprisions in a reporter's transcript which do not affect the substantial right of a party should be disregarded.

People v. Marr, 44 Cal.App.2d 760, 761, 113 P.2d 22.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




78 Cal.App.2d 293

**PEOPLE v. HARRIS.**

**Cr. 2431.**

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1947.

**1. Criminal law ⇐1134(3)**

Defendant's fear that, under sentence "for the term prescribed by law", he would be treated as a two-term offender ineligible to apply for parole for two calendar years, rather than as a first offender eligible to apply for parole in six months, because during trial he admitted prior convictions, although prior convictions were not pleaded in information, is not a question that can be raised on appeal from conviction, and remedy, if application is rejected, is by habeas corpus. Pen.Code, § 3041; Vehicle Code, § 503.

**2. Criminal law ⇐1144**

On appeal from a judgment sentencing defendant to imprisonment "for the term prescribed by law" without mentioning prior convictions, reviewing court could not assume that the Adult Authority will go behind the judgment for the purpose of adjudging defendant a "two termer" and refuse to entertain his application for parole as a first offender.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Donald Harris was convicted of driving and taking a vehicle belonging to another without the owner's consent and he appeals.

Affirmed.

Donald Harris, in pro per.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., of San Francisco, for respondent.

NOURSE, Presiding Justice.

Appellant appeals from a judgment of conviction of a violation of Section 503 of the Vehicle Code—driving and taking a vehicle belonging to another without the owner's consent. He was sentenced to imprisonment in the state prison "for the term prescribed by law."

[1] His only ground urged on the appeal is that, since during the trial he admitted two prior convictions, he believes that the prison authorities will consider him a two-term offender and will not consider an application for parole until he has served two calendar years. Respondent concedes that the prior convictions were not pleaded in the information. Hence appellant argues that he must be treated as a first offender and as such entitled to apply for parole within six months from the commencement of his imprisonment. Section 3041, Penal Code.

[2] But this is not a question which may be raised on an appeal from the judgment of conviction. That judgment makes no mention of the two prior convictions. The appellant was merely sentenced for "the term prescribed by law." On this appeal we cannot assume that the Adult Authority will go behind the judgment for the purpose of adjudging appellant a "two-termer" and thus refuse to entertain his application for parole.

If, when the time arrives when appellant is entitled to apply for parole, his application is rejected on the grounds herein stated appellant has an adequate remedy by habeas corpus to determine his status. In re McVickers, 29 Cal.2d 264, 176 P.2d 40; In re Seeley, 29 Cal.2d 9, 176 P.2d 24. In the two cited cases habeas corpus was held to be the proper remedy to test the validity of an "adjudication" of prior convictions under the habitual crimi-

nal act. Here there was no "adjudication" since the prior convictions were not pleaded in the information. By analogy, if the writ of habeas corpus is the proper remedy to test an "adjudication" of prior convictions by the court entering the sentence, it must with more reason be a proper remedy to test the validity of the ruling of an administrative agency on the same subject. In any event the question cannot be raised on an appeal from a judgment which is silent on the matter of the prior convictions.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.




78 Cal.App.2d 378

**ANDERSON et al. v. PERMENTER et al.**

**Civ. 3542.**

District Court of Appeal, Fourth District, California.

March 4, 1947.

**1. Pleading ⇐236(3)**

Amendment of a complaint at commencement of trial after decision on demurrer is not a matter of right, but is within the discretion of the trial court.

**2. Appeal and error ⇐959(3)**

Order refusing permission to amend a complaint at commencement of trial after decision on demurrer can only be reversed when the record shows an abuse of discretion.

**3. Pleading ⇐236(3)**

Refusal to permit amendment of complaint at commencement of trial was discretionary, where case had been at issue for nearly a year before leave to amend was asked.

**4. Specific performance ⇐12**

Specific performance of oral contract to sell grocery business, the stock of which was to inventory at a specified value subject to proportionate reduction in purchase price if inventory was less than that value, could not be refused on ground that stock in trade had changed between date contract was entered into and part of purchase price paid and date buyer tendered remainder of purchase price and that other similar articles had replaced some of the original stock. Civ.Code, §§ 1725, 1788, 3390, subd. 6.

**5. Specific performance ⇐30**

The price to be paid for personal property is an element of the sales contract which must be certain and clearly ascertained before specific performance can be decreed. Civ.Code, §§ 1788, 3390, subd. 6.

**6. Specific performance ⇐30**

A contract for sale of grocery business could not be specifically enforced by buyers, where contract did not fix the price to be paid but provided for payment of a certain price and that stock should inventory at a certain amount and provided for proportionate reduction in purchase price if inventory was less than that amount, but no inventory was taken and no witness gave the value of the stock. Civ.Code, §§ 1788, 3390, subd. 6.

**7. Specific performance ⇐30**

A contract to sell a grocery business was not specifically enforceable by buyers where stock was to inventory at specified price subject to proportionate reduction in price if stock inventoried at less, but whether the inventory should be based on wholesale or retail prices was not specified, and written demand to perform served by buyers required an inventory measured at wholesale prices while the inventories taken by seller were based on retail prices. Civ. Code, §§ 1788, 3390, subd. 6.

**8. Sales ⇐185**

Buyers' offer of performance of contract to buy grocery business, requiring seller to deliver a stock of goods in no event of lesser value than $5,500 measured at present wholesale prices, was not an offer to perform the sales contract which provided for payment of $8,000, or such smaller sum as the inventory showed stock to be of less value than $5,500. Civ.Code, §§ 1788, 3390, subd. 6.

**9. Specific performance ⇐128(1)**

Damages in lieu of specific performance could not be awarded for failure of sellers to perform contract for sale of grocery business, where the market or current price of the stock when the stock should have been delivered was not indicated, and the selling price to be paid by buyers was not specifically fixed. Civ. Code, § 1787.

**10. Sales ⇐415**

Damages could not be awarded buyers for sellers' failure to perform contract for sale of grocery business, where no evidence that buyers had suffered any damage from breach of the contract was offered. Civ.Code, § 1787.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Lloyd Anderson and Lorn Aistrup against Dale Permenter and A. V. Gill for specific performance of an oral contract for the sale of a grocery business. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellants.

West & Vizzard, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of defendants in an action to enforce specific performance of an oral contract for the sale, for $8,000, of a stock of groceries, store fixtures and furnishings, and the assignment of defendant Permenter's interest in a lease on the store premises which had more than one year to run. Plaintiffs paid defendants $50 on account of the purchase price at the time of making the oral agreement.

Plaintiffs filed a complaint, an amended complaint and a second amended complaint.

The second amended complaint attempted to state three causes of action. The first was for specific performance of the oral contract, without any allegations which would support a judgment for damages in the event specific performance should be denied. The second attempted to state a cause of action for damages but contained no proper allegation of the damages suffered by plaintiffs See, Sec. 1787, Civil Code. The third attempted to state a cause of action for declaratory relief but failed to contain allegations of a sufficient controversy between plaintiffs and A. V. Gill against whom this cause of action was directed to permit the intervention of a court of equity.

On January 23, 1945, a demurrer to the first cause of action was overruled, was sustained to the second cause of action with ten days given plaintiffs to amend, and was sustained to the third cause of action without leave to amend. These rulings were proper and are sustained by the record at least as to the second and third causes of action. Plaintiffs failed to amend.

The cause went to trial on January 7, 1946. At the outset counsel for plaintiffs asked permission to amend the complaint by alleging general damages in the sum of $3,500 resulting from the failure and refusal of Permenter to perform his contract. On the objection of defendants this request was denied and the ruling is now urged as error.

[1-3] The general rule is well established that under the circumstances here disclosed amendment of a pleading at the commencement of a trial is not a matter of right but is within the discretion of the trial court; that the order refusing such right can only be reversed when the record shows an abuse of such discretion. Manha v. Union Fertilizer Co., 151 Cal. 581, 91 P. 393. Here the case had been at issue for nearly a year before leave to amend the complaint was asked. As was said in Johnson v. Johnson, 134 Cal.App. 460, 25 P.2d 538:

"The issues were framed nearly twelve months prior to the date of trial and no motion was made during that time to amend the answer, and for that reason also the refusal of the trial court to grant leave to amend during the trial cannot be said to be an abuse of discretion. Reay v. Reay, 97 Cal.App. 264, 275 P. 533; Hagar v.

Home Stores, Inc., 85 Cal.App. 533, 259 P. 1007."

The facts are not in serious dispute. Defendants were lessees of a building in the city of Wasco, in Kern County, in which they conducted separate businesses, Gill a meat market, and Permenter a grocery store. The oral agreement to sell the grocery business to plaintiffs was made on August 13, 1944. According to plaintiffs the purchase price was $8,000, subject to the guaranty of Permenter that the stock in trade would inventory $5,500, and, if it did not inventory that amount, the purchase price would be reduced accordingly. At that time plaintiffs paid and Permenter accepted $50 on account of the selling price.

On August 21, 1944, plaintiffs tendered Permenter a certified check for $7,950 with a written demand that he complete the sale. This demand contained the condition that the stock of groceries be "of substantially the same character and quantity of that existing on the premises as of August 13, 1944, but in no event of lesser value than $5,500.00, measured at present wholesale prices."

Permenter refused to go through with the sale, offered to return the $50, and, as one witness intimated, offered to pay plaintiffs $500. The reason for the refusal to perform was that Gill objected to the sale although the lease contained no provision against either lessee assigning his interest under it.

In 1931 the legislature passed section 1788 of the Civil Code, which was taken from the Uniform Sales Act. It provides as follows:

"Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just."

Defendants urged as a defense and the trial court found that there was nothing to show the detailed items of the stock on August 13, 1944. It was also found that it was impossible to determine the itemized inventory or contents of the stock in trade which had changed since August 13, 1944, so that specific performance could not be enforced.

[4] We cannot conclude that the fact that the stock in trade had changed after August 13, 1944, and other similar articles of the same or other brands had replaced some of the original stock, furnishes a valid reason for refusing specific performance. See, Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 A. 378; Glick v. Beer, 263 App.Div. 599, 33 N.Y.S.2d 833. The contract provided for a sale of the stock in trade in bulk and the parties were more interested in total values than in brands and the specific items composing the stock. In fact both plaintiffs testified they were willing to waive any objections based on changes in the stock and would pay an additional sum if the inventory showed that the stock in trade had a value of more than $5,500, or if any fixtures or furnishings had been added since August 13, 1944. Also, section 1725 of the Civil Code provides that the subject of a contract of sale may be either existing goods, or goods to be acquired by the seller after making the contract of sale. There is nothing to indicate that the parties expected Permenter to close his store and make no sales after August 13, 1944, so they must have contemplated some change in the stock before the sale could have been consummated.

Subdivision 6 of section 3390 of the Civil Code contains the provision that a contract may not be specifically enforced, "the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

[5] It is generally held that the price to be paid for personal property is an element of the contract which must be certain and clearly ascertained before specific performance can be decreed. In speaking of an uncertainty as to the consideration to be paid in Gatley v. Shockley, 215 Cal. 604, 12 P. 2d 436, 439, it was said:

"It is elementary that equity requires as a condition of specific performance a clear mutual understanding and a positive assent on both sides as to the terms of the contract, and it will withhold the exercise of jurisdiction in that respect unless there is such a degree of certainty as will enable it to do complete equity. The contract must not only contain all the material terms, but the terms must, in the language of the Code, be 'sufficiently certain to make the precise act which is to be done clearly ascertainable.' Civ.Code, § 3390; 23 Cal.Jur. 429, § 11. Here the contract fails entirely to provide for one of the most essential terms."

See, also, Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610; Reymond v. Laboudigue, 148 Cal. 691, 84 P. 189; Rittigstein v. Dignan, 122 Cal.App. 357, 9 P.2d 856.

In the instant case neither the contract nor the evidence fixed the price to be paid for the stock of goods so that the court could have decreed specific performance on the part of Permenter upon the payment of a certain sum of money to him.

Mr. Aistrup testified as follows:

"Q. And what was said about the value of the inventory, if anything? A. It would be $5500.

"Q. In other words, if it didn't inventory $5500, you would not take it? A. That was not the understanding. It was the understanding that the inventory would be $5500, or it would be reduced accordingly.

"Q. If it ran under $5500 the price would be reduced accordingly? A. Yes."

The testimony of Mr. Anderson was to the same effect and this evidence was not contradicted.

Aistrup also testified:

"Q. And that inventory was never taken? A. No sir.

"Q. And you didn't know what the stock in trade amounted to at that time? (August 13, 1944) A. I have no idea."

[6] Permenter testified that his inventory of his stock on January 1, 1945, was $8,300, which was the wholesale price plus an average mark up of 21% to indicate the retail value and that the inventory on January 1, 1946, was between $6,000 and $6,500 with the same mark up over wholesale prices to represent the retail price. As no inventory was taken, and as no witness gave the value of the stock of goods, the price to be paid by plaintiffs was not ascertainable.

[7] The oral contract detailed by plaintiffs merely referred to an inventory to be taken of the stock of goods without specifying whether the inventory should be based on wholesale or retail prices. The written demand to perform, served by plaintiffs, required an inventory value of $5,500, measured at present wholesale prices, while the inventories taken by Permenter were based on retail prices. Thus there is another uncertainty in the contract which prevented the trial court from determining the precise amount to be paid had it been inclined to enforce the contract.

[8] It might be argued that the conclusion we have reached permitted Permenter to take advantage of his own wrong in failing to take any inventory so that the purchase price to be paid would have been certain and could have been ascertained. Under the facts of this case the answer is found in the variance between the terms of the offer of performance made by plaintiffs and the terms of the contract detailed in the evidence. The offer required Permenter to deliver to them a stock of goods "in no event of lesser value than $5500.00 measured at present wholesale prices" while their contract provided that they pay $8,000, or such smaller sum as the inventory showed the stock to be of less value than $5,500. Thus plaintiffs did not offer to perform the contract they testified they had made. While they testified that they would pay more than $8,000 if the inventory showed a greater value of the stock than $5,500, or for added fixtures or furnishings, they did not offer to complete the transaction if the stock in trade had a less value than $5,500. Thus it appears that they did not offer to perform the exact contract which they testified they had made, so they should not be permitted to enforce that contract on other terms and at a different price. If the inventory had shown the stock of goods to be of less value than

$5500, Permenter, under the offer, would have had to go into the market and purchase sufficient goods to bring the value up to that amount in order to conform to the terms of the offer as made. There is nothing in the contract requiring him to do this.

[9, 10] If it be assumed that under the prayer for general relief, and under the provisions of section 1788 of the Civil Code, the court might have awarded damages in lieu of specific performance, still there is nothing in the record to form a basis for any such award. There is nothing to indicate the "market or current price of goods" in August, 1944, and the selling price to be paid by plaintiffs is not precisely fixed so there was no adequate measure of damages furnished to the trial court. Sec. 1787, Civil Code. Plaintiffs neither produced nor offered any evidence that they had suffered any damage from the breach of the contract. Thus the trial court could award them none had he desired to do so.

As the contract was not sufficiently certain to be specifically enforced, as plaintiffs never offered to perform according to the exact terms of the contract they had made, and as there is no ascertainable measure of the damages resulting from the breach of the contract, the judgment cannot be disturbed and we need not consider the other questions argued by counsel.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

29 Cal.2d 773

**BERNSTEIN et al. v. BUSH, State Oil and Gas Supervisor.**

**L. A. 19764.**

Supreme Court of California, In Bank.

March 8, 1947.

**1. Mines and minerals ⇐92**

The oil and gas well spacing laws were enacted as a protection against fire, explosion, and other hazards, and exceptions were made in the interest of utilizing the greatest production without unnecessary waste. Public Resources Code, §§ 3600–3607.

**2. Mines and minerals ⇐92**

Legislature has power to enact police regulations to prevent waste of natural resources.

**3. Mines and minerals ⇐92**

The spacing statutes, which contemplate that oil and gas wells will be drilled on private property overlying source of supply and which assume to regulate spacing of wells thereon in interests of public safety and conservation of natural resources, are valid on their face and, insofar as they can be complied with and applied without a denial of constitutional rights, they will be sustained. Public Resources Code, §§ 3600–3607.

**4. Constitutional law ⇐42**

When a statute, innocuous and valid on its face, becomes invalid in its application, the one aggrieved thereby may show facts by which he contends that as to him the statute is unreasonable, oppressive, and void.

**5. Constitutional law ⇐45, 70(1)**

When the police power is exerted to regulate a useful business or occupation, what is a reasonable and just restraint upon the constitutional right of citizen to pursue the business or occupation becomes a judicial as well as legislative question, although authority of courts to declare a regulation invalid will be exercised with caution and only when it is clear that law exceeds limits of legislative power and infringes upon constitutional rights.

**6. Mines and minerals ⇐48**

The property right of a landowner in oil and gas beneath surface is not an absolute title to oil and gas in place, but is an exclusive right to drill upon his property for such substances and his unqualified and absolute title attaches after substances have been reduced to possession. Public Resources Code, §§ 3600–3607, 3203, 3204.

**7. Eminent domain ⇐2(1)**

An undue restriction on the use of private property is a "taking" of property for constitutional purposes. Const.Cal. art. 1, § 21; art. 4, § 25, subd. 19; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Taking".

**8. Constitutional law ⇐205(2), 206(4), 240 (1), 296(1)**
**Mines and minerals ⇐92**

Statutory regulations dealing with the location and spacing of oil and gas wells, including provisions for pooling and proration of interests, providing equal treatment of rights of surface owners in common source of supply, or containing provisions looking to prevention of hardship upon owners in particular cases, are not unconstitutional as denying the privileges and immunities of citizens, as denying equal protection of law, or as denying due process. Const.Cal. art. 1, § 21; art. 4, § 25, subd. 19; U.S.C.A.Const. Amend. 14.

**9. Constitutional law ⇐240(1), 296(1)**

Where combined lands of applicants for an oil and gas well drilling permit were sufficient in area under spacing law to authorize drilling but lands were not contiguous, and spacing law did not provide an adequate means of protection as a substitute for the right to drill offset wells, application of spacing law to applicants was unconstitutional as a denial of equal protection and as a taking of private property without due process. Public Resources Code, §§ 3600–3607, 3203, 3204; Const.Cal. art. 1, § 21; art. 4, § 25, subd. 19; U.S.C.A.Const. Amend. 14.

**10. Mandamus ⇐87**

In the absence of a provision in Public Resources Code requiring state oil and gas

supervisor to issue an oil well drilling permit or requiring applicants for such a permit to obtain one before commencing drilling of proposed well, mandamus will not issue to compel supervisor to issue a permit, notwithstanding that application of statutory spacing rules as to applicants is unconstitutional. Public Resources Code, §§ 3600–3607, 3203, 3204.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting in part.

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Original proceeding on the petition of Sam Bernstein and others against R. D. Bush, as State Oil and Gas Supervisor, for a writ of mandamus to compel issuance of a permit to drill for oil and gas, wherein an alternative writ was issued.

Alternative writ discharged and peremptory writ denied.

Boone & Satchell, of Long Beach, for petitioners.

Robert W. Kenny, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., of San Francisco, for respondent.

SHENK, Justice.

This is an application for the writ of mandate to compel the respondent, State Oil and Gas Supervisor, to grant to the petitioners a permit to drill for oil and gas upon the lease and properties owned by them. The petition shows the following:

The petitioners own several parcels of land in the city of Long Beach, located in what is known as the Long Beach Harbor Area of the Wilmington Oil Field. This area is subdivided into town lots of approximately 3,000 square feet each, and is intersected by streets and highways.

The development of the Wilmington Oil Field was started in 1936, by the General Petroleum Corporation of California. In 1931, the Legislature had enacted a statute relating to the spacing of oil wells (Stats. 1931, p. 1277, as amended, now Pub. Resources Code, §§ 3600–3607). A provision of the statute (now Pub. Resources Code, § 3600) declared any well to be a public nuisance which was thereafter drilled for oil or gas and which was located within one hundred feet of the outer boundary of the parcel of land (which might comprise several contiguous parcels operated as one lease, § 3601) on which the well was situated, or within one hundred feet of a public street or highway dedicated prior to the commencement of drilling, or within one hundred fifty feet of a well being drilled or theretofore drilled and which was producing or capable of producing oil or gas. Exceptions to the spacing regulations were provided. Where a parcel of land containing an acre or more was less than two hundred fifty feet in width, not more than one well to the acre might be drilled if the same be placed as far from the lateral boundary lines as the configuration of the surface and the existing improvements would permit (§ 3602). It was provided that spacing regulations should not apply to a field producing oil or gas on August 14, 1931 (§ 3605). Two other exceptions were contained in sections 3606 and 3607 of the Public Resources Code added in 1945 (Stats.1945, pp. 625, 626) as an emergency to stimulate oil production in the war effort. Section 3606 permits slant drilling outside of the boundaries of a parcel containing an acre or more whose surface is unavailable for the location of wells, and provides for certain minimum spacing. Section 3607 states that the prohibition against drilling within one hundred feet of any public street or highway shall not apply to a street or highway which is opened through a field in which drilling was commenced prior to the opening of the street or highway. Section 3604 provides that each day in which a well is drilled or permitted to produce in violation of the foregoing provisions shall constitute a separate nuisance.

Wells have been drilled in the Long Beach Harbor Area under leases covering contiguous lots aggregating one acre or more; and it is asserted that many wells have been located pursuant to the exceptions to the spacing requirements of section 3600. It is alleged that due to the leasing by General Petroleum Corporation of California of strategic acre parcels, certain single lots of less than one acre owned by the petitioners, and located in the area overlying the oil basin, have been isolated and

cut off from participation in the leases and the royalties from oil produced from adjacent property. The isolated parcels, six in number, are scattered throughout the area and are noncontiguous. Although the area of each is less than one acre, the aggregate area of all is more than one acre. It is stated that the drilling of a well on some portion of the petitioners' properties will not cause the number of wells to exceed the number of acres in the field.

The petitioners, owners of the isolated noncontiguous lots in the oil field, entered into a community oil and gas lease with the petitioner Bernstein. On May 2, 1946, Bernstein, pursuant to sections 3203 and 3204 of the Public Resources Code, filed with the respondent State Oil and Gas Supervisor a notice of intention to drill an oil and gas well on a specified lot included in the petitioners' properties, and deposited with the respondent the required bond. On May 8, 1946, the respondent issued a disapproval of the proposal for the reason that, although the parcels involved in the lease comprised an acre or more, they were noncontiguous and a well drilled on any one of them would constitute a public nuisance within the meaning of section 3600 of the Public Resources Code. Whereupon the present petition was filed in this court.

It is asserted that the application for the writ was made to this court in the first instance because of an alleged emergency created by the recent discovery and development of a new oil sand underlying the petitioners' properties at an approximate depth of 6,000 feet, and that several producing wells have already been drilled into that oil sand; also because the drilling of an oil well on the petitioners' properties without the approval of the respondent or a disposition of the questions here presented favorable to them would subject the petitioners to prosecution on the grounds that the proposed well, if drilled, would constitute a public nuisance. The alternative writ was issued, and the matter is submitted on the petition, and the demurrer and answer of the respondent. A determination of the issues of law raised by the general demurrer will dispose of the controversy.

It is the petitioners' position that sections 3600-3607 of the Public Resources Code violate the special privileges and immunities clauses of the United States Constitution (§ 1 of the XIV Amendment), and of the California Constitution (Art. I, § 21; Art. IV, § 25, subd. 19); that they deny the equal protection guaranteed by the XIV Amendment of the United States Constitution, and deprive the petitioners of their property without due process of law.

The respondent asserts that the foregoing provisions of the Public Resources Code were enacted pursuant to the police power of the State of California for the protection and preservation of the public peace, health, safety, and the general welfare; that the spacing requirements are reasonably necessary for the purpose intended; that they are not discriminatory, and that they do not constitute an unlawful invasion of the petitioners' constitutional rights.

[1] The petitioners refer to the preamble of the 1931 statute enacting well-spacing provisions, wherein it was declared that it was the purpose of the act to protect persons and property against danger from fire and explosion in petroleum or gas wells. This declaration does not appear in the Public Resources Code. The respondent asserts that the prevention of waste and the conservation of natural resources might also have been within the legislative purpose. Since both public safety and conservation are legitimate objectives in the exercise of the police power it is unnecessary to determine the respects in which the code provisions are related to either purpose. The statute clearly indicates that in the interests of utilizing the greatest production without unnecessary waste the Legislature made exceptions to the general spacing requirements which were declared to have been enacted as a protection against fire, explosion, and other hazards.

[2] The courts of this state have uniformly recognized the power of the Legislature to enact police regulations to prevent the waste of natural resources. People v. Associated Oil Co., 212 Cal. 76, 297 P. 536; People v. Associated Oil Co., 211

Cal. 93, 294 P. 717; Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 217, 237 P. 538, 40 A.L.R. 782; Bandini Petroleum Co. v. Superior Court, 110 Cal. App. 123, 293 P. 899, affirmed 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826,

The intendments favor the constitutionality of such enactments, but the courts are repeatedly called upon to determine whether they violate the fundamental rights of those adversely affected.

It is not always enough to say that the injury or detriment suffered by a property owner as a result of the exercise of the police power within a legitimate sphere is damnum absque injuria. Cf. Larson v. Bush, 29 Cal.App.2d 43, 83 P.2d 955. Instances where that was the necessary result of the legislation are numerous. Zoning regulations are familiar examples. As applied to oil well operations an absolute and all-inclusive prohibition against the drilling for oil and gas in a specified district zoned as residential was deemed reasonable and constitutional. Cromwell-Franklin Oil Co. v. Oklahoma City, D.C., 14 F.Supp. 370. A statute which forbids the drilling of a well within 100 feet of a railroad right of way was upheld as a constitutional exercise of the police power. Winkler v. Anderson, 104 Kan. 1, 177 P. 521, 3 A.L.R. 268.

[3-5] The present legislation, however, is not in that category. It contemplates that oil and gas wells will be drilled on the private property overlying the source of supply, and assumes to regulate the spacing of the wells thereon in the interests of the public safety and the conservation of natural resources. The face of the legislation may appear to be valid, and insofar as it can be complied with and applied without a denial of constitutional rights it will be held to be proper and lawful legislation. But a statute, innocuous and valid on its face, may become invalid in its application, in which event it is proper for the petitioner to show the facts by which he contends that as to him the law is unreasonable, oppressive and void. In re Smith, 143 Cal. 368, 370, 77 P. 180. In that case, 143 Cal. at page 371, 77 P. at page 180, it was said that when the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue the business or occupation; that it is always a judicial question whether the particular regulation of the right is a valid exercise of the police power, although the authority of the courts to declare a regulation invalid will be exercised with caution and only when it is clear that the law exceeds the limits of legislative power and infringes upon rights guaranteed by the Constitution. See also, Dobbins v. Los Angeles, 195 U.S. 223, 237, 25 S.Ct. 18, 49 L.Ed. 169. In Skalko v. City of Sunnyvale, 14 Cal.2d 213, 216, 93 P.2d 93, this court recognized that a police regulation, valid when adopted, might become invalid in its operation in particular instances. The same principle was stated in Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 22, 52 S.Ct. 103, 108, 76 L.Ed. 136, 78 A.L.R. 826, where the Supreme Court upheld a California statute regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas as "valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional right * * *."

Here then we are more directly concerned with the contention of the petitioners that in its application to them the statute is discriminatory and therefore unconstitutional. They assert that such discrimination results from the fact that the enforcement of the regulations permits some owners of lands overlying the oil basin to exercise and enjoy their property right to take oil from the field, while the petitioners, who are property owners overlying the same oil supply, are deprived of the use and enjoyment of their coequal right. The mere assertion of the problem suggests the answer.

[6, 7] Under the law of this state the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances. His unqualified and absolute title attaches

after the substances have been reduced to possession. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 819, 129 P.2d 383; Bandini Petroleum Co. v. Superior Court, supra, 110 Cal.App. 123, 127, 293 P. 899. This is a right which is "as much entitled to protection as the property itself, and an undue restriction on the use thereof is as much a taking 'for constitutional purposes as appropriating or destroying it.'" People v. Associated Oil Co., supra, 211 Cal. at pages 99, 100, 294 P. at page 721, and cases cited.

In Ohio Oil Co. v. Indiana, 177 U.S. 190, at page 209, 20 S.Ct. 576, 44 L.Ed. 729, involving an oil and gas conservation measure, the Supreme Court said that all (not some) of the surface proprietors within an oil and gas field have the right to reduce to possession the oil and gas beneath the surface, and that they could not be absolutely deprived of that right without a taking of private property. The court went on to consider the owners' coequal right to take from the common source of supply, observing that one owner should not be permitted to convert an undue proportion of the supply to the detriment of others; hence that from the peculiar nature of the property right, the legislative power might be exerted in the protection of all the collective owners by securing a just distribution among them. Thus the Supreme Court held that a statute designed to protect life and property or prevent waste, or both, must apply without discriminating against the coequal rights of the property owners; also that a police regulation otherwise reasonable which was designed to secure to each a just distribution from the common source of the supply of oil and gas, took proper cognizance of the property owners' rights. See, also, Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73. In the latter case it was said that the denial to one surface owner of his fair chance to recover in kind the oil and gas beneath the surface, or its equivalent, would be a confiscation of his property.

In Railroad Commission v. Magnolia Petroleum Co., Tex.Civ.App., 169 S.W.2d 253, the test of confiscation was said to be the denial to one of the property owners of the equal opportunity with adjoining leaseholders to develop and realize the benefits from his leasehold; and it was concluded that confiscation resulted from the commission's ruling which had not accorded to the Magnolia company an equal opportunity with the surrounding lessees to recover its fair share of the recoverable oil lying beneath the surface. To the same effect and with a similar result is Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941.

In Marrs v. City of Oxford, 10 Cir., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied 280 U.S. 573, 50 S.Ct. 29, 74 L.Ed. 625, 67 A.L.R. 1336, a city ordinance regulating the spacing and drilling of oil wells within the corporate limits was upheld on the ground that the regulations indicated every effort to protect, rather than to destroy, private rights by extending like opportunity to all who had an interest, thus eliminating the race among those having rights in a common source of wealth.

The decisions approving the regulatory legislation involved in the cases of People v. Associated Oil Co., supra, 212 Cal. 76, 81, 297 P. 536 and Bandini Petroleum Co. v. Superior Court, supra, 110 Cal.App. 123, 134, 293 P. 899, were based in part upon the legislative recognition and preservation of the correlative rights of the surface owners, and the necessity of one landowner to make productive use of his parcel in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels.

[8] Statutory regulations dealing with the location and spacing of wells including provisions for pooling and proration of interests, enacted in oil producing states such as Texas, Oklahoma, New Mexico, Arkansas, Louisiana, Michigan, Illinois, Georgia and Mississippi, have been supported as constitutional because of the equal treatment of the rights of the surface owners in the common source of supply, or because they contained provisions looking to the prevention of hardship upon owners in particular cases. See Vol. 1, Summers, Oil and Gas, Perm.Ed., pp. 187

et seq. and numerous statutes and cases cited. Such statutes do not violate either federal or state Constitutions. Champlin Refining Co. v. Corporation Comm., 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403; Patterson v. Stanolind Oil & Gas Co., 182 Okl. 155, 77 P.2d 83.

[9] In the absence of statutory prohibition, the right to drill an offset well was commonly resorted to as a means of protection by an owner whose property was being drained by a well drilled on adjoining land. The wasteful use of offset wells was recognized as one of the evils sought to be minimized by the enactment of well spacing regulations. Croxton v. State, 186 Okl. 249, 97 P.2d 11, 19; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 99 A.L.R. 1107; Id., 126 Tex. 296, 87 S.W.2d 1069, 101 A.L.R. 1393. But since the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions, regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. Equal protection is so denied where, as here, the law, in its application at least, does not afford adequate means of protection as a substitute for the right to drill an offset well.

From the foregoing it follows that the respondent's disapproval of the petitioners' proposal to drill a well in accordance with the notice of intention on file, if effective to prevent such drilling, would amount to a deprivation of the petitioners' right, coequal with the right of surrounding owners and lessees, to recover their fair share of the oil and gas from the common source of supply, and consequently would infringe upon the constitutional guaranties invoked. We conclude that the spacing provisions of the Public Resources Code are inapplicable to prevent the drilling of a well by the petitioners. Insofar as the decision in Larson v. Bush, supra, 29 Cal.App.2d 43, 83 P.2d 955, is contrary to this conclusion, it is disapproved.

[10] The result is that the petitioners have the right to drill the proposed well under their community lease upon compliance with the code provisions insofar as they are otherwise applicable. But it does not follow that the peremptory writ of mandate should issue. There is no provision in the Public Resources Code which requires the respondent to issue a permit, nor is there any provision which requires the petitioners to obtain a permit before commencing the drilling of the proposed well. There is therefore no authority under the circumstances here presented for the issuance of the writ of mandate. Dormax Oil Co. v. Bush, 42 Cal.App.2d 243, 108 P.2d 710.

The alternative writ is discharged and the peremptory writ is denied.

EDMONDS, CARTER, and SCHAUER, JJ., concurred.

GIBSON, Chief Justice, and TRAYNOR and SPENCE, Justices.

We concur in the judgment, but we cannot agree that a sufficient showing has been made that the legislation in question is unconstitutional as to petitioners.




29 Cal.2d 709

**Ex parte LINDLEY.**

**Cr. 4709.**

Supreme Court of California, In Bank.

Feb. 18, 1947.

**1. Habeas corpus ⇐30(1)**

In habeas corpus proceeding, one who establishes by preponderance of substantial, credible evidence that he was convicted by perjured testimony knowingly presented by representatives of state, is entitled to a judgment discharging him from custody and suppression by the state of material evidence will be considered in connection with such a charge. Pen.Code, § 118.

**2. Habeas corpus ⇐30(1)**

Proof that evidence upon which petitioner was convicted was uncertain, questionable, or directly in conflict with other

testimony, does not afford a ground for relief upon habeas corpus.

**3. Habeas corpus ⇐30(1)**

A habeas corpus proceeding may not be used as a device for the correction of mere errors or irregularities committed within exercise of an admitted jurisdiction.

**4. Habeas corpus ⇐92(1)**

On habeas corpus ordinarily it is not competent to retry issues of fact or merits of a defense, such as insanity.

**5. Habeas corpus ⇐92(1)**

The sufficiency of evidence to warrant conviction of petitioner is not a proper issue for consideration in habeas corpus proceeding.

**6. Habeas corpus ⇐30(1)**

Habeas corpus is not an available remedy to review rulings of trial court with respect to admission or exclusion of evidence or to correct other errors of procedure occurring on the trial.

**7. Habeas corpus ⇐25(1)**

Newly discovered evidence does not justify relief in habeas corpus proceeding unless it is of such character as will completely undermine entire structure of case upon which prosecution against petitioner was based.

**8. Perjury ⇐12**

"Perjury" cannot be willful where the oath is according to belief and conviction of witness as to its truth, and reckless disregard of truth by witness who has no belief that he is swearing falsely is not perjury, though his testimony is in fact false, and he would have made it true if he had used caution. Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Perjury".

**9. Habeas corpus ⇐30(1)**

One convicted of murder and sentenced to death was not entitled to release from custody on writ of habeas corpus on ground that his conviction was obtained by perjured testimony of members of victim's family, where evidence showed serious discrepancies in testimony of members of victim's family but fell far short of showing perjury as defined by statute. Pen.Code, § 118.

**10. Habeas corpus ⇐25(1)**

One convicted of murder was not entitled to release from custody on writ of habeas corpus on ground that representatives of state suppressed or prevented introduction of evidence in the murder prosecution which would have been favorable to petitioner's defense, where evidence showed at most that investigation of the crime was incomplete and failed to show any willful suppression of credible evidence.

**11. Habeas corpus ⇐25(1)**

One convicted of murder was not entitled to release from custody on writ of habeas corpus on ground of newly discovered evidence consisting of testimony that a red-headed man other than petitioner was in vicinity of boathouse at time crime was committed, where the testimony presented as constituting newly discovered evidence did not completely undermine the structure of the case as presented by the prosecution, but at most afforded only a basis for speculation or conjecture.

**12. Habeas corpus ⇐25(1)**

Conclusion of a former autopsy surgeon, called as an expert witness in murder prosecution, that, in his opinion, victim died of a heart attack presented only a conflict with the evidence which was before jury, and did not afford basis for a discharge from custody on a writ of habeas corpus.

**13. Criminal law ⇐997**

A writ of error coram nobis is not broad enough to reach every case in which there has been an erroneous or unjust judgment on sole ground that no other remedy exists, but it must be confined to cases in which the supposed error inheres in facts not actually in issue under the pleadings at the trial and were unknown to court when judgment was entered, but which, if known, would have prevented the judgment.

**14. Criminal law ⇐997**

Generally, the writ ot error coram nobis does not lie to correct an issue of fact which has been adjudicated, even though wrongly determined, nor for alleged false

testimony at trial, nor on ground that a juror swore falsely as to his qualifications, nor for newly discovered evidence.

15. Criminal law ⇐997

The basis for issuance of a writ of error coram vobis is substantially the same as for a writ of error coram nobis.

16. Criminal law ⇐997

An application for a writ of error coram nobis should be addressed in the first instance to the court in which the petitioner was tried and convicted.

17. Criminal law ⇐997
Habeas corpus ⇐25(1)

Where representatives of state acted with reasonable caution in interviewing shepherd boy who allegedly witnessed the attack forming basis of murder prosecution and in presenting him as a witness, despite fact that he was of low mentality, use of boy as a witness presented no ground for relief after conviction by writ of error coram nobis, writ of error coram vobis, or habeas corpus.

18. Criminal law ⇐997
Habeas corpus ⇐92(1)

Where plea of not guilty by reason of insanity was not raised as a defense in murder prosecution, Supreme Court on petition for writ of error coram vobis and for writ of habeas corpus was in no position to re-examine petitioner's sanity either at date crime was committed or at time of trial. Pen.Code, § 3701 et seq.; Const. art. 7, § 1.

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Proceeding in the matter of the petition of Marvin Lindley for a writ of habeas corpus to secure release from custody and for writ of error coram vobis.

Writs respectively discharged and denied.

Jesse W. Curtis, Sr., of San Bernardino, Al Matthews, of Los Angeles, and Arthur D. Carr and Rosalie S. Asher, both of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Loyd E. Hewitt, Dist. Atty., of Yuba City, for respondent.

EDMONDS, Justice.

William Marvin [Marven] Lindley was found guilty of the murder of Jackie Hamilton, a 13-year-old girl. The verdict included no recommendation for life imprisonment and a sentence of death followed. Upon appeal, the judgment and the order denying a new trial were affirmed. People v. Lindley, 26 Cal.2d 780, 161 P.2d 227. Thereafter the superior court denied a writ of error coram nobis. In the present proceeding, the petition for a writ of habeas corpus includes an application "by way of appeal" from that order and also asks that this court grant a writ of error coram vobis.

The petition asserts generally that the judgment of conviction is "illegal" because of certain false testimony given by several witnesses at the trial. This evidence, the petition alleges, was offered by the State with knowledge of its falsity. More specifically, it is charged that a representative of the State suppressed, or prevented the introduction of, evidence which would have been favorable to Lindley's defense.

In the petition, extrajudicial statements said to have been made by Louis Onie Hamilton, father of the victim, are compared with his testimony at the trial, and it is alleged that the witness, because of deliberate "fraud, or perjury, * * * or because of persuasive influence, amounting to duress, of Sheriff A. W. Kimmerer * * * or because of faulty memory and plain mistake * * *," changed his testimony to such an extent that the jury, courts, and Lindley's attorney "were misled into believing that Lindley was the only person in the vicinity of the crime at the time it took place who could have been 'the man in the willows.'" The testimony of Willa Mae Hamilton, Jackie's sister, is attacked upon the ground that as a result of her false testimony the jury and court and Lindley's attorney "were misled into believing that she had never met Lindley and for that reason did not recognize him as the man she had seen in the willows." In support of this allegation, an affidavit of Nathan W. Owen is attached to the petition.

A further charge is that Jackie described her assailant as "an old red-headed man," and although she knew Lindley and called

him "Red" she did not use that name in any statement in regard to her injury. The evidence upon which the conviction rests is also criticized in other particulars.

Sheriff Kimmerer, according to the petition, in a published statement asserted that Luther B. Owen, the 11-year son of Nathan W. Owen, was not near the scene of the crime, but as a matter of fact, he was in the immediate vicinity when it was committed. In an affidavit made by Ferrel Fry and attached to the petition, she declares that the boy told her he was present at the boat house about the time of the crime and saw a red-headed fisherman in the willows "waving a fishing pole at the girls in swimming." Also, the affidavit continues, "the Owens' boy definitely stated that he saw * * * Jackie grabbed by a man who had been standing in the willows and that it was a man other than Marvin Lindley, that he thinks it was the other red-headed man who had been fishing."

Another affidavit, included in the petition, was made by Betty Biggs Schrick, a newspaper writer. She states that in an interview with Guino Filipelli, a shepherd boy who testified as an eyewitness to the tragedy, he told her "that the two boys on horseback went to the boat house before he saw the man grab Jackie" and after the attack "he saw the man walk toward the boat house but he did not see the man enter the boat house."

A report made by the acting governor in connection with a reprieve granted Lindley is made a part of the petition. This report includes the statement that, since the trial, new and additional evidence has been discovered by reporters who interviewed the father and sisters of the victim. As summarized in the report, this evidence relates to the presence of a red-headed fisherman who followed Jackie toward the camp and was "ogling the [Hamilton] girls who were in swimming."

The remaining allegations of the petition relate to the asserted knowledge of the prosecuting officials in regard to the false testimony, their neglect in failing to conduct a full investigation, and the mental condition of Lindley. In this connection it is alleged that the prosecuting officials "deliberately suppressed information they had obtained from Willa Mae Hamilton" concerning the description of a red-haired fisherman who was watching the girls in swimming, "for the reason that such information would have been fatal to their theory of Lindley's guilt, and would have raised a reasonable doubt in the minds of the jurors." Other charges are that "the misinformation given the investigators from the Department of Justice from the State of California by Sheriff Kimmerer led them to neglect to interview any of the Hamilton family and the two fishermen Logan and Davis," who, according to their own admission, were not over two hundred feet from the place of the attack. Also, the petitioner declares, no effort was made to communicate with Luther B. Owen or Henry (Shorty) Sternat, who were present at the boat house at the time the crime was discovered. The pleading concludes with a statement of asserted facts tending to prove Lindley's insanity at the time the crime was committed, during the trial and at the present time.

Upon this petition, a writ of habeas corpus issued, and Honorable Donald Geary, Judge of the Superior Court, in and for the County of Sonoma, was appointed referee to hear the evidence responsive to the following questions:

"1. Did any witness who testified against William Marven Lindley in the trial which resulted in the judgment of conviction, affirmed by this Court in People v. Lindley, 26 Cal.2d 780, 161 P.2d 227, commit perjury as defined in the Penal Code of the State of California; that is, did any witness testify to any material matter which he knew to be false?

"2. In the event that any witness did commit perjury, did any representative of the State of California cause or suffer such testimony to be introduced, knowing such testimony as given was perjured?

"3. Did any representative of the State of California suppress or prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of William Marven Lindley?"

The referee visited the scene of the crime and held hearings in five cities of the state.

More than 40 witnesses appeared and testified. The identification of Lindley and his conviction, the referee reported, "rested primarily upon the testimony of four witnesses: Louis Onie Hamilton, father of Jackie Marie, the victim; Barbara and Willa Mae Hamilton, her sisters, and Guino Filipelli, herding his sheep across the river some six hundred to seven hundred feet away. Two of these witnesses, Mr. Hamilton and his daughter Barbara, testified that Jackie Marie Hamilton had directly accused * * * [Lindley] in the words 'the old red-headed man at the boat house did it.' Three of them, Mr. Hamilton and his daughters Barbara and Willa Mae, also testified to conduct of * * * [Lindley] that must plainly have indicated to the jury, and anyone reading the trial transcript, evidence of a deep consciousness of guilt on his part." Because of the importance of the testimony of these witnesses and the attacks made upon it in the present proceeding, the referee included in his report extensive quotations from the records of the coroner's inquest, the grand jury inquiry, the trial of Lindley, and the transcript of the recent hearings. To summarize this evidence within reasonable limits presents many difficulties.

At the trial, Louis Onie Hamilton testified upon direct examination that when he first arrived at the side of his injured daughter she said, "Daddy, that old red headed man, the dirty liar." She repeated this several times, he declared. He also quoted her as saying, "Daddy, that old red headed man; that dirty liar at the boat house." Upon cross-examination, Hamilton's testimony before the grand jury, in which no reference to the boat house appears, was read to him. In explanation of that testimony, Hamilton replied, "I answered the question in this way. She said, 'the old red headed man, the dirty liar at the boat house, did it.'" The father's recital before the coroner's jury of his daughter's statements was the same as that given at the trial.

At the referee's hearing Hamilton testified that in answer to his inquiry Jackie said: "The old red-headed man, the dirty liar, did it." And after Barbara suggested that Jackie be taken to the boat house, the father told the referee, the injured girl said, "No, no, that old red-headed man at the boat house, the dirty liar, did it."

At the trial Hamilton was asked if he had seen "any other red headed men around there, except Lindley," and he replied, "No, sir." He did not see Lindley after Lindley left the camp following their return from the nearby ranch on an errand, Hamilton testified, and Lindley did not come up from the boat house while Jackie was in the car. According to Hamilton, he saw Lindley give some water to his daughter, Barbara, "on the platform of the boat house"; then Lindley "turned his head went on back. Dropped his head and went back to the boat house." The witness repeated some of this testimony before the referee, but stated that about the time the crime was committed, he saw a fisherman, dressed in khaki and wearing a blue straw hat, picking a fig. He did not notice the color of the man's hair or his complexion. When he was before the grand jury Hamilton said that when Jackie came up to the camp he saw Lindley go "down through the woods there."

Barbara Hamilton told the grand jury, "I said, 'Daddy, let's take her to the boat house' and she said 'No, daddy, no. That old red headed man is a dirty liar.'" At the trial, under cross-examination, Barbara gave Jackie's answer as, "No, daddy, the old red headed man at the boat house did it, the dirty liar." When shown her testimony before the grand jury, she stated it was true. Before the referee upon direct examination, quoting her sister, Barbara used the same language as she did at the trial. But when asked if it was possible that her sister did not mention the boat house, but said only, "No, daddy, that old red-headed man, that dirty liar," she replied, "It could be." Under cross-examination she said that she was not able to remember whether Jackie said anything about the red-headed man being at the boat house. In regard to her testimony generally, Barbara stated to the referee that no one in the sheriff's office or in the district attorney's office had told her what to say.

Barbara testified both before the grand jury and at the trial that she did not see Lindley come up from the boat house to the car where Jackie had been placed; Lindley

came only half way. She asked either Lindley or Henry Sternat to get some water for Jackie. Lindley "walked as slow as he could." At the hearing before the referee she could not remember testifying to some of these facts, and in answering the question, "* * * you didn't tell him [Red] to get Bill, and he didn't walk as slow as he could? None of those things happened, did they?", she replied, "No." When asked, "In other words, you say, Barbara, that is a wrong statement," she at first said, "Yes"; but then stated, "Yes * * * I don't recall that * * * I wouldn't say they are wrong." In corroboration of the testimony of Barbara and her father, Richard Burks and Lawrence McCarthy, horseback riders, told the jury at the trial of Lindley that he did not come up to the car during the time Jackie was there.

Kenneth Hopper, deputy sheriff, and E. L. McCune, constable, who were present when Louis Onie Hamilton brought Jackie to the police station before taking her to the hospital, testified before the referee that Jackie's statements were limited to "The old red-headed man did it, Daddy, the old red-headed man." Jackie said nothing while they were present which connected the red-headed man with the boat house, they testified. However, in corroboration of the testimony of Jackie's father and sister is the statement found in a special agent's report as follows: "* * * Sheriff Kimmerer states the answer that he had from the girls from the very start was, 'It was the old red headed man at the boat house, he did it, the dirty liar.'"

Willa Mae Hamilton, also a daughter of Louis Onie Hamilton, testified upon the trial that she "just glanced" at the man in the willows, but did not recognize him. However, this witness testified before the referee, "Yesterday [April 1st, 1946] when I got to studying it over, it was Lindley" who was the man in the willows. In conflict with Willa Mae's testimony at the trial that she had never been down to the boat house before the day Jackie was killed is the affidavit of Nathan William Owen in which he states that Willa Mae had met Lindley at the boat house on several occasions prior to the time of the attack. This witness did not appear before the referee. Upon the trial, Willa Mae testified that after they took Jackie away she did not go to the place where Jackie was found. But, upon being questioned at the referee's hearing, she said that she accompanied Lindley, who was carrying her younger sister, Shirley, to the willows where the attack occurred.

Unquestionably the jury which convicted Lindley believed the account of the crime which was given by Guino Filipelli, a shepherd boy. He was herding sheep across the Feather River when the attack occurred and testified as an eyewitness to the homicide. He said that while sitting under a tree, he had watched two girls swimming. They left the water and entered the boat house. Later he noticed one of the girls go toward her home. Then he saw a girl come down to the water and wash her feet. When she went back toward the levee, he said, she started fighting with "Red" and they went down behind the willows. He positively identified "Red" as one of two men he had seen around the boat house and said that on the afternoon Jackie died he saw "Red" walking back and forth in the willows, wearing a brown hat, brown pants, and brown shirt. The record of the trial shows that he picked "Red" out in the jail, and recognized Lindley in the courtroom as "Red," even against suggestions of other identity.

Guino's mentality and his ability to correctly recognize colors were severely challenged at the referee's hearing. He told the referee that he did not know what an oath was. In response to the question, "Do you know what it is to tell the truth?" he replied, "Yes. * * * Don't tell no lies." However, he did not know what "it is to tell a lie," and when asked "In other words, as you see it, telling a lie, telling the truth is the same thing, is that right?" he replied, "Yes." When asked, "Why do you tell things because somebody else tells you to tell them?" Guino replied, "Because he wants to tell them."

When asked to state the color of the dress of a woman who was attending the referee's hearing, he said "black"; in reality it was brown and white. In answer to the question, "Why did you first believe you had on brown pants?" the witness

replied, "Because I like brown." In view of this testimony, the referee conducted experiments along the banks of the Feather River. Cards measuring about two by three feet were shown to Guino at different times and he was questioned as to their color. The distance from the witness to these cards was stipulated as being between six and seven hundred feet. He said that the yellow card was white, a gold one brown, an orange one red, and a gray one blue. At another time, he said that green was blue, gold was white, light brown was white, and pink was red, but he identified some colors. He correctly stated at one time that a man across the river and at the same distance from him was wearing a brown hat, coat, and trousers. But he erroneously identified a blue hat as brown, a grey coat as black, and a brown hat and trousers as black.

In his examination before the referee as to his testimony at the trial, Guino's answers were quite inconsistent. However, when he was allowed to tell his story as a whole without the pressure of questions by counsel, he gave it in essentially the same form as at the trial.

Kenneth Hopper, deputy sheriff assigned to investigate the crime, testified before the referee as to an interview with Guino the next day after the crime was committed. Later, he said, Sheriff Kimmerer questioned the boy. Each time Guino told practically the same story. According to Hopper, they allowed Guino to tell his own story freely and asked him only necessary questions. As he recalled the conversation at that time, "The Sheriff asked [Guino] if he knew the man and he said yes, it was Red from the boat house." Sheriff Kimmerer died some time before the referee's hearings.

In the course of the investigation, Guino was taken to the scene of the crime by Hopper. In his testimony before the referee, Hopper said that at the time he talked with Guino he was satisfied as to the competency of the boy. Both Hopper and Guino's father told the referee that Guino picked out Lindley from a group of four or five prisoners as the man in the willows. He also selected Lindley's brown hat from several exhibited to him as the one worn by Jackie's assailant. Hopper's testimony was corroborated by Guino's mother and father who told the referee that on the evening of the crime Guino related the events to them in substantially the same language as he used in answering the questioning of the officers and at the trial.

The testimony of Luther B. Owen, presented to the referee by deposition, is not in accordance with the facts stated in the affidavit of Ferrel Fry. Although Luther admitted that he was in the vicinity of the boat house on the date in question, he denied seeing a fisherman or red-headed man in the willows. Moreover, he specifically contradicted the statements of Mrs. Fry regarding her asserted conversation with him. However, Mrs. Fry insisted before the referee that Luther told her the story which she related in her affidavit.

Several witnesses told the referee that at the time of the homicide a red-headed hop picker was employed at the Cunningham ranch, located about a mile and one-half from the boat house. On the day Jackie died this man did not work and was drinking heavily. That evening, they said, a fight occurred at the hop ranch and in the melee two fellow workers accused the red-headed man of "having done it." According to a witness to the fracas, one of the hop pickers said to the red-headed man, "If I tell on you, it will be the ropes for you." The red-headed man then "jumped like a tiger" and choked the accuser. Sheriff Kimmerer was notified of this incident and the following afternoon went to the hop fields and interviewed witnesses. However, by that time, the men who were in the fight had left without collecting their wages which, for one of them, amounted to about $24.

Late in the afternoon of the day of the homicide, according to testimony presented to the referee, a red-headed man appeared at the Gum Tree Store, located in the vicinity of the Cunningham ranch. He purchased some clorox and soap. A clerk in the store noticed that the man's face was scratched and "he was so nervous he couldn't accept his change." The man told the clerk to "mind * * * [her] business," when she questioned him about his nervousness. This incident was reported to a highway patrol officer and the man was identified. But, according to the officer,

the man "didn't look like his description." The witness did not know whether the officer talked with the man. Later, the proprietor of the store reported her suspicions to the sheriff but, as she related the incident, neither the sheriff nor any of his deputies interviewed her. However, she did not know what, if any, investigation the sheriff had made. Several other witnesses testified that a red-headed man other than Lindley was in the vicinity at the time of the homicide.

Upon reviewing all of the evidence, the referee concluded that the testimony of Louis Onie Hamilton, Barbara Hamilton, and Willa Mae Hamilton, as given at the trial of Lindley, was erroneous and untrue in certain particulars. This testimony was material, in the opinion of the referee, and its effect cannot be minimized. However, he found that it did not constitute perjury as that term is defined in the Penal Code of California. In explanation of his finding he reported: "The character, personality, emotional reaction and intelligence of each of the witnesses is clearly revealed by their testimony at the various hearings and their appearance upon the stand. The nature of the crime and the excitement, in the case of one witness described as hysteria, immediately following its discovery, undoubtedly affected the ability of the witnesses to either accurately observe or correctly relate all facts as they were. More than a year elapsed between the date of the crime and Lindley's trial. Admittedly, the Hamilton family had occasion to frequently discuss their tragedy and the circumstances connected therewith. It would be surprising if a natural and abiding resentment against the person designated by the authorities as the perpetrator of the crime did not exercise an important, though unconscious, influence in such discussions. Indeed, the continued presence of such resentment is manifest in the testimony of these witnesses herein. Under such circumstances, in view of those common vagaries which affect each of us at times, the ability to distinguish between fact and fancy must necessarily have been reduced to the vanishing point. Hence, although in the heretofore mentioned particulars the Referee is convinced the testimony of the witnesses * * * was not in accord with the facts, unquestionably these witnesses testified according to their belief and conviction. * * *"

Considering the story of the crime which the young shepherd boy related to the jury, the referee found "his testimony in certain essential details, eventually and after much conflict, reverts to substantially the same as originally related by him. It is quite probable that, in part at least, his testimony is based upon a combination of observation and a lively imagination. * * * However, it cannot be doubted that regardless of the quality of his testimony the witness testified in each instance according to his own belief and conviction, such as they are. Under such circumstances his testimony cannot legally be deemed perjured. * * *"

The finding upon the second issue submitted to the referee is that no perjury or false testimony was knowingly introduced against Lindley by any representative of the State of California. In the opinion of the referee, the only witness whose testimony affords the slightest support of the charge that perjury was committed by any person, or that the record in the trial of Lindley includes either perjured or false evidence, is that of the shepherd boy. As to him, the referee reported:

"The inherent weakness is in Filipelli's testimony and the existence of at least an opportunity for the sheriff and his deputies, were they so disposed, to have induced or permitted the witness to commit perjury or offer false testimony must be conceded. However, there is not a scintilla of evidence herein indicating such a disposition upon the part of Sheriff Kimmerer, Deputy Hopper or any other representative of the State of California.

"The conclusion necessarily follows that Guino Filipelli testified according to his belief and conviction, of doubtful value though they be. Yet he committed no perjury. Under such circumstances, there is no foundation for the claim of subornation of perjury or that anyone caused perjured testimony to be introduced knowing the same to be perjured. * * * Nor can it be held that any representative of the State of California knowingly suffered false testimony—as distinguished from perjured

testimony to be introduced, knowing the same to be false. The witness Filipelli was questioned and requestioned. From such questioning the Sheriff gained some doubt of the reliability and truthfulness of the witness. The parents were questioned and declared the boy to be truthful. He was thereafter always questioned in the presence of his father. The father was present when he identified * * * [Lindley] and the latter's hat. The Sheriff appears to have placed the boy in the position from which he claimed to have seen the crime committed and, according to Mr. Hewitt, 'they could recognize color and movements' from that point. * * * That, of course, is not equivalent to stating the witness could recognize 'color and movements' but it certainly reveals an effort to ascertain the credibility of the witness. The evidence shows the law enforcement officers acted with reasonable caution as regards the witness. The legal qualification of the witness was a question that was neither addressed to, nor determinable by them in the first or final instance. * * *"

In regard to the charge of the suppression of evidence by officers of the State, the referee reviewed the testimony in regard to the man known as "Red" who worked on the Cunningham ranch and talked to the proprietor of the Gum Tree Store. The report also mentions the testimony of fourteen witnesses tending to prove that an unidentified red-headed man was in the vicinity of the Hamilton camp at the time of the attack upon Jackie. "Such testimony," the referee concluded, "might possibly indicate that the Sheriff and his deputies did not thoroughly exhaust all of the reasonable clues available to them as to the perpetrator of the crime. If such were in fact the case, such conduct would certainly indicate inefficiency. However, assuming that one whose duty it was so to do did not properly investigate a case, and did not explore clues as he should have done, if, even though by reason of his failure to look for evidence he discovered none, he could not be charged with suppressing it. One cannot suppress that which he does not possess. The testimony offered upon this issue falls far short of establishing the suppression of evidence or the prevention of the introduction of any evidence by the Sheriff or any other law enforcement officer which, if given, would have been favorable to the Petitioner. * * *"

Upon the filing of the referee's report and findings, the cause was calendared for oral argument before this court. At the time of hearing, although the referee determined each issue submitted to him in favor of the State, the attorney general moved for, and was granted, leave to file an answer and objections to the referee's determinations. The document subsequently presented challenges the conclusion of the referee as to the falsity of some of the evidence upon which Lindley was convicted. The reply filed by counsel for Lindley declares that its purpose is "to vindicate the general Findings of the Referee." In the main, Lindley's attorneys now urge that he was convicted by the testimony of witnesses known by the prosecution to be incompetent, that new and material evidence has been discovered that was not presented at Lindley's trial, that certain testimony was false, that Lindley was insane when the crime was committed and at the time of trial, and is now mentally incompetent.

[1-6] In a habeas corpus proceeding, one who establishes by a preponderance of substantial, credible evidence that he was convicted by perjured testimony knowingly presented by representatives of the State, is entitled to a judgment discharging him from custody and the suppression by the State of material evidence will be considered in connection with such a charge. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; In re Mooney, 10 Cal.2d 1, 14, 73 P.2d 554. However, evidence which is uncertain, questionable or directly in conflict with other testimony does not afford a ground for relief upon habeas corpus, and the proceeding may not be used as a device for the correction of mere errors or irregularities committed within the exercise of an admitted jurisdiction. In re Porterfield, 28 Cal.2d 91, 99, 168 P.2d 706; In re Connor, 16 Cal. 2d 701, 108 P.2d 10. Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant the conviction of the peti-

tioner is not a proper issue for consideration. In re Connor, supra; In re Drew, 188 Cal. 717, 207 P. 249; In re Stevenson, 187 Cal. 773, 204 P. 216; In re Williams, 183 Cal. 11, 190 P. 163; In re Jacobs, 175 Cal. 661, 166 P. 801; Ex parte Long, 114 Cal. 159, 45 P. 1057; Ex parte Cottrell, 59 Cal. 420; Ex parte Bird, 19 Cal. 130; In re Vitalie, 117 Cal.App. 553, 4 P.2d 171; see In re Nicholson, 24 Cal.App.2d 15, 74 P.2d 288; 13 Cal.Jur. 238; 39 C.J.S., Habeas Corpus, § 21, p. 469 et seq. Nor is habeas corpus an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial. In re Polizzotto, 188 Cal. 410, 205 P. 676; Burall v. Johnson, 9 Cir., 134 F.2d 614; Thouvenell v. Zerbst, 10 Cir., 83 F.2d 1003; see 25 Am.Jur., Habeas Corpus, § 28; 39 C.J.S., Habeas Corpus, § 21.

[7] Also, newly discovered evidence does not justify relief unless it is of such character as will completely undermine the entire structure of the case upon which the prosecution was based. Kelly v. Ragen, 7 Cir., 129 F.2d 811; see 39 C.J.S., Habeas Corpus, § 26, p. 503.

[8, 9] In the present case, considering as a whole the great mass of evidence presented at the coroner's inquest, before the grand jury, at the trial of Lindley and during the hearings held by the referee, serious conflicts and unexplainable discrepancies clearly appear. It may also be said that there is substantial support for the referee's conclusion that certain testimony given by members of the Hamilton family was untrue. But it is equally clear that the evidence falls far short of showing that perjury, as defined in section 118 of the Penal Code, was committed by any witness who testified before the jury which convicted Lindley of murder. "Perjury cannot be willful where the oath is according to the belief and conviction of the witness as to its truth. Reckless disregard of truth by a witness who has no belief that he is swearing falsely is not perjury, though his testimony is in fact false, and he would have made it true if he had used caution." People v. Von Tiedeman, 120 Cal. 128, 137, 52 P. 155, 158; see People v. Wong Fook Sam, 146 Cal. 114, 115, 79 P. 848; People v. Nelson, 36 Cal.App.2d 515, 519, 97 P.2d 1043; People v. Johnson, 14 Cal.App.2d 373, 379, 58 P.2d 211. And there is no evidence whatever in the record that any false, as distinguished from perjured, testimony was knowingly caused or suffered to be introduced at the trial of Lindley by any representative of the State. Some of the conflicts and inconsistencies in the statements of the witnesses connecting Lindley with the crime can be reconciled. However, all of these discrepancies and any probable falsehoods relate to issues of fact or matters of defense, and were, or could have been brought to the attention of the jury. All of them came within the scope of the appeal from the judgment.

[10] The evidence in the present proceeding concerning the shoes which were found near the scene of the crime and the footprints in the vicinity, coupled with the testimony in regard to another person, or persons, who generally met Jackie's description of her assailant, afford some basis for a conjecture that the sheriff or his deputies did not exhaust all of the possible clues. But the record does not show that all available and important clues were not explored. And even assuming that the investigation was incomplete, as the referee concluded, the evidence falls far short of proof, by substantial credible evidence, that the representatives of the State suppressed or prevented the introduction of any evidence which would have been favorable to the defense of Lindley.

[11] Although newly discovered evidence may justify relief by habeas corpus when it completely undermines the entire structure of the case presented by the prosecution at the time of the conviction, the testimony presented to the referee does not go that far and affords only a basis for speculation or conjecture. Proof that a red-headed man other than Lindley was in the vicinity of the boat house at the time the crime was committed, or the identification by a witness of this stranger as the "man in the willows" would have weakened the prosecution's case and presented a more difficult question for the trier of fact. But

the testimony in regard to the other man does not point unerringly to Lindley's innocence.

[12] Also, the conclusion of a former autopsy surgeon, called as an expert witness, that, in his opinion, Jackie died of a heart attack, presents only a conflict with the evidence which was before the jury.

[13, 14] The grounds upon which a court may issue a writ of error coram nobis or writ of error coram vobis are more narrowly restricted than those which allow relief by habeas corpus. "In the original as well as in the modern practice [the purpose of these writs] was not to permit a review of the evidence given in connection with the issues actually tried to determine whether witnesses who actually testified before a jury sworn on those issues testified falsely, but to determine whether facts existed which were not known to the court at the trial and not in issue under the pleadings, but which, if known, would have prevented the judgment which actually was entered from being entered. And that must necessarily have been so, for, if the effect of the writ was to permit the court in which the judgment was entered to decide whether the witnesses in the case had testified falsely, and if it decided that they had to reverse it, instead of being the end of the litigation, the judgment might well be but the beginning of it. * * * Where applicable at all, there is little dissent from the proposition that it lies to obtain relief from such errors of fact as the infancy, death, or coverture of the defendant in cases where those defenses, if known at the time, would have prevented a judgment but which through no fault of the defendant were not known when the judgment was entered. * * * Such facts would rarely affect the proceedings in a criminal prosecution; consequently the writ is less frequently available in such cases than in civil cases, and there is less uniformity in the decisions as to what errors of fact will justify its use in criminal prosecutions. But it has been generally held that, where the writ is available, it lies to reverse a judgment obtained by fraud, coercion, or duress, as where a plea of guilty was procured by force, violence, or intimidation, or where at the time of the trial the defendant was insane, when such facts were unknown to the court when the judgment was entered * * * or where the accused was prevented by fraud, force, or fear from presenting defensive facts which could have been used at his trial, when such facts were not known to the court when the judgment was entered. * * * By the decided weight of authority, however, the remedy is not broad enough to reach every case in which there has been an erroneous or unjust judgment on the sole ground that no other remedy exists, but it must be confined to cases in which the supposed error inheres in facts not actually in issue under the pleadings at the trial and were unknown to the court when the judgment was entered, but which, if known, would have prevented the judgment. Accordingly it is stated as a general rule that 'the writ of error coram nobis does not lie to correct an issue of fact which has been adjudicated, even though wrongly determined; nor for alleged false testimony at the trial; nor on the ground that a juror swore falsely as to his qualifications; nor for newly discovered evidence. * * *'" Keane v. State, 164 Md. 685, 166 A. 410, 411, 412, 413; see People v. Mazurski, 298 Ill.App. 362, 18 N.E.2d 701, 706; Hicks v. State, 213 Ind. 277, 11 N.E.2d 171, 12 N.E. 2d 501, 502; Coppock v. Reed, 189 Iowa 581, 178 N.W. 382, 383, 10 A.L.R. 1407; 24 C.J.S., Criminal Law, § 1606, p. 145, et seq.

[15, 16] This restricted scope of the writ of coram nobis has been recognized by the California courts. As stated in People v. Reid, 195 Cal. 249, 256, 232 P. 457, 460, 36 A.L.R. 1435, quoting from Sanders v. State, 85 Ind. 318, 44 Am.Rep. 29: "'It is our opinion that the courts have the power to issue writs in the nature of the writ coram nobis, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the ap-

pellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for new trial, and cannot be made the grounds of an application for the writ coram nobis. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.'" Quoted with approval in People v. Lumbley, 8 Cal.2d 752, 759, 68 P.2d 354; People v. Superior Court, 4 Cal.2d 136, 149, 47 P.2d 724. The basis for the issuance of a writ of error coram vobis is substantially the same as for a writ of error coram nobis; however, the application for a writ of error coram nobis should be addressed in the first instance to the court in which the petitioner was tried and convicted. In re De La Roi, 28 Cal.2d 264, 276, 169 P.2d 363.

[17] It is conceded by all concerned that the shepherd boy was of dull mentality, as noted by this court in its opinion affirming the judgment. The court then observed: "At the trial he gave testimony which, along certain lines, such as that regarding the color of bathing suits, showed a tendency to give an affirmative answer to each question asked, although his answers were inconsistent." People v. Lindley, supra, 26 Cal.2d at page 786, 161 P.2d at page 230. The testimony before the referee substantiated this observation. But Guino's competency was not challenged at the time of the trial, although his mental capacity and the inconsistencies in his testimony, to some extent, were brought to the attention of the jury by cross-examination and the argument of counsel.

The record of the testimony presented to the referee does not bear out the charge that Guino is an incompetent person. The evidence in this regard shows that he has an I. Q. of between 40 and 50. In terms of physical age, this is said to be the equivalent of the mental capacity of a normal child between six and eight years old. He completed the work of the eighth grade, but when asked if he had done so he replied "No." His reply to the question, "Can you read," was, "Not much." He did not know the name of the school he attended but said his teacher was Miss King. He acknowledged that while in school he had experienced difficulty in seeing and hearing.

This evidence does not, as a matter of law, show that either at the time of the trial or upon the date he was examined before the referee, Guino was an incompetent person. The record upon each occasion of his examination as a witness shows many inconsistencies in his answers. Very probably the boy was quite confused by his strange surroundings and the questioning of the attorneys. But as the referee reported, he has never changed his testimony in certain essential particulars.

The charge now leveled against Filipelli, in effect, is a repetition of the attack made upon his testimony when the judgment was under review. In challenging the evidence as being insufficient to support the judgment of conviction, Lindley's counsel then declared: "A perusal of the cross-examination of this witness will show conclusively that he can be made to answer any question satisfactory to the questioner as he did the question of the District Attorney set forth above. It is impossible to give a better picture of the mentality of the witness than is given by his answers on direct and cross-examination. His testimony is full of discrepancies and is absolutely unreliable and unbelievable."

Very probably, Sheriff Kimmerer and the officers who interviewed Filipelli were fully aware of his limited education and mental deficiencies. But, necessarily, officers must interview and procure for the prosecuting officials as witnesses those persons who know the facts in regard to the crime which has been committed. The officers, and counsel, must use the available persons; the weight to be given to their testimony is a question for the court or jury. The evidence before the referee fully supports a determination that the representatives of the State acted with reasonable caution in interviewing Filipelli and presenting him as a witness, and, as the referee concluded, his competency as a witness "was a question that was neither addressed to nor deter-

minable by them in the first instance." Under these circumstances, there is no ground for relief by writ of error coram nobis, writ of error coram vobis, or habeas corpus.

[18] The question of whether Lindley was insane at the time of his conviction was indirectly considered upon the appeal from the judgment, and no additional evidence which properly could have been presented during the trial was offered before the referee. The plea of not guilty by reason of insanity was not raised as a defense and this court is not now in a position to reexamine Lindley's sanity either at the date the crime was committed or at the time of trial. If, as alleged in the petition, Lindley now is insane, the applicable procedure is specified by section 3701 et seq. of the Penal Code. The facts here relied upon present only a case for further investigation and consideration by the Governor of this State, if he be so advised. Cal.Const., art. VII, § 1; In re De La Roi, 28 Cal.2d 264, 169 P. 2d 363.

The writ of error coram vobis is denied, the writ of habeas corpus heretofore issued is discharged and Lindley is remanded to custody.

GIBSON, C.J., and SHENK and SPENCE, JJ., concurred.

SCHAUER, Justice.

I concur only because upon the record, and remaining obedient to the established law of this state, no alternative judgment appears tenable. In the interests of justice, however, I am impelled to declare that that same record leaves with me a grave doubt as to whether Lindley is guilty of the crime of which he stands convicted. The seeming anomaly in the foregoing statements arises from the fact that in this proceeding for a writ of habeas corpus and by way of error *coram vobis* the grounds upon which we may act are strictly limited. For a statement of those limitations see People v. Gilbert, 1944, 25 Cal.2d 422, 442, 154 P.2d 657; In re De La Roi, 1946, 28 Cal.2d 264, 269, 169 P.2d 363.

No serious contention is or can be made that the showing warrants the writ *coram vobis*. The bulk of petitioner's contention is directed to the application for the writ of habeas corpus and the only recognized ground (lack of due process of law) upon which that writ is sought depends on showing that the conviction was obtained upon perjured testimony produced by the prosecution *with knowledge, of its falsity*. "Proof of both elements, perjury and knowledge, by a preponderance of credible evidence, is indispensable" to discharge of the convicted person on habeas corpus based on that theory. (In re Mooney, 1937, 10 Cal.2d 1, 15, 73 P.2d 554; In re De La Roi, 1946, supra, 28 Cal.2d 264, 269, 169 P.2d 363.) Thus a showing by a preponderance of evidence that the defendant had been convicted upon mistaken or false testimony and that he was in fact innocent would not justify sustaining the writ and releasing the convicted person because, in the absence of proof that perjured testimony had been introduced with knowledge of its falsity on the part of a responsible representative of the state, there would be no lack of due process. The remedy in such cases is committed by our law exclusively to the governor of the state.

The record in this proceeding discloses apparently substantial evidence, relevant to Lindley's guilt or innocence, which was not introduced at his trial. It also discloses that evidence given at the trial which substantially tended to support the verdict apparently was, in truth, either false or mistaken. It does not appear that any responsible prosecuting officer deliberately produced false and material evidence with knowledge of its falsity. Hence we may not discharge the defendant.

CARTER and TRAYNOR, JJ., concurred.

29 Cal.2d 745

## NELSON v. ABRAHAM.

## S. F. 17145.

Supreme Court of California, In Bank.

March 3, 1947.

**1. Judgment ⇐250**

In action for accounting of plaintiff's agreed share of profits from operation of business managed by him, fact that complaint was drawn on theory that parties' parol agreement contemplated only a partnership between them does not prevent granting of relief on some other theory based on facts in evidence.

**2. Partnership ⇐3, 5**

A "partnership" connotes members' coownership of partnership property with sharing in profits and losses of continuing business. Civ.Code, § 2400.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

**3. Joint adventures ⇐1**

A "joint venture" is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Venture".

**4. Joint adventures ⇐1**

A joint venture or undertaking may be formed by parol agreement or assumed as reasonable deduction from parties' acts and declarations.

**5. Partnership ⇐5, 9(1)**

A person's receipt of share of profits of business is prima facie evidence that he is a partner, but such inference is not drawn if profits are received in payment as wages of employee. Civ.Code, § 2401, subd.4.

**6. Joint adventures ⇐1**
**Partnership ⇐6, 9(1)**

Whether agreement to share profits of business is merely to provide measure of compensation for services or use of money or bestows ownership and interest in profits themselves, so as to constitute undertaking a partnership or joint venture, is primarily a fact question.

**7. Joint adventures ⇐4(1)**
**Partnership ⇐70**

The relationship between copartners or joint adventurers is fiduciary.

**8. Contracts ⇐275**

Every contract calls for highest degree of good faith and honest dealing between parties thereto.

**9. Joint adventures ⇐1**
**Master and servant ⇐1**
**Partnership ⇐15**

The relationship between parties may be that of employer and employee for one purpose and that of partners of joint adventurers for another purpose.

**10. Joint adventures ⇐4(1)**
**Master and servant ⇐70(3)**
**Partnership ⇐70, 97**

Good faith and fair dealing require that neither party to agreement for division of profits, whether contract is one of copartnership, joint venture, or employment, may be permitted to take unfair advantage or enjoy greater rights than terms of agreement call for, one of them may not obtain secret profit or undue benefit, and one intrusted with another's rights is charged with duty to guard such rights with utmost good faith.

**11. Joint adventures ⇐4(1)**
**Master and servant ⇐70(3)**
**Partnership ⇐86**

One intrusted with establishment, management, integrity, and expansion of wholesale ice business in certain city by one who took no active part in management of business, but supplied capital and agreed to divide profits in accordance with parties' oral agreement, was entitled to agreed share of net profits from operation of business and sale thereof by such other party.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Julius Nelson against Isaac Abraham for an accounting and dissolution of a partnership. Judgment for defendant, and plaintiff appeals.

Reversed.

Prior opinion 167 P.2d 801.

Hardin, Rank, Meltzer & Fletcher, of Oakland, for appellant.

Raymond Salisbury and Joseph C. Prior, both of Oakland, for respondent.

SHENK, Justice.

The plaintiff commenced an action for an accounting, dissolution of partnership, and such other relief as might be proper. The complaint alleged a copartnership between the plaintiff and the defendant in the business of selling ice at wholesale and retail in San Francisco under the name of Independent Ice Company; the sale by the defendant of the business without plaintiff's consent; the existence of a net profit from the operation of the business and from the sale of assets in which the plaintiff was entitled to share; and the defendant's refusal to account. The trial court found that a copartnership did not exist and that the plaintiff was not entitled to any portion of the profits derived from the operation or sale of the business "as copartner or otherwise." The plaintiff appealed from the judgment.

The defendant for a number of years had been engaged in the manufacture and sale at wholesale of ice in the county of Alameda under the name of Independent Ice Company. For six years the plaintiff had been employed by the defendant as an ice salesman. Early in 1940, they talked about opening an office and establishing a sales business in San Francisco. They arrived at an oral agreement which provided, according to the defendant's testimony, that if the plaintiff would conduct the San Francisco business he would receive one-third of the net profits from operation of that business but would not have an interest in the business. Thereupon the plaintiff, with the help of one driver, commenced the sale of ice in San Francisco under the company name. At first the ice for San Francisco deliveries was stored in the Oakland plant and picked up there by the San Francisco trucks, thence delivered directly to the San Francisco customers. Two routes were started in San Francisco. When the number of customers increased and sales justified it, the defendant, in September, 1941, leased a lot in San Francisco and placed upon it a building which was used for storage and office purposes. Thereafter, the plaintiff assumed entire charge of the management and operations in San Francisco, and the deliveries there were conducted separately from the Oakland business, with a separate set of books, and a separate bank account in which all the receipts were deposited by the plaintiff. Each of the parties could sign checks, but the plaintiff alone signed checks withdrawing moneys from the account. Both parties signed as partners the application for the sales permit issued by the State Board of Equalization. The ice sold in San Francisco was furnished by the defendant's Oakland plant, but the San Francisco business was billed for ice as a customer purchasing from the Oakland plant. It is shown that the profit to the defendant on "sales" for San Francisco deliveries was $2,934 for the period involved.

In San Francisco ice was sold to wholesale and retail customers on the routes established by the plaintiff. The plaintiff managed and conducted all of the details of the San Francisco business, including the hiring and discharging of employees, fixing their compensation, and determining the sale price of ice. He selected the customers, made extensions of credit, and performed the other necessary and usual details of management. He continued to draw his wages of $185 a month, less deductions for social security and unemployment benefits. His regular wages constituted an expense of operation and were not intended to be included in the amount of net profits. He did not draw wages for overtime, although he worked twelve to sixteen hours a day in building up the routes, making collections, and in the discharge of other duties of management. The drivers who delivered ice to the San Francisco customers received pay for overtime, thus drawing more in wages than the amount received by the plaintiff. The physical properties employed in the conduct of the business, such as the plant and office building, furniture, trucks, ice equipment, and the money capital were furnished by the defendant.

Some time in March, 1942, the defendant commenced negotiations for the sale of the San Francisco business to two San Francisco competitors. On March 31, 1942, the sale of the San Francisco storage plant, equipment and routes was consummated without notice to the plaintiff. The consideration received by the defendant was $14,000 cash, five ice routes in Oakland, and a contract on the part of one of the purchasers to buy from the defendant a minimum of 2,500 tons of ice per year for a period of not less than five years. It was shown that the cash consideration alone represented an amount which was $5,000 in excess of the defendant's capital outlay for the San Francisco business.

On April 7, 1942, one week after the sale, the plaintiff asked the defendant for an accounting and division of profits, but he refused on the ground that the profit and loss statement showed a net operative loss of $2,090 for the period. This action followed.

The question for determination is whether under the admitted agreement the plaintiff is entitled to an accounting and to a division of any profits which may be shown thereby. The question may not be dismissed summarily with the observation that, since the agreement gave the plaintiff a share of the net profits from operation without an interest in the business, and since the books showed no net profit from operation, the plaintiff has furnished no basis for an accounting. The trial court made no finding on the issue of the amount of profit, nor did it find that there was no operative profit. The finding on this issue could not be made without granting the relief prayed for, unless the plaintiff conceded that an accounting would show that there was no net profit from operation. The plaintiff asserts that the evidence does not justify the finding that he is not entitled to an accounting, nor, if an accounting be had, that it would not disclose a profit from operation.

[1] The fact that the complaint is drawn on the theory that the parol agreement between the parties contemplated only a partnership does not prevent the granting of the relief on some other theory based on the facts in evidence. Champagne v. Passons, 95 Cal.App. 15, 29, 272 P. 353; 30 Am.Jur. p. 711.

[2] A partnership connotes coownership in the partnership property with a sharing in the profits and losses of a continuing business. Wheeler v. Farmer, 38 Cal. 203, 213; Dempsey-Kearns Theatrical & Motion Picture Enterprises v. Pantages, 91 Cal.App. 677, 682, 267 P. 550; 40 Am.Jur. p. 145 et seq.; Civ.Code, § 2400.

[3, 4] A joint venture has no corporate or partnership designation. It is an undertaking by two or more persons jointly to carry out a single business enterprise for profit. Hansen v. Burford, 212 Cal. 100, 108-109, 297 P. 908; Irer v. Gawn, 99 Cal. App. 17, 277 P. 1053; Keyes v. Nims, 43 Cal.App. 1, 9, 184 P. 695. Such a venture or undertaking may be formed by parol agreement (Sly v. Abbott, 89 Cal.App. 209, 216, 264 P. 507), or it may be assumed as a reasonable deduction from the acts and declarations of the parties. Swanson v. Siem, 124 Cal.App. 519, 524, 12 P.2d 1053. For further discussion of the nature of joint ventures see Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 764, 128 P.2d 665; Kraemer v. World-Wide Trading Co., 195 App.Div. 305, 187 N.Y.S. 16; Shoemake v. Davis, 146 Kan. 909, 73 P.2d 1043; see also note, What Amounts to Joint Adventure, 138 A.L.R. 968; note, Joint Adventures, 30 Am.Jur. 676; note, Partnership Distinguished from Employment, 137 A.L.R. 6.

[5, 6] The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner, but the inference is not drawn if the profits were received in payment as wages of an employee. Civ.Code, § 2401, subd. 4. Whether the agreement to share profits is merely to provide a measure of compensation for services or for the use of money, or whether it extends beyond and bestows ownership and interest in the profits themselves so as to constitute the undertaking a partnership or a joint venture, presents primarily questions of fact. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138. It has been

said to be a "mingled problem of law and fact." Swanson v. Siem, supra, 124 Cal.App. 519, 523, 12 P.2d 1053, 1055, citing 20 R.C.L. 849, § 55.

It is, however, unnecessary to place a precise legal designation on the relationship between the parties. The present controversy is between the parties to a contract by which the plaintiff admittedly became entitled to a one-third share of the net profits from operation without acquiring an interest in the business. The oral agreement and the conduct of the parties thereunder, considering the nature of the undertaking and the surrounding circumstances, define their respective rights, liabilities and duties one to the other without the necessity for designating their relationship by a particular label.

[7-9] The relationship between copartners, or between joint adventurers, is of a fiduciary character. 14 Cal.Jur. p. 763; Arnold v. Humphreys, 138 Cal.App. 637, 643, 33 P.2d 67; Sly v. Abbott, supra, 89 Cal.App. 209, 216, 264 P. 507; Chapman v. Dwyer, 2 Cir., 40 F.2d 468. But it is also true that every contract calls for the highest degree of good faith and honest dealing between the parties. In Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163, involving an agreement to share the profits from the production of a play, the court referred to the fiduciary relationship which had its origin in the contract, and which imposed upon the parties the duty of utmost good faith. The court (at page 87 of 263 N.Y., at page 167 of 188 N.E.) recognized the "principle that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing." In Elliott v. Murphy Timber Co., 117 Or. 387, 244 P. 91, 48 A.L.R. 1043, involving an action between the parties to a contract for salary and division of profits, it was said (at p. 393 of 117 Or., at page 92 of 244 P.): "Whatever their relation may have been, their rights and liabilities rest upon their agreement, and where a contract provides as this does, for payment by one party to another of profits received, it is the duty of the one receiving such profits to account to the other, for otherwise there would be no way by which such party could determine whether there were any profits. * * * When an employer has received profits in which, by the terms of his contract, an employee is entitled to share, it is as much his duty to account to the employee, as it would be if the relation of partners or joint adventurers existed between them. 'The right to go into equity for an account is not confined to a partner. Any employee paid by a share of the profits may maintain a bill for an account, though he is not a partner * * *,'" citing among other authorities Parsons on Partnership, 4th Ed., section 54, note 1. It is conceivable that the relationship between parties may be, for one purpose, that of employer and employee, while for another, that of partners or joint adventurers. See Wiltsee v. California Emp. Comm., 69 Cal.App.2d 120, 126-129, 158 P. 2d 612; also discussion 33 Cal.L.Rev., p. 648 et seq.

[10] It must be obvious therefore that under an agreement calling for a division of profits, whether the contract is one of copartnership, joint venture, or employment, good faith and fair dealing require that neither party may be permitted to take an unfair advantage or enjoy greater rights than called for by the terms of the agreement. One may not obtain a secret profit or undue benefit. The one who is entrusted with the rights of another is charged with the duty of guarding those rights with the utmost good faith. Stenian v. Tashjian, 178 Cal. 623, 174 P. 883; Fink v. Weisman, 129 Cal.App. 305, 18 P.2d 961; Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379.

[11] In the present case the plaintiff was entrusted with the establishment and management of the business in San Francisco, its integrity and expansion. The defendant took no active part in the conduct or management of the San Francisco business. He supplied the capital and was

entrusted with the duty of making a fair division of the profits in accordance with the agreement and understanding of the parties. The plaintiff undertook to build up the business in a new and highly competitive field. Something more than mere direction to perform a particular task in return for salary or wages was inherent in the agreement and in the minds of the parties. The establishment of the business entailed more than merely selling merchandise. To establish the ice routes in the new and competitive territory required effort, skill, management and tact beyond the mere delivery of ice over an already established route. That the time and effort expended by the plaintiff in these respects were successful is evidenced by the eagerness of the competitors and the return to the defendant on the sale of the business.

The foregoing observations become pertinent in determining the nature of the relationship of the parties and in defining the correlative rights and duties flowing from a contract which gave to the plaintiff a share in the net profits from operation. The words "net profits of a business" have been defined generally as the difference between the gross receipts from sales of merchandise and the expenses of conducting the business. Boradori v. Peterson, 86 Cal.App. 753, 759, 760, 261 P. 520. Notwithstanding this definition there is no warrant for excluding the plaintiff from sharing in the gain arising out of the relationship which the parties have created by their contract.

The profits taken by the defendant on the so-called "sales" of ice for San Francisco deliveries if not a secret profit may, when properly considered, be deemed at least an undue benefit to the defendant, and therefore a profit from operation in which the plaintiff was entitled to share. The amount of such profit to the defendant, added to gross income, insofar as the present record shows, indicates that there was a net operative profit from sales of ice rather than a loss for the period. The amount thereof might become a pertinent item of inquiry in an accounting based on the contract.

Likewise, in any accounting under the agreement, the court may consider what the parties meant by "profits from operation" of the San Francisco business. This is so for the reason that there existed between them an agreement to share those profits. This agreement, the court found, did not create a partnership. As a conclusion from that finding the court determined that plaintiff was not entitled to any portion of the profits derived from the operation or sale of the business "as copartner or otherwise." As we have seen, however, the basic issue in this case is not resolved by a finding that there was no partnership. The plaintiff is entitled to his portion of the profits under the agreement established by the record. The defendant testified that one of his reasons for going into the San Francisco territory was the fact that San Francisco dealers had entered his Oakland territory and taken away the routes which he subsequently received in part payment for the San Francisco operation. This might indicate that the purpose of the San Francisco venture was to create a basis for recovering what the competitors had taken from the defendant.

It was in evidence that the plaintiff, without objection from the defendant, participated in one of the meetings with negotiators for the purchase of the San Francisco business and stated in that meeting that he had an interest in the business. It was also in evidence that one week after the purchase of the business by the competitors a preliminary account of the profits from the sale was shown to the defendant at which time he admitted that the plaintiff was entitled to one-third of the cash consideration after deducting operating expenses and losses.

Therefore, upon proper consideration of all relevant facts, there might appear justification for viewing the San Francisco venture as an "operation," and for concluding that any other sense of that word would render the parties' agreement meaningless.

Considering the relationship which the defendant had assumed toward the plaintiff, and his subsequent conduct, the prin-

ciples of equity might best be served by treating the San Francisco business, including the building of the routes and the sale, as an "operation." To that end the defendant should not be permitted to say that he intended to profit from the plaintiff's labor and at the same time deprive the plaintiff of the fruits of the agreement. See Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Champagne v. Passons, supra, 95 Cal.App. 15, 28, 272 P. 353.

The conclusion of the trial court that the plaintiff is not entitled to an accounting or to profits is not supported by the record.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




78 Cal.App.2d 417

## LANDE v. SOUTHERN CALIFORNIA FREIGHT LINES.

Civ. 15227.

District Court of Appeal, Second District, Division 3, California.

March 5, 1947.

Rehearing Denied March 26, 1947.

**1. Appeal and error ⇐82(1)**

The orders after judgment, which are appealable under the statute authorizing an appeal from any "special order made after final judgment", are only those which affect the final judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order After Judgment".

**2. Appeal and error ⇐82(1)**

An order terminating proceedings for the preparation of a record on appeal has the same effect as an affirmance of the judgment or dismissal of the appeal and is appealable within meaning of statute authorizing an appeal from any "special order made after final judgment", but neither an order denying a motion to terminate such proceedings nor an order relieving a party from default in the preparation of a record on appeal is appealable. Code Civ. Proc. § 963.

**3. Appeal and error ⇐82(1)**

Order of trial judge settling statement proposed by appellant in lieu of reporter's transcript did not affect the judgment or its enforcement and was not appealable under statute authorizing an appeal from any special order made after final judgment. Code Civ.Proc. § 963.

**4. Appeal and error ⇐569(1)**

If an appellant proposes to proceed by settled statement in lieu of a reporter's transcript, the trial judge is not required to settle the statement without the use of a transcript, but, to the contrary, he is not required to act upon his own recollection and should not do so unless he is satisfied that his recollection is so clear and complete as to make an examination of a transcript unnecessary. Rules on Appeal, rule 7(a).

**5. Appeal and error ⇐569(1)**

Where appellant proposed to proceed by settled statement in lieu of a reporter's transcript but refused to furnish a transcript which trial judge considered necessary to determine what additional evidence should be added to appellant's proposed statement, trial judge was not required to settle the statement without use of a transcript, and allowance of respondent's proposed amendment for incorporation of testimony was not error. Rules on Appeal, rule 7(a).

**6. Appeal and error ⇐569(1)**

Action of trial judge in settling a statement after ordering incorporation of transcript of testimony as proposed by respondent was not subject to review on ground that some of the testimony ordered incorporated might prove to be unnecessary. Rules on Appeal, rule 7(a).

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Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Florence Lande, doing business as North & South Transportation Company, against Southern California Freight Lines, a corporation, wherein plaintiff recovered a judgment and defendant appealed. From an order settling, as amended, the statement proposed by defendant in lieu of a reporter's transcript, defendant appeals.

Appeal dismissed.

Sheppard, Mullin & Richter and Cameron W. Cecil, all of Los Angeles, for appellant.

Pacht, Pelton, Warne, Ross & Bernhard and Bernard Reich, all of Beverly Hills, for respondent.

SHINN, Justice.

Plaintiff recovered a judgment in a court trial against Southern California Freight Lines, and the defendant gave notice of appeal. In due time defendant served and filed a notice stating that it desired to set forth the oral proceedings by a settled statement, in lieu of reporter's transcript, under rule 7(a) of Rules on Appeal. Defendant caused to be prepared a partial transcript of the testimony and served and filed a condensed statement in narrative form of portions of the oral proceedings and also stated the points to be raised on appeal. These points were twenty-one in number, thirteen of which specified insufficiency of the evidence to justify certain findings and that the findings in some particulars were conflicting. Plaintiff gave notice of motion to strike the proposed statement upon the ground that it was a wholly inadequate statement of the evidence material to the points raised on appeal and a sham, but also served and filed proposed amendments to the statement. The motion was based upon an affidavit in which it was stated that the trial had lasted for 42 actual trial days, spread over a period of many months; that the testimony would cover some 2,000 pages of reporter's transcript; that the proposed statement consisted of only 76 pages; that it would be necessary, in order to prepare a full, correct and adequate statement, to have transcribed and incorporated, partly in narrative form and partly in question and answer form, testimony of some eighteen or twenty witnesses which was not included in the statement, and that the cost of transcribing said testimony would be approximately $1,250. Plaintiff, by proposed amendments, sought to have incorporated in the statement the testimony of the witnesses referred to in the affidavit.

The matter of the settlement of the statement and plaintiff's motion to strike the proposed statement came on for hearing together. The motion to strike was denied. Defendant objected to each of plaintiff's proposed amendments and the matter was argued at length. At the conclusion of the hearing the trial judge made an order that there be incorporated in the statement in narrative form the whole of the testimony of nineteen witnesses and portions of the testimony in question and answer form of several other witnesses as the same was set forth in plaintiff's proposed amendments. Defendant was ordered and directed within 65 days to engross said statement in accordance with the order allowing the amendments. Defendant gave notice of appeal from the order allowing the proposed amendments and ordering the statement to be engrossed, and also petitioned this court for a writ of review by which it was sought to annul the order insofar as it ordered the incorporation of plaintiff's proposed amendments. The petition for review was denied without written opinion.

The only matter which requires consideration is the contention of respondent that this attempted appeal should be dismissed for the reason that the order settling the statement is non-appealable. This point is well taken.

[1-3] An appeal may be taken from any special order made after final judgment. Code of Civil Procedure, section 963. But the orders after judgment which are appealable under this section are only those which affect the final judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. Lake v. Harris, 198 Cal. 85, 89, 243 P. 417; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 150 P.2d 881. The test is the same with relation to orders made in the preparation of records on

appeal. An order terminating proceedings for the preparation of a record has the same effect as an affirmance of the judgment or dismissal of the appeal, and is appealable (Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; W. J. Somers Co. v. Smith, 45 Cal.App. 703, 188 P. 311), but an order denying a motion to terminate such proceedings is not appealable (Hohnemann v. Pacific Gas & Elec. Co., 29 Cal. App.2d 551, 85 P.2d 151; Landreth v. Ducommun, 9 Cal.App.2d 136, 48 P.2d 984); nor is an order relieving a party from default in the preparation of a record on appeal. McWilliams v. Hudson, 98 Cal.App. 185, 276 P. 598, 277 P. 529; Buis v. Lindauer Corp., 116 Cal.App. 558, 3 P.2d 18.

[4, 5] Appellant, however, claims to have some special rights derived from the new Rules on Appeal. Rule 7(a) allows an appellant to propose a condensed statement of a portion only of the oral proceedings, together with a statement of the grounds of the appeal, and allows the respondent to propose the addition of all or any portion of the remainder of the proceedings. Appellant contends that the court exceeded its jurisdiction in ordering the incorporation of a transcript of the entire oral proceedings as to the 19 witnesses. The contention appears to be that if an appellant proposes to proceed by settled statement in lieu of a reporter's transcript, the trial judge must settle the statement without the use of a transcript. The rule is to the contrary. A judge is not required to act upon his own recollection in such matters, and of course should not do so unless he is satisfied that his recollection is so clear and complete as to make an examination of a transcript unnecessary. It appears clearly from the record that the trial judge was convinced of his inability to settle a satisfactory statement without the benefit of a transcript. Rule 7 is exceedingly broad. It provides a method for preparation of an abbreviated record, where a full transcript is not needed for that purpose, but it does not excuse an appellant from furnishing a transcript, either partial or complete, which the judge deems necessary in the settlement of the statement. In view of defendant's refusal to furnish a transcript which the judge considered necessary in determining what additional evidence should be added to appellant's proposed statement, it was entirely proper to allow respondent's proposed amendments.

[6] It is argued that the trial judge ordered the addition of all the testimony in question while conceding that some of it might prove to be immaterial. Responsibility for this situation would rest upon appellant because of its refusal to furnish a transcript. Even if some of the testimony should prove to be unnecessary, that would furnish no ground for intervention by this court. When a trial judge has settled a transcript in accordance with the facts and in the exercise of his discretion as to what should be included, his action is not subject to review upon the ground that too much has been included. In re Gates, 90 Cal. 257, 27 P. 195; Hyde v. Boyle, 89 Cal. 590, 26 P. 1092.

There is nothing in the Rules on Appeal which places any new limitation upon the discretionary powers of the trial judge in the settlement of records on appeal and nothing which would bring the order here under consideration into the class of orders after judgment from which appeals may be taken.

The order settling the statement does not in any manner affect the judgment or its enforcement; it is not appealable and the appeal from the order is dismissed.

DESMOND, P. J., and KINCAID, Justice pro tem., concur.

78 Cal.App.2d 555

## HUGHES v. GRANDY.

No. 13323.

District Court of Appeal, First District, Division 1, California.

March 14, 1947.

1. Appeal and error ⇐1012(1)

It is not sufficient ground for reversal of a judgment to demonstrate that a finding is against preponderance of evidence, but appellant must show that there is no essential evidence to sustain the findings.

2. Deeds ⇐211(1)

Evidence warranted finding that deceased was mentally incompetent to make deed by reason of old age, illness, and increasing senility.

3. Deeds ⇐68(1½)
Wills ⇐21

Generally, the rules respecting competency to make deed and the rules respecting testamentary capacity are the same.

4. Deeds ⇐68(1½)

The issue of competency of deceased to make deed must be determined from all the circumstances surrounding the transfer.

5. Deeds ⇐203

The condition of mind of grantor before and after making deed can be considered in determining grantor's mental competency to make deed, notwithstanding that it is grantor's mental condition at very moment of executing and delivering deed that is important.

6. Evidence ⇐574

The mere fact that adverse witnesses, who saw grantor on the particular day that deed was executed, testified that grantor was not mentally incompetent, was not conclusive as against evidence which showed a continuing incompetency over a period beginning before and continuing after such day.

7. Deeds ⇐68(1½)
Wills ⇐50

A testator has sufficient mental capacity to execute a will and grantor has sufficient mental capacity to execute deed if he has sufficient capacity to understand the nature of his act and is capable of fairly and rationally considering the character and extent of his property and persons to whom he is bound by ties of blood or friendship and the persons to whom and the manner and proportions in which he wants the property to go.

8. Appeal and error ⇐1010(1)

The findings of trial court can be overthrown only when they totally lack the support of substantial evidence.

9. Appeal and error ⇐1012(1)
Evidence ⇐474(4)

The opinions of intimate acquaintances are admissible on issue of mental competency of grantor, and the weight to be given such testimony is for trier of fact.

10. Appeal and error ⇐1011(1)

The reviewing court will not weigh conflicts in testimony or decide where the preponderance lies, but will only determine if there is substantial evidence to support the trial court's findings.

11. Appeal and error ⇐204(1)

An appellant not objecting to introduction of testimony in trial court could not for first time object in reviewing court to introduction of such testimony.

12. Deeds ⇐203

In action against grantee to recover realty conveyed by grantor who was allegedly incompetent to make deed, the fact that grantor had been declared incompetent and a guardian appointed was admissible for purpose of showing grantor's mental capacity at such time and on issue of mental capacity at time of execution of deed, in view of testimony that grantor's mental condition did not change between execution of deed and later appointment of guardian.

13. Deeds ⇐203

In action against grantee to recover realty conveyed by grantor who was allegedly incompetent to make deed, the fact that declaration of incompetency was made five months after execution of deed went to the weight and not to admissibility of fact of declaration of incompetency and appointment of guardian.

14. Deeds ⇐211(1)

In action against grantee to recover realty conveyed by grantor who was allegedly mentally incompetent to make deed, evidence warranted finding that grantor was unable properly to manage and take care of herself and her property and that by reason thereof, she was easily deceived and imposed upon by artful and designing persons.

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Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action to recover real property by Cadwaladr Hughes, as administrator of the estate of Hannah Elinor Stewart, an incompetent person, against John Grandy. Upon the death of Hannah Elinor Stewart, Cadwaladr Hughes, as the administrator of the estate of Hannah Elinor Stewart, deceased, was substituted as party plaintiff. From the judgment, the defendant appeals.

Affirmed.

Franklyn M. O'Brien and James C. Espey, both of San Francisco, for appellant.

Elmer P. Delany, of San Francisco (James A. Himmel, of San Francisco, of counsel), for respondent.

BRAY, Justice.

Appeal by defendant from a judgment in favor of plaintiff administrator in an action to recover certain real property transferred to defendant in her lifetime by plaintiff's intestate. The action was originally brought by the guardian of the person and estate of Hannah Elinor Stewart, an incompetent person. Upon the death of Mrs. Stewart plaintiff administrator was substituted.

The complaint contains three causes of action. The first alleged that Hannah Elinor Stewart was mentally incompetent to make a deed of her property at the time of the conveyance to defendant, and "by reason of old age, disease and weakness of mind was a person unable to properly manage and take care of herself and her property, and by reason thereof was easily deceived and imposed upon by artful and designing persons;" that knowing of her physical and mental infirmities and condition, and for the purpose of unjustly and illegally enriching himself, defendant enticed, persuaded and prevailed upon the said Hannah Elinor Stewart to transfer the said real property to him without consideration.

The second cause of action alleged that by the same means the defendant obtained dishes, silverware, household belongings and other personal property of Mrs. Stewart, and also $700 of her money. The court found that prior to Mrs. Stewart's death and during certain guardianship proceedings, this money, after a court hearing, was returned by the defendant to the then guardian of the person and estate of Mrs. Stewart. No finding was made concerning the alleged transfer of the household goods and other personal property. It is therefore unnecessary to consider this second cause of action any further.

The third cause of action contained the usual allegations of a quiet title action.

Appellant bases his appeal on three grounds: (1) That respondent failed to prove by a preponderance of evidence that Mrs. Stewart was mentally incompetent to execute the deed in question; (2) that the court erred in the introduction of certain evidence; (3) that there was insufficient evidence to support the findings and judgment. Points (1) and (3) will be considered together, as they practically cover the same subject.

The court found that for some time prior to and on the first day of January, 1945, Mrs. Stewart was a widow, "aged about seventy-seven years, and by reason of old age, disease and weakness of mind was a person unable to properly manage and take care of herself and her property, and by reason thereof was easily deceived and imposed upon by artful and designing persons"; that a short time prior to January 6, 1945, defendant went to the office of John J. Lagorio, a notary public in the city of San Francisco, and asked him to prepare a deed of gift from Mrs. Stewart to defendant, showing love and affection as the consideration; that on or about the eighth day of January, 1945, Lagorio, as such notary, went to the home of Mrs. Stewart, and then

and there, in the presence of defendant, presented the deed to Mrs. Stewart for her signature, no other persons being present; that Mrs. Stewart signed the deed and delivered it to the defendant; that Mrs. Stewart was not advised by Lagorio as to the legal significance of said deed of gift, nor did he hold any private consultation or interview with said Mrs. Stewart; that all of the activity of the execution of the deed was had in the presence of the defendant; that Mrs. Stewart did not have any independent legal advice; that, unknown to Mrs. Stewart, defendant caused the deed to be recorded; that at the time of executing and delivering the deed Mrs. Stewart was not mentally competent to execute and deliver said deed; and that she received no consideration for it.

[1] The principal issue to be determined is that concerned with the sufficiency of the evidence respecting the mental competence of the grantor on January 6, 1945, the day of the execution and delivery of the deed to appellant. Before discussing the evidence it is well to consider the rules of law applicable here. The question is not, as contended in appellant's opening brief, where the preponderance lies, but whether there is substantial evidence to support the findings. In Rinker v. McKinley, 65 Cal.App.2d 109, at page 110, 149 P.2d 859, at page 860, the same contention was made, and the court said: "This proposition is untenable, for the rule is established that it is not sufficient ground for reversal of a judgment for an appellant to point out or to even demonstrate to an appellate court that a finding is against the preponderance of the evidence; he must show that there is not any substantial evidence to sustain the questioned finding. Meyer v. Great Western Ins. Co., 104 Cal. 381, 386, 38 P. 82; J. & H. Goodwin, Ltd., v. Franich, 37 Cal.App. 493, 494, 174 P. 83." "* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion * * *". Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[2] Disregarding all conflicts in the evidence, and giving to the evidence the weight to which it is entitled by an appellate court, there can be no doubt that the evidence supports the court's finding. The property involved, worth about $4500, is comprised of two contiguous lots on Gambier Street in San Francisco, on one of which was the house in which decedent lived. Plaintiff is the brother of the decedent. Defendant is no relation. Decedent lived with her husband on the property for some time prior to his death in May, 1944, and then continued to live there until her commitment to Agnews State Hospital on June 27, 1945.

Mrs. Marie Harris testified that she had known decedent for about three years, and visited her practically every day through 1944 and thereafter until Mrs. Stewart went to Agnews, and sometimes decedent would visit the witness' home three or four times a day. Mrs. Harris first noticed something wrong with decedent in September, 1944. Her mind was getting bad—she could not remember anything. Her mind was just as bad on January 6, 1945. During her husband's lifetime Mrs. Stewart had been a very neat housekeeper, but in late 1944 she became very untidy in her house and everything was in a turmoil. Decedent moved her furniture and other things into her kitchen because she imagined there were hoodlums coming into her house at night through the attic, and she wanted to be in the kitchen, where she could watch them. Decedent would try to tell Mrs. Harris things, but would not be able to remember. Decedent became ill on December 22, 1944, and Mrs. Harris did not believe she ever became well again. She did not believe that on January 6, 1945, decedent would know about transferring property. In the opinion of the witness decedent on that date was not competent to transfer property or transact any business. The witness had seen appellant put his arm around decedent in a loving and affectionate way, and feeding decedent with a spoon when she was capable of eating by herself. One night early in November, 1944, decedent came to the Harris home and asked if she could remain for the night. Mrs. Harris put her to bed, and at 2 a. m. decedent was sitting in the kitchen fully dressed, even wearing her hat. De-

cedent said she was going home because it was morning. Mrs. Harris tried to persuade decedent to go back to bed, but she fell asleep in a kitchen chair. Mrs. Harris awakened her, and she went back to bed with her clothing and shoes on, taking off only her hat and galoshes. She would not take off her clothes or shoes. She broke her glasses, and thereafter appellant read the newspapers to her. Between December 22, 1944, and January 6, 1945, Mrs. Harris visited decedent almost every morning, and she seemed in a daze most of the time, and Mrs. Harris could not carry on a conversation with her.

Mrs. Rose Wells, a neighbor who had known decedent for about three years, testified that she noticed a gradual change in decedent from the time of her husband's death. Decedent had been taking care of Mrs. Wells' small boy since January or February, 1944, but because of the decided mental change which Mrs. Wells noticed in decedent in December, she took the child from her. Decedent told the witness that people were walking about the house taking things. She had a loaded shotgun which the witness took away from her. In December, decedent said that Mr. Stewart (dead since May) was lying beside her all night. Most of the time she thought there were people in the house, when actually there was no one there. Decedent imagined that a man had taken over one of the bedrooms and was living there. In early January she carried her deceased husband's shirts over to the witness' house in a bundle and kept them with her for fear someone would steal them. On one occasion decedent visited the witness' house, without any dress on, just her overcoat. She became very untidy and unkempt, even filthy, in caring for her house. Mrs. Wells noticed quite a deterioration of decedent's mental faculties during 1944; and in her opinion, decedent on January 6, 1945, was not competent to transact business affairs or to execute a deed; she was not "in her right mind to do anything like that."

In February, 1945, Richard W. Evans, a resident of Racine, Wisconsin, on naval duty in San Francisco, called to see decedent at her home. He had been requested so to do by Robert Hughes, another brother of decedent's, whose home was in Racine, because her relatives had sent her a gift at Christmas, had received no acknowledgment of it from Mrs. Stewart, and thought that something was wrong. Evans spent two or three hours with her, and testified that she seemed interested in her relatives in the east, and spoke very kindly of her brothers. She seemed untidy, and the house was messy. She faltered in her expressions, had a failing memory, and did not carry on a coherent conversation. She spoke of appellant as her "guardian angel." She stated that several times she had started to write to her eastern relatives, but that she could not express herself properly. While she seemed to understand Evans, she spoke falteringly.

Immediately after respondent came to San Francisco and on April 10, 1945, respondent called upon decedent, and he testified that she appeared in a "kind of daze," but invited him into her house after he told her who he was. In June, 1945, he took up residence in her house. Decedent insisted to him that the property was still hers, that it was not appellant's. She contradicted herself in regard to having given the deed to appellant. Respondent then started guardianship proceedings, and decedent's attitude toward him changed. She thought that appellant was all right, and respondent was getting in the way. He also testified that he had found four money orders which decedent had bought but had forgotten to mail to the payees.

Appellant's own testimony was to the effect that he had known decedent for about five years. He was 64 years old at the time of the trial. He visited decedent almost daily after her husband's death, and decedent had given him the property because he was the only friend she and her husband ever had, and because he was kind to her after her husband's death. Decedent also gave him some dishes, "a few things like that, and a few carpenter tools" which had belonged to her husband. Decedent had had $700 in her sole name in the bank, and at her request he had transferred it to another bank, and into a joint

tenancy account with himself. $90 of this account was withdrawn. After the guardianship proceedings were started, and without any instructions from decedent, or even informing her, he changed the account to his own name solely, because his then attorney advised him to do so. (This is the money referred to in plaintiff's second cause of action, and which under the court's order in the guardianship proceedings, defendant returned to the guardian.) Appellant knew that Mrs. Stewart had a legal adviser at the time of the execution of the deed, but appellant did not suggest that she advise with him, nor did appellant have him prepare the deed.

Appellant places principal reliance upon the testimony of the notary public, Lagorio. This witness stated that prior to January 6, 1945, he knew appellant and "was doing some things for him." He had not known decedent prior to the day she signed the deed. On that day, appellant asked the witness to draw a deed of gift from decedent to appellant of the property concerned, appellant supplying the description. The witness brought the deed to decedent's house that afternoon. Appellant was already there with the decedent. During the entire transaction no other persons were present other than appellant, decedent and the witness. The witness asked decedent if she was the party who was going to give the property to appellant, and she replied, "yes." Thereupon the witness said, "You will have to sign the deed," which she did. After taking her acknowledgment, the witness gave the deed to decedent and asked her if she wanted to give it to appellant at the time. She said "yes." He then said, "You can pass it to Mr. Grandy in my presence and I will witness the passing and the delivery of the deed," which she did. It is apparent that the witness went to decedent's home on the assumption that she was going to execute and deliver the deed, and that he there took charge of the proceedings, did not discuss the transaction in any detail with her, and proceeded to get the matter concluded as expeditiously as possible. He testified that decedent was in "first class mind, sound mind, and good memory," and that no influence of any kind was brought to bear on her while he was there. He was there altogether about fifteen to twenty-five minutes. He did not see decedent at any time thereafter. The only conversation that took place was as above set forth, except that they talked about the weather and decedent's memory.

Miss Ethel DuRivage, a witness for appellant, testified that she had known decedent for twelve or fifteen years, and visited her six or eight times during 1944 after Mr. Stewart's death. Decedent was quite ill about holiday time, and was delirious for a month or so. The witness visited decedent right after Christmas, and then again a week or so later. Decedent told her appellant had been very kind to her, and that she wanted him to have everything decedent had. Decedent said she did not have much use for her family, and did not want them to have anything she possessed. In the opinion of the witness, decedent was competent on January 6th. Appellant was always very kind and gentle to decedent, and decedent treated him as a brother or a son. On Sunday, January 7th, when the witness visited decedent, she was weak from her illness, "delirious at times, and some things she remembered and other things she didn't remember." The witness asked decedent if she had made a will and "she gave me to understand she had. She said she had left everything to Mr. Grandy, or wanted him to have everything. I don't know which words. She didn't say by will or deed or how." Decedent in the latter part of her life told the witness that she had lost some things and she thought somebody was in the house and taking them.

Mrs. Florence McLeod, a defense witness, testified that she knew decedent intimately the last eight years. The witness noticed no change in decedent's general condition until after respondent came, although she had a weakness which the witness attributed to her December illness. The witness noticed nothing peculiar with decedent's mentality during a visit with decedent Christmas night, 1944. Decedent told the witness that her relatives had never been good to her, that she had left the

east to get rid of them, and she hoped they would not come out to "bother her." The witness observed appellant ministering to decedent in her home, and decedent in the latter part of January told the witness that decedent had transferred her property and everything she had to appellant. The witness considered decedent of sound mind on Christmas night, and also on January 15, 1945, which was the next time she saw decedent.

Another defense witness, Rose Ruiz, was a neighbor of decedent, and testified that they often visited each other's homes. Their acquaintanceship began in 1943. She saw decedent regularly in December, 1944, and January, 1945, and noticed no difference in decedent during that period. Shortly after January 5th, decedent was able to carry on a conversation and go shopping. Decedent told the witness that she was giving everything to appellant as she did not want her folks coming and seeing her. In the witness' opinion decedent knew what she was doing on January 6th.

[3] The rules governing capacity to execute and deliver a deed are in general the same as those governing testamentary capacity. Hemenway v. Abbott, 8 Cal. App. 450, 97 P. 190; 9 Cal.Jur. 117, secs. 21, 22; 5 Cal.Jur. 10 Yr.Supp., p. 135.

[4] In 9 Cal.Jur. 117, sec. 21, it is said: "It is difficult to formulate any rule determining the degree of mental weakness which will destroy a person's capacity to convey property * * * mental competency requires that the mind and memory of the grantor be sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the deed." At page 119, sec. 22, it is said: "Old age alone does not render a person incompetent to execute a deed. Nor will sickness, extreme distress or debility of body affect the capacity of the grantor to make a conveyance if sufficient intelligence remains." Therefore, the issue of competency must be determined from all of the circumstances surrounding the transfer.

[5, 6] Appellant vigorously contends that the only evidence that can be considered is as to decedent's actions and condition on the very day of the execution of the deed. He argues that testimony of respondent's witnesses concerning decedent's actions and mental condition prior and subsequent to that date is incompetent and immaterial, and, he reasons, as the only persons who saw her on that day were appellant and Lagorio, and as both of them testified that she was fully competent, there is no evidence upon which a court could find her to be incompetent on that day. But that is not the law. "* * * testimony as to the mental condition of the party before and after the time of the making of the instrument is admissible for the purpose of disclosing circumstances tending to show his probable condition of mind at the time of the transaction." 9 Cal.Jur. 120, sec. 23. Of course, it is the mental condition of the decedent at the very moment of executing and delivering the deed that is important, but in arriving at that condition it is well settled that her condition of mind both before and after may be considered. The mere fact that adverse witnesses who saw her on the particular day testify that she was not mentally incompetent is not conclusive as against evidence which showed a continuing incompetency over a period beginning before and continuing after that date. The trial court believed this latter evidence and did not believe that presented by the appellant. This court in that respect is bound by the trial court's finding.

Keeping in mind the principle that rules respecting competency to make a deed are about the same as those respecting testamentary competency (Hemenway v. Abbott, supra; 9 Cal.Jur. 117, supra), it is said in 26 Cal.Jur. 636, sec. 10 (Wills), that "* * * proof tending to show insanity at another time than that of execution of the instrument is relevant and admissible; and the contestant is entitled to have the jury pass upon its weight * * *." The same rule respecting the execution of wills is enunciated in Estate of Hartley, 137 Cal.App. 630, 31 P.2d 240. 137 Cal.App. at page 633, 31 P.2d at page 242 thereof it is said: "Evidence of the testator's mental status, together with his appearance, conduct, acts, habits, and conversation, both before and after the execution

of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will. Its weight was for the jury to determine. [Citing cases.] This is particularly true when the characteristics of the malady indicate a permanent and progressing mental disease. This is the nature of senile dementia. [Citing cases.]" It is likewise said, 137 Cal.App. at page 633, 31 P.2d at page 242, quoting from In re Carpenter's Estate, 79 Cal. 382, 387, 21 P. 835: "'A marked change in a man's habits of thought is strong evidence of his mental unsoundness.'" It is further said in 26 Cal.Jur. 636, sec. 10 (Wills) that: "It seems that evidence tending to show insanity at another time is in no circumstances to be excluded purely on the ground that the point of time to which the evidence relates is remote from the date of execution."

[7] The testimony in this case must be tested by certain standards. "* * * a person may be insane in the general acceptation of the term, and yet his insanity may be of such a character as not to deprive him entirely of the power of understanding the nature of ordinary business transactions, and * * * such form of insanity, or rather unsoundness of mind, does not render a person incapable of entering into a valid contract." 6 Cal.Jur. p. 33. A testator has sufficient mental capacity to execute a will (and, as pointed out before, the rule is the same as to deeds), if he has sufficient capacity to understand the nature of his act and is capable of fairly and rationally considering the character and extent of his property, the persons to whom he is bound by ties of blood or friendship, and the persons to whom and the manner and proportions in which he wants the property to go. Estate of Purcell, 164 Cal. 300, 128 P. 932. In Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, it was held that delusions, eccentricity and mental weakness alone were not sufficient to avoid the instrument. But it was pointed out in that case, 3 Cal.2d at page 589, 46 P.2d at page 150: "No witness, however, attempted to say that he [the testator] was so low in mentality that he could not transact business of every kind." In the present case two intimate acquaintances did testify that Mrs. Stewart in their opinion was not mentally capable of transacting any business, giving the reasons on which they based their opinions. As stated in Estate of Pessagno, 58 Cal.App.2d 390, at page 401, 136 P.2d 644, at page 650, in distinguishing the facts in that case from those in Estate of Finkler, supra: "In the instant case the theory of the contestants is that the testator suffered from general mental incompetency. It is well settled, of course, that general mental incompetency is sufficient to deprive a testator of the power to make a will. As already pointed out, the evidence here is susceptible of the reasonable conclusion that, by reason of the ravages of disease and old age, Tony was mentally incompetent in a general sense." In our case the trial court could reasonably conclude from the evidence that by reason of illness, old age and increasing senility, the decedent was generally mentally incompetent.

[8, 9] Appellant vigorously contends (as he contended in the trial court) that, at best, respondent's evidence indicates irrationality and failing mental and physical health, but not mental incapacity, and that therefore the evidence is not sufficient to justify a finding of mental incompetency. While the evidence indicative of lack of mental capacity may not be overwhelming, and while there is a strong conflict between the witnesses of the respective parties on this subject, it cannot be found, as matter of law, (which this court would have to find in order to reverse the judgment) that there is no substantial evidence of decedent's incompetency on the day in question. "* * * the findings of the trial court can be overthrown only when they totally lack the support of substantial evidence." Nielsen v. Frank, 117 Cal.App. 117, 120, 3 P.2d 607, 608. A summary of the testimony in this case substantially shows that decedent went into a mental and physical decline subsequent to the death of her husband in 1944; that her previous habits of cleanliness about her home turned into habits of slovenliness and unkemptness; that she thought that

thieves were entering her home and stealing her belongings; that she kept a loaded shotgun to protect against that imagined danger; that she thought spirits were in her home, and that her deceased husband had occupied the bed with her; that she went to bed with her clothes on in the house of a friend; that she entered a friend's house with only a coat on; that she was very ill immediately before the date upon which she made the deed; that, according to appellant's own witness, Miss DuRivage, on the next day after making the deed decedent was delirious and remembered some things and did not remember others; that decedent had suffered loss of memory; that she was unable to coordinate her thoughts sufficiently to write to her relatives in the east to acknowledge Christmas gifts; that her attitude towards her relatives changed from one of devotion and regard to one of animosity; that, although she had completely conveyed the property away, at times she still thought that she owned it; that she had denuded herself of all her real property and money without any provision made for her care or support, either by appellant or anyone else; that she had become senile, growing progressively worse from the death of her husband in May, 1944, until her commitment to Agnews in June, 1945; and that in the opinion of two of her friends who had observed her over a considerable period of time before and after January 6th, she was incompetent over that period and was incompetent on that particular date. The opinions of intimate acquaintances are admissible on the mental competency issue, the weight to be given such testimony being for the trier of fact. 26 Cal.Jur. 740, sec. 86; p. 742, sec. 87.

[10] Now, it is true that quite a case can be built up from the evidence to support a conclusion that decedent knew what she was doing when she executed the deed; that appellant had been good to her and taken good care of her since her husband's death; that he was her "guardian angel"; that she had lost contact with her relatives and did not want to see them; that her actions were merely eccentric or peculiar; that she felt her brother was getting in appellant's way. In addition, three of her intimate acquaintances believed her fully competent to transact the business of executing and delivering the deed. Appellant and Lagorio were of the same opinion. However, as pointed out before, it is not the province of this court to weigh conflicts in testimony or decide where the preponderance lies. All this court can do is to determine if there is substantial evidence to support the court's findings. There is such support here.

The testimony of the witness Lagorio as to what occurred at the time of executing the deed and as to decedent's mental capacity at that time is not conclusive, as contended by appellant. The conflict which it creates with the evidence of respondent's witnesses is one which was resolved by the lower court in favor of respondent. This court must follow the lower court's determination in that respect.

[11] Appellant's second point is that the court "erred in allowing, over objections of appellant's counsel, the introduction of certain evidence prejudicial to appellant." In neither of appellant's briefs does he give any transcript reference to indicate what evidence was admitted over his objection. Rule 15, Rules on Appeal, provides: "The statement of any matter in the record shall be supported by appropriate reference to the record." The failure to follow this rule has caused this court considerable additional work. We are unable to find in the record any evidence which comes within the category of appellant's specification of error. The nearest we can come to it results from the statement on page 6 of appellant's opening brief that the trial court erred in admitting, over appellant's objection, testimony given by Mrs. Stewart in the guardianship proceedings. Following this lead, we assume that appellant refers to the following situation, as shown in the transcript beginning with page 129. Appellant was on the stand under cross-examination by respondent. In response to the question "Is it not a fact tthat Mrs. Stewart didn't know that she signed any deed of gift to you?" appellant responded, "She certainly did know it." Thereupon appel-

lant was asked without objection: "Have you any recollection of Mrs. Stewart ever making a statement to you, or to any other person or any other place that she had signed a deed, but she had not signed the deed over to you?" Appellant replied "No, I have no recollection of that." Thereupon Mr. Himmel, counsel for respondent, stated:

"I might say, your Honor, that I am digressing a moment. I have here the entire transcript of the proceedings which I have had written up at the suggestion of Judge Fitzpatrick, and at this time I would like to introduce the entire transcript in evidence, for identification, as Plaintiff's next exhibit in order. I think that will facilitate the matter because it is my intention to read certain excerpts.

"The Court: For identification there probably wouldn't be any objection.

"Mr. O'Brien [counsel for appellant]: No objection.

"Mr. Himmel: It may go in for identification, Exhibit for Plaintiff next in order.

"The Clerk: Plaintiff's Exhibit No. 8 for identification.

"The Court: For identification?

"Mr. Himmel: That is right, your Honor. No other purpose."

It will be noted that this transcript of the guardianship proceedings was not offered in evidence, but without objection was received for identification. It never was admitted in evidence. Mr. Himmel then went on to call appellant's attention to page 25 of that transcript, reading some of it to lead up to the following questions asked of Mrs. Stewart to which she gave the following answers:

"Q. When you gave this property to Mr. Grandy did you go to a Notary Public and transfer that property? A. No, indeed, I did not, and I don't intend to.

"Q. You don't intend to transfer your property, do you? A. No, I certainly don't.

"Q. And do you still own that property, do you? A. I Do.

"Q. You still own that property? A. As long as I have it with Mr. Grandy.

"Q. But you still own the property, you are quite sure about that? A. Of course, I do.

"Q. Now, then, if I should say to you that on the 13th day of March, 1945, in Record 4190 of the Records in the Recorder's office of the City and County of San Francisco, page 420, that your property stands in the name of Mr. John Grandy, would that be true? A. Yes.

"Q. Well, now, who owns the property, Mr. Grandy, or you? A. Both of us.

"Q. Both of you? A. Yes.

"Q. You are quite sure that both of you own it? A. Yes."

Having read the foregoing to appellant, Mr. Himmel then asked appellant the following questions:

"Q. Were those statements made in the court room of Judge Fitzpatrick at the time I called to your attention? A. As far as I know.

"Q. Then you are in error when you say you thought she gave you this property, is that right? A. No, I am not in error."

No objection whatever was raised by appellant's counsel to the reading of the above quoted portions of the guardianship proceeding transcript, nor to the questions asked appellant by Mr. Himmel. It is apparent that the only purpose of reading from that transcript was to attempt to impeach appellant by confronting him with Mrs. Stewart's statements made in the guardianship proceeding, and which respondent claimed was contrary to the situation disclosed in appellant's answer. Just why appellant now objects when he did not object in the trial court is not clear. He claims that the testimony of Mrs. Stewart at the guardianship proceedings is not admissible in this case to show the circumstances of making the deed, and cites Estate of Anderson, 185 Cal. 700, 198 P. 407. There are two answers to that contention here: First, the testimony was not offered for that purpose, but merely as an attempt to impeach appellant by showing that he had heard Mrs. Stewart make statements which he had denied he had heard; and secondly, no objection whatever was made to the

introduction of the testimony. Having failed to object in the trial court, appellant cannot for the first time object here. 10 Cal.Jur. 824, sec. 111; 5 Cal.Jur. 10 Yr. Supp. 588, sec. 111.

Appellant states: "* * * we find in 26 Cal.Jur. p. 632, that 'incompetency to make a will is not established by the fact that the decedent was adjudged to be incompetent in guardianship proceedings.' [citing cases]" As this statement is included in the paragraph in the brief where he claims that the court erroneously admitted the testimony of Mrs. Stewart in the guardianship proceedings, we assume that he is still referring to the matters hereinbefore quoted from the transcript of those proceedings. As pointed out above, the testimony was not admitted for that purpose and was not objected to.

[12, 13] However, the fact that decedent had been declared incompetent and a guardian appointed, was admissible for the purpose of showing the decedent's mental capacity at that time; and where, as here, there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, the appointment, although later in time, is admissible on the issue of capacity when the act was done. Estate of Loveland, 162 Cal. 595, 599, 123 P. 801. This rule, of course, would not admit the testimony taken at the guardianship hearing, but, except for the small amount of testimony heretofore quoted, used in attempted impeachment without objection, none of the testimony was admitted. The fact that the declaration of incompetency was made five months after the execution of the deed goes to the weight the court should place upon it, and not to its admissibility. 26 Cal.Jur. 636, sec. 10.

[14] Appellant finds additional fault with that portion of the findings which, after finding that Mrs. Stewart was a person unable properly to manage and take care of herself and her property, goes on to find: "and by reason thereof was easily deceived and imposed upon by artful and designing persons." As to this finding the evidence, which showed, among other things, that appellant employed a man to draw the deed who "was doing some things for him"; that that man and appellant were the only persons present at the execution and delivery of the deed; that Mrs. Stewart had no independent advice, nor opportunity to get any; that Lagorio came with the deed and acknowledgment all filled out, except the signatures; that Lagorio, according to his own testimony, told decedent "You will have to sign the deed" and then instructed her to give it to appellant in his presence; that appellant obtained from decedent all her real and personal property, including the moneys in the bank account which he was forced in the guardianship proceeding to return—all this and the other circumstances in the case support such a finding.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.




**PEOPLE v. YEIZO IKEDA et al.***
**Civ. 13133.**

**District Court of Appeal, First District, Division 2, California.**
**March 14, 1947.**

**Rehearing Granted April 12, 1947.**

**1. Escheat ⇐6**

In action to escheat two parcels of agricultural land, title to which was taken in names of citizens for benefit of aliens ineligible for citizenship, evidence sustained findings and judgment for the state. Gen.Laws, Act 261.

**2. Aliens ⇐6(1)**

The conduct of the parties after the acquisition of property may be considered in determining the purpose and intent of alien parents in its acquisition. Gen.Laws, Act 261, § 9(a).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

* Reversed and Remanded March 1, 1948.

Action by the People of the State of California against Yeizo Ikeda and others to escheat two parcels af agricultural land under the Alien Land Law. From a judgment for plaintiff, the defendants appeal.

Affirmed.

J. Marion Wright, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon, Deputy Atty. Gen., of Los Angeles, and Anthony Brazil, Dist. Atty., of Salinas, for respondent.

DOOLING, Justice.

This is an appeal from a judgment determining the escheat of two parcels of agricultural land to the State of California under the Alien Land Law. (1 Deering's Gen.Laws, Act 261.) In the briefs certain constitutional questions and the statute of limitations are argued by appellants, but on the oral argument it was conceded that those questions are now foreclosed by the recent case of People v. Oyama, 29 Cal.2d 164, 173 P.2d 794. The only question remaining is the sufficiency of the evidence to support the findings and judgment.

The evidence shows that appellants Yeizo and Satsuka Ikeda, husband and wife, are aliens ineligible for citizenship. Appellant Atsuko Ikeda, their daughter, is a citizen of this country and at the time of trial was 23 years of age.

In 1928 Florence and Clarkson Dye executed a deed to Shizo and Mitsua Ikeda (no relation to appellants) who are American citizens, conveying to them a tract of agricultural land of approximately 170 acres. The consideration for the purchase of 56 acres of this tract was furnished by appellants Yeizo and Satsuka Ikeda. This 56 acres was in 1934 conveyed by Shizo and Mitsua Ikeda to Toshi Hanazono, also a citizen of this country. In 1939 F. Cook and Sterling Carr conveyed a second parcel of agricultural land to Toshi Hanazono, the consideration for this conveyance also being paid by Yeizo and Satsuka Ikeda. The Ikeda family moved onto the larger of the two tracts and Yeizo managed and farmed them until the family was evacuated in the early stages of the recent war with Japan.

It was the testimony of Yeizo and Satsuka Ikeda that they purchased both tracts of land for their daughter Atsuko, that they consulted a lawyer who suggested that Mrs. Hanazono should make a deed to Atsuko, which he said he would record as soon as Atsuko reached the age of 21. This attorney had died before the time of trial but a deed from Mrs. Hanazono to Atsuko was found in his files and produced at the trial. They further testified that shortly before their evacuation they went to this attorney's office and found that he had removed to San Francisco, leaving his practice in the hands of another attorney and that this second attorney on learning that Atsuko was still a minor told them to come back when Atsuko reached the age of 21 and he would then record the deed. They also testified that they did not intend the transactions as a subterfuge to evade the Alien Land Law but left the details of the transactions to their lawyer, and followed his advice. Much of this testimony was corroborated by Atsuko.

Mrs. Hanazono testified that she held the property for Atsuko, received none of the revenue from it, but paid the taxes including income taxes and was reimbursed by the Ikedas.

A neighbor testified to conversations with Yeizo Ikeda in which he referred to the property as "his property", "his land" or "his place". No guardian was ever appointed for Atsuko, no formal accounting of the income from the property was ever made to Atsuko by her parents, the annual reports required by section 5 of the Alien Land Law were never filed by Mrs. Hanazono, Atsuko's parents or any one else, and the Ikeda family from the time they were acquired received its support from the proceeds of these lands. The properties were actually conveyed to Atsuko only after the filing of the complaint in this action.

[1, 2] The inferences to be drawn from these facts lay in the trial court's discretion. The conduct of the parties after the acquisition of the property was certainly equivocal and may be considered in deter-

mining the purpose and intent of the alien parents in its acquisition, Longway v. Newbery, 13 Cal.2d 603, 611–612, 91 P.2d 110; Jarkieh v. Badagliacco, 75 Cal.App.2d 505, 170 P.2d 994; and the trial court's conclusion finds additional support in the presumption created by section 9 (a) of the Alien Land Law, which declares that a prima facie presumption of an intent to violate the act shall arise upon proof of the taking of the property in the name of an eligible person "if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof." On facts certainly no stronger than those established here the court held in People v. Oyama, supra, that the findings of a violation of the statute were "fully supported by the evidence." 29 Cal.2d at page 164, 173 P.2d 794, 800.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.




78 Cal.App.2d 362

## SAPPA v. CRESTETTO.

Civ. 15333.

District Court of Appeal, Second District, Division 3, California.

March 4, 1947.

Hearing Denied May 1, 1947.

**1. Action ⇐30**
**Frauds, statute of ⇐149**

Where complaint against executor for personal services rendered decedent alleged oral agreement between parties and that decedent agreed to compensate plaintiff, rendition of services by plaintiff, and amount of balance due, but did not allege that decedent agreed to pay any certain amount, the action was not on the oral agreement allegedly within statute of frauds but on quantum meruit and complaint stated a cause of action. Code Civ.Proc. § 1973; Civ.Code § 1624.

**2. Contracts ⇐9(2)**

In the absence of agreement as to the amount to be paid for personal services to be rendered another, there is no enforceable express contract.

**3. Work and labor ⇐1**

An action on quantum meruit for services rendered is based on the principle that, where services are rendered for compensation without a valid agreement as to price, there is an obligation to pay their reasonable value, and that, if they are rendered continuously without a valid agreement as to time of payment, there is an obligation to pay when they have been completed.

**4. Limitation of actions ⇐46(5)**

An action brought on testator's agreement to pay plaintiff for personal services on or before testator's death was not barred because made in 1922, since no cause of action arose until the services were terminated by death of testator in December, 1943.

**5. Release ⇐39**

A written statement declaring that one rendering services to testator was fully satisfied and that she did not expect other compensation, and statement on reverse side by testator that receipt did not deprive other party of $500 given to her by testator's will, was binding on the parties and deprived party rendering services of right to recover for services rendered before date of statement. Code Civ.Proc. §§ 1523, 1541, § 1962, sub. 3; § 1963, sub. 27.

SHINN, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge pro tem.

Action by Caterina Saffa against Peter Crestetto, as executor of the last will and testament of Giuseppe Crestetto, on a rejected claim for personal services rendered the deceased. From a judgment for plaintiff for $5,000 and from order denying motion for new trial, the defendant appeals.

Judgment reversed, and purported appeal from order denying defendant's motion for new trial dismissed.

H. E. Bianchi, of Los Angeles, for appellant.

F. M. Andreani, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiff sued upon a rejected claim against the estate of Giuseppe Crestetto, who died on December 13, 1943, and obtained verdict and judgment for the amount of the claim. Defendant appeals. The demand, as stated in the claim, was for $5,000 as the "balance of account for nursing, personal care, attendance, companionship, board and lodging September 20, 1922 to December 10, 1943."

It was alleged in the complaint, "That on or about the 20th day of September, 1922 the Plaintiff and said decedent Giuseppe Crestetto, entered into an oral agreement and understanding whereby the Plaintiff agreed to render, perform and furnish certain constant and continuing personal work, labor and services consisting of furnishing board, lodging, personal care, attendance, companionship and nursing to, of and for the said decedent and that the said Giuseppe Crestetto would compensate the Plaintiff and pay therefor at the termination thereof, to wit: on or before the death of said decedent; that further it was by said parties agreed that said decedent would pay to Plaintiff some nominal amount periodically on account of said work, labor and services; and further in connection with the foregoing the Plaintiff alleges that during the entire period intervening between said 20th day of September, 1922 and said 10th day of December, 1943, she rendered, conferred and furnished said work, labor and services under the terms of said agreement and understanding; that said work, labor and services were constant, continuous and uninterrupted during said period of time and that during all of said period of time the same were received, enjoyed and accepted by said decedent." It was further alleged that Crestetto had paid upon account from $25 to $30 per month and that there was a balance due of $5,000. There was no allegation as to the amount agreed to be paid, nor as to the reasonable value of the services. A bill of particulars, furnished by plaintiff upon demand of appellant, is reproduced at pages 12 and 13 of respondent's brief and shows in detail the various items which form the basis of the creditor's claim.

The points on appeal are (1) that the complaint failed to state a cause of action; (2) that the claim was barred by the statute of limitations; (3) that an accord and satisfaction set up in the answer was a bar; (4) insufficiency of the evidence to establish an agreement for additional compensation; (5) that the instructions were erroneous, and (6) that the verdict was excessive.

[1-3] Under the first point it is argued that the agreement pleaded was void because it was not in writing and was not to be performed within a year from the making thereof and within the lifetime of the promisor. Code Civ.Proc., sec. 1973; Civ. Code, sec. 1624. The argument assumes that the action was based upon the oral agreement. This is not the case. It was not alleged that Crestetto agreed to pay any certain amount and, in the absence of an agreement as to the amount to be paid, there was no enforceable express contract. The cause of action was in quantum meruit. It was founded on the principle that where services are rendered for compensation, without a valid agreement as to price, there is an obligation to pay their reasonable value, and that if they are rendered continuously, without a valid agreement as to the time of payment, there is an obligation to pay when they have been completed. The right of recovery under such an arrangement has been affirmed many times. Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904; Turell v. Anderson, 16 Cal. App.2d 445, 60 P.2d 906; Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281; Doolittle v. McConnell, 178 Cal. 697, 174 P. 305. See also additional cases listed in Long v. Rumsey, 12 Cal.2d 334, at page 342, 84 P.2d 146. The purpose of alleging that Crestetto agreed to pay for the services was to show that they were not rendered gratuitously. An allegation that they were rendered at his special instance and request would have served the same purpose, since an obligation to pay would have been implied. The allegation that they were to be

paid for "at the termination thereof, to wit: on or before the death of decedent," served to show that they were not to be paid for as they were rendered. It was the same as if it had been alleged that no time was agreed upon when payment would be made, since the presumption then would be that payment for the continuous and uninterrupted services became due when they were terminated. The pleading of the agreement merely served the purpose of enabling plaintiff to offer proof of conditions under which she would be entitled to recover the reasonable value of her services, at the time they were completed, and was not relied upon as the basis of defendant's liability.

[4] There is no merit in the plea of the statute of limitations. No cause of action arose until the services were terminated by the death of Crestetto.

Under the point of insufficiency of the evidence, it is contended that there was no evidence of any agreement between the parties under which Mrs. Sappa was to render services, and no evidence as to the value of the board, lodging and services rendered. Such evidence as there was of an agreement is to be found in the testimony of the witnesses, other than Mrs. Sappa, who was incompetent to testify as to the terms of any agreement, and in the circumstances under which Crestetto lived in Mrs. Sappa's home as a boarder. He came from San Francisco and took up his home with Mr. and Mrs. Sappa in 1922. The Sappas were subsequently divorced and Crestetto continued to room and board with Mrs. Sappa. Both were steadily employed, Crestetto in a terra cotta factory and Mrs. Sappa in an overall factory. Crestetto paid Mrs. Sappa $25 per month, at first, and gradually increased it to $30. He owned several houses and was frugal and prosperous. He not only received board and lodging, but also the domestic services of Mrs. Sappa which usually go with home life. She laundered and mended his clothes, nursed him through various illnesses and accidental injuries, she was his constant companion, a good housekeeper, a devoted friend, and he had complete confidence in her. She occasionally attended to his banking, collected some of his rents, performed manual labor in his several houses, and at times carried his real property in her name. He expressed himself as happy and satisfied in the home she provided for him and spoke of her to their friends as a good and faithful woman and friend. For 21 years he lived this peaceful and contended life and had no other home. The arrangement which he had for Mrs. Sappa's compensation appears to have been the subject of frequent discussion with his friends. Teresa Benedetto had been his friend since their childhood in Italy. Crestetto had been a boarder with the Benedetto family in Alameda for 13 years. Mrs. Benedetto came to Los Angeles in 1921 and Crestetto brought Mrs. Sappa to her house in 1922. A month or two later Crestetto told her "he was paying $25.00 a month and then if he died or moved away he would give her the rest." She testified, "I told him, 'you don't pay enough' and he said, 'Well, I don't pay right away; if I move or would pass away I pay the rest.'" Throughout the testimony of this witness many such conversations with Crestetto were related and he made many statements such as, "I am going to pay when I go away, or in the end"; "If I don't pay it now I pay it afterwards." He also said repeatedly that he would leave Mrs. Sappa money so that "she don't have to worry for her life." Statements to the effect that he would pay more and at some later time were made to Mrs. Benedetto "50 or 100 times" and upon many occasions in the presence of Mrs. Sappa, who would say only that she was satisfied. Mrs. Hodgson testified that he said, "She always did a lot for him, that when he passed away or when he went away from that home he would always see she was left enough so she would never have to go out and work." Crestetto spoke in the highest terms of Mrs. Sappa to his niece, Mary Vironda, and said that if anything happened to her he would take care of her. William Benedetto testified to similar statements made by Crestetto when the witness' mother questioned his as to what he was going to do about Mrs. Sappa.

[5] The jury concluded, from the circumstances of the parties and the declarations of Crestetto, that he had agreed with

Mrs. Sappa that he would pay her further remuneration when her services were terminated and that she rendered the services in reliance upon his agreement; also that the services for the period September 20, 1922, to December 10, 1943, were worth $5,000 more than had been paid on account. Such findings are implicit in the verdict, but we cannot accept the view that the period of reckoning, twenty-one years, was correct, for the reason that a settlement was reached between Mrs. Sappa and Mr. Crestetto which barred any recovery for the period preceding January, 1940. This appears from a document, the genuineness and due execution of which were admitted by the plaintiff in the pleadings and orally before the court. It is signed on one side by Mrs. Sappa and on the other by Crestetto and was introduced in evidence at the trial. It reads as follows:

"I, undersigned, declare that during the past 15 years I have received from Giuseppe (Joseph) Crestetto the amount of 28 to 30 dollars monthly for house rent, etc. therefore I declare that as today I am fully *satisfied* and I am not expecting any other compensation from G. Crestetto.

"This writing serves as a receipt.

"Los Angeles, California, January 1940.

"Caterina Sappa"

And on the reverse side:

"This receipt does not deprive Mrs. Caterina Sappa of the right to receive $500—after I am passed away—as provided in Testament dated December 25, 1937.

"Giuseppe Crestetto fu Domenico

"(Joseph Crestetto son of the late Domenic)."

Why this instrument was signed in January, 1940, is unknown. It may have been signed at the time in 1940 when, according to the testimony, he was very sick and as the result of arguments concerning the sufficiency or inadequacy of the payments made by Crestetto for the period beginning in 1925, fifteen years preceding its date, or possibly Crestetto believed that he was entitled to the "receipt" in consideration of his having made provision in his will for Mrs. Sappa, or perhaps an additional cash payment was made at the time. It appears from the document that the writing on the face thereof was made by the hand of the person who signed it, Caterina Sappa. If that is so she is not permitted to impugn it or to avoid responsibility upon a claimed ambiguity. Any such claim should be resolved against her. Furthermore, since it does not appear that she made any objection concerning the document during the period of approximately four years after she delivered it to Mr. Crestetto and prior to his death, and since it is to be presumed that he relied upon or acquiesced in her declarations therein (Code Civ.Proc. sec. 1963, subdiv. 27), she should not be permitted after his death, in litigating her claim against his estate, to falsify her declarations in the document. Under Section 1962 of the Code of Civil Procedure, wherein conclusive presumptions are specified, it is provided in subdivision 3 thereof: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." The holographic will, with its English translation, was introduced in evidence and imposed upon Crestetto's four brothers the obligation to pay to his two sisters the sum of $1,000 each. It further provided that "I desire that in the same way that the sisters are paid, that likewise be paid $500 five hundred dollars to my landlady, Caterina Sappa (Catherine Sappa) as a recompense for the many years I lived in her house as a boarder." Whatever may have been the reason for preparing the document signed by both parties, it constituted an acquittance of any liability on the part of Crestetto for "house rent, etc.," as of the date Mrs. Sappa signed it. See secs. 1523, 1541, Civil Code. If any question arises as to what is meant by "house rent, etc.," the answer is furnished by reference to the first item of the bill of particulars, reading as follows: "For personal care, attention, contentment, comfort, entertainment, affection, nursing, ailment [aliment], lodging and companionship, from September 20, 1922 to December 10, 1943." Whether the language, "I am not expecting any other compensation

from G. Crestetto," bars Mrs. Sappa from collecting from January, 1940, to December 10, 1943, which was three days before the death of Mr. Crestetto, is a question to be decided upon a new trial if one is had.

It is unnecessary, in view of our decision upon the points discussed, to consider other objections raised by appellant.

The judgment is reversed. The purported appeal from the order denying defendant's motion for a new trial is dismissed.

WOOD, J., concurs.

SHINN, Justice (dissenting).

I dissent. A point of disagreement with my associates is in the answer to the following questions:

Where a creditor, without receiving any sum in payment, signed an ambiguous receipt of full payment under an acknowledged liability to pay for services, which receipt did not purport to be a release, and the jury impliedly found upon sufficient evidence that a waiver of the creditor's claim was not intended, should this court, upon appeal, from a consideration of the writing alone, construe it as a release and reverse the judgment to the extent of the amount which was owing to the creditor on the date of the receipt? The opinion of my associates answers this question in the affirmative. I think that is the wrong answer.

In my opinion no sufficient reason has been shown for disturbing the verdict. It is based upon the following implied findings: 1. That for a period of 21 years there existed an understanding between Mrs. Sappa and Crestetto (a) that the latter would pay Mrs. Sappa in the neighborhood of $28 per month for his room and board and the care, attention and services which she rendered from day to day; (b) that the services were worth more than Crestetto was paying, but that the understanding did not include an agreement as to what they were worth; (c) that some undetermined amount would be paid upon Crestetto's death or in the event of his leaving the home during his lifetime. 2. That all of Mrs. Sappa's services were rendered in conformity with the understanding. 3. That the services were worth $5,000 more than the total of the sums paid by Crestetto. 4. That in the execution of the writings denominated "receipt," dated January, 1940, it was not the intention of Mrs. Sappa and Crestetto to make a new agreement superseding the oral agreement, which had been in force for 18 years, and that it was not their intention to fix the sum of $28 or $30 as the full value of the services which had been rendered in the past or which might be rendered in the future.

It is conceded in the opinion of my associates that implied findings 1 and 2 are supported by the evidence, and no question is raised as to the sufficiency of the evidence to support the implied finding No. 3. But from a reading of the receipt the conclusion is reached that Mrs. Sappa thereby released and relinquished all claim to additional compensation for the accommodations and services which she had rendered to Crestetto in the past. It is said that the writing was evidence of a settlement between the parties which barred recovery for the period preceding January, 1940. Section 1523 of the Civil Code, which is cited, reads: "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction." The writing clearly does not evidence an accord and satisfaction. Section 1541, Civil Code, also cited, reads: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration." The writing did not purport to be a release. The code section applies only to formal and express releases given with intent to extinguish the obligation. Upper San Joaquin Canal Co. v. Roach, 78 Cal. 552, 21 P. 304; Rogers v. Kimball, 121 Cal. 247, 53 P. 648.

In the broad interpretation given the writing in the main opinion it could have amounted to no more than a declaration by Mrs. Sappa that the amounts which she had received constituted payment in full for the services rendered. It was said in Brannan v. Mesick, 10 Cal. 95, 108: "A receipt is not regarded as a contract, and

hardly as an instrument at all, and has but little more force than the oral admission of the party receiving." It is only prima facie evidence. "A receipt in its common use is nothing more than a bare acknowledgment of having received something." Greer v. Los Angeles Athletic Club, 84 Cal. App. 272, 276, 258 P. 155. Viewed as a receipt, the writing was subject to explanation and open to proof that its recitals were untrue. All the evidence as to the understanding between Mrs. Sappa and Crestetto during the preceding 18 years was to be weighed against the alleged admission by Mrs. Sappa that she had been paid in full. It appeared clearly that the amounts that had been paid were wholly inadequate and that the parties had always understood them to be inadequate. After the receipt was given, Crestetto repeated his promises to pay the "rest" of what he owed at a future time. The jury gave greater weight to the evidence of the foregoing facts than it did to Mrs. Sappa's equivocal acknowledgment, if it was an acknowledgment, that she had been paid in full. The receipt, when construed most strongly against Mrs. Sappa, being only a written admission, was subject to contradiction; as evidence that she had been paid in full, or that the parties understood she had been paid in full, it was strongly contradicted, and the implied finding that the parties did not intend that the receipt would alter the oral understanding which had existed for many years is conclusive on that point.

The writing has none of the features of a contract. But if it is examined on the theory that it was intended to be a release, the implied findings of the jury are equally conclusive. The circumstances under which the writing was signed, including the situation of the parties and the subject to which it related were to be taken into consideration. Civil Code, sec. 1647; Code of Civ.Proc., secs. 1856 and 1860. The meaning of the writing was doubtful, and extrinsic evidence was admissible to explain the ambiguity. The evidence to which reference has been made, and which is stated more fully in the main opinion, amply supports the implied finding that Mrs. Sappa did not intend to release her claim to further compensation. The debt was a just one, and there was no question as to whether Crestetto would pay more, but only a question as to when it would be paid. He had been chided by the mutual friends of the parties, he had explained his intentions, and Mrs. Sappa had declared that she was satisfied. She said no more than this in the writing. The jury construed her written statement, as it construed her oral statements, to mean that she was satisfied, not with the amounts which she had received, but with the understanding that she had with Crestetto. The words of the receipt, "as today I am fully satisfied and am not expecting any other compensation," being in the present tense, may reasonably be construed as a declaration that Mrs. Sappa was not presently expecting additional compensation. That had been her attitude from the beginning. She continued to render services as she had been doing in the past, and Crestetto continued to repeat his statements that he would pay her more at some future time. The intentions of the parties were to be ascertained and determined by the jury as a question of fact. The implied finding that the writing expressed Mrs. Sappa's satisfaction with the amounts that had been paid, and would be paid, monthly, and did not constitute a release of her right to receive more at a future time, is supported by the evidence that she had a just claim, and that Crestetto recognized it, and was not shown to have had any inclination to evade his responsibility. Where the meaning of a writing is doubtful, and a finding as to the intention of the parties has been made from a consideration of the writing and proper and sufficient extrinsic evidence, the decision is one of fact and is binding upon an appellate court. We cannot with propriety ignore or override the implied findings that the parties intended to carry out their oral understanding and that the writing was not intended to express a new agreement.

I do not doubt that we should regard the implied findings as to the intentions of the parties as conclusive, but if I were in doubt upon that point I would still be unable to agree with the construction given the receipt in the main opinion. From a consideration of the receipt and the entire evi-

dence in the case, I would arrive at the same conclusion as that reached by the jury. I would read the receipt as a statement of Mrs. Sappa that she was satisfied to receive a certain amount monthly, in view of Crestetto's intentions to pay more in the event of his death or upon leaving the home during his lifetime. I see no reason whatever why these two friendly and congenial persons should have come to the unreasonable and unfair understanding that Crestetto should pay as little as $28 or $30 a month as the full value of the satisfactory food and shelter, the surroundings of a good home, and the congenial companionship and thoughtful care which Mrs. Sappa had bestowed upon him. Section 1648 of the Civil Code reads as follows: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." And in Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, at page 481, 19 P.2d 785, at page 788, the court said: "Whenever it may be determined as a matter of law that the actual mutual intention of the parties may be found within the scope of the language employed by them, the court must interpret the contract so as to give effect to such intention, even though the broader and more general terms of the contract may, standing alone, apparently include something as to which it nevertheless appears from the circumstances and from the contract as a whole that the parties did not intend to contract." The principle of these rules is especially applicable to an agreement in which no broad terms can be found except by giving a loose construction to vague and ambiguous language. Upon careful study, the wording of the writing in question will be found to be consistent with the oral understanding of the parties. The interpretation which my associates have given to the receipt brings it in direct conflict with the oral understanding which was firmly established by the evidence. Such construction would also make an entirely new contract for the parties and one which I believe finds no support in the evidence. If the receipt was an acknowledgment that $28 or $30 a month was all Mrs. Sappa's services had been worth in the preceding 18 years, it was an acknowledgment that they would be worth that sum, and no more, in the future. No different services were contemplated. Upon the evidence, Mrs. Sappa was entitled to be paid the reasonable value of her services over the entire 21-year period, or she was entitled to nothing in addition to what she had received.

Inasmuch as I favor an affirmance of the judgment, it is necessary to discuss other points raised by appellant which are not treated in the main opinion.

Appellant argues that there was no evidence of an offer by one of the parties which was accepted by the other, and therefore no proof of an agreement, and he says that there was, at most, only an expression of Crestetto's intention to provide for Mrs. Sappa by will. Crestetto's promises were made in the presence of plaintiff, she acquiesced in them and continued to render the services, there was no agreement as to the exact amount that Crestetto would eventually pay, and upon these facts he became obligated to pay what the services were reasonably worth. Civ.Code, sec. 1611. He left Mrs. Sappa $500 by his will and he named her the beneficiary of $532 worth of war bonds which were turned over to her after his death. It is argued that he never intended to do more, and that he thereby fulfilled his promises and obligations. Perhaps Crestetto thought he could fix his own price upon the services and satisfy his obligation by a $500 bequest or a gift of bonds, and so he could have if Mrs. Sappa had agreed to it, but the implied finding was that she did not agree to such a settlement. If the jury had found that Mrs. Sappa, in executing the receipt of January, 1940, intended to accept the $500 bequest in Crestetto's December, 1937, will in satisfaction of her claims to further compensation, the question would be whether that finding had support in the evidence. I do not say that it would have been an unreasonable conclusion, but the question here is just the reverse, namely, whether the finding that she did not agree to accept the bequest as a full settlement has support in the evidence. In my opinion, it is amply supported for the reasons heretofore stated. The obligation implied by law was to pay the reason-

able value of the services. The conclusion that the bequest and the gift of bonds were gratuities was not unreasonable. The jury found that the services for the entire period were worth approximately $50 per month, or $20 per month more than Mrs. Sappa had received. The bequest, which antedated the receipt, would have added only about $27 per year for the 18-year period. The jury was required to find what Mrs. Sappa's intentions were when she signed the receipt, that is to say, whether she then intended to accept the $500 bequest in satisfaction of her claim. If she did not intend to accept such a settlement, the fact that Crestetto considered the bequest to be sufficient would be immaterial. A valid obligation, of course, can be satisfied by partial performance only by mutual agreement. In determining what Mrs. Sappa's intentions were, the jury no doubt gave considerable weight to the fact that the amount of the bequest was insignificant as compared with the extent of Crestetto's obligation.

A further contention is that the verdict is without support in the pleadings or evidence, for the reason that there was no allegation or proof of the value of the services. No witness gave opinion evidence as to the value of the services but I find the evidence sufficient to enable the jury to determine what the services were reasonably worth. It was emphasized that Mrs. Sappa was a good cook and there was comprehensive evidence of the personal care, attendance, companionship, nursing, and other services which she rendered. There was testimony that she nursed Crestetto through a seige of pneumonia and other lesser illnesses and that she also nursed and cared for him throughout a period of several months after he had been seriously injured in an automobile accident. He had no other nurse upon these occasions and the care and attention which he received from Mrs. Sappa appear to have been adequate and satisfactory. The services were not merely occasional; they were constant throughout the entire period and were under the observation of mutual friends, who testified as witnesses for Mrs. Sappa. One cannot read the transcript without being impressed with the fact that Crestetto, who was the only one who boarded or roomed with Mrs. Sappa, enjoyed to a large extent the conveniences and advantages of a congenial and well-ordered home life. The small daily attentions which he received were not without value; they had a real and substantial value. The evidence was sufficient to give the jury an insight into the home which Mrs. Sappa made for him. She testified upon some phases of the case and the jurors had an opportunity to observe her appearance and demeanor and to form opinions as to her character and capabilities. The determination which the jurors had to make required a consideration of the entire evidence. The security, the comfort, and the peace of mind which Crestetto found in the constant attentions of Mrs. Sappa, and her interest in his welfare, were peculiar to her own home. Others could have nursed him, attended to his banking, helped keep his several houses in order and done his errands, and it may be conceded that if Mrs. Sappa had kept an account of the time which she devoted to such activities, which any competent person could have performed, opinion evidence as to the value could properly have been received. But the other factors which we have mentioned were to be weighed in the light of common experience and were to be appraised, not in accordance with any fixed standard of value, but in the exercise of the judgment of each individual juror, in the light of his own experience and observation, as to the advantages of having a home life such as Crestetto enjoyed. It was not a case which called for the testimony of expert witnesses. Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917, is in point. The plaintiff there recovered $5,200 against the estate of a decedent for services rendered as housekeeper and nurse for a period of some 16 years. The court found the value of the services to be $15,600 and that the estate was entitled to a credit of $10,400 on account of supplies, etc., paid by the decedent. It was urged there, as it is here, that the finding as to the value of the services was not supported by any evidence of value. There was, however, evidence of

daily care of the decedent similar to that furnished Crestetto by Mrs. Sappa, and it was held that this evidence was sufficient to support the finding, the court saying (44 Cal.App. at page 46, 111 P.2d at page 920): "In matters of continuous domestic service, opinion evidence if given need not be followed if the trier of the facts is convinced that the opinion expressed is not sound. As a rule the facts do not call for the testimony of an expert. If the trier of the facts possesses the common knowledge of the value of such services, their reasonable value may be determined without the aid of opinion testimony. Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374; Birkhofer v. Krumm, 27 Cal.App. 2d 513, 81 P.2d 609; John H. Spohn Co. v. Bender, 18 Cal.App.2d 447, 64 P.2d 152." The jurors must be presumed to have had such knowledge.

As already stated, the complaint contained no allegation as to the reasonable value of the services. While it is ordinarily necessary, in an action to recover for services rendered, to allege in the complaint that the value which plaintiff places upon them, the complaint in the present action, which set forth fully the nature and the duration of the services, and alleged the agreement of Crestetto to pay for them, was not fatally defective in failing to allege their reasonable value. The prayer of the complaint placed a value upon them and defendant was fully advised as to what the issue was, since it was not alleged that the amount to be paid had been agreed upon. Where the services are fully described in the complaint and their value may be determined from evidence as to the nature and duration of them, and where the prayer of the complaint states the amount which the plaintiff seeks to recover, the issue is tendered and a specific allegation of value of the services is unnecessary.

The verdict was not, as a matter of law, excessive. The sums which plaintiff had been paid on account over the 21-year period were quite small. The additional $5,000 would bring plaintiff's total compensation to slightly over $50 per month for the entire period. That was not too much for Mrs. Sappa to ask for what she gave.

The reversal, as directed in the main opinion, leaves undecided an important question which will arise again upon a retrial, namely, whether the court should receive the testimony of Mrs. Sappa as to the circumstances under which the receipt was given. She admitted having signed the writing but contended that the executor, by placing in evidence what he claimed to be a receipt of payment, waived the bar of section 1880, subdivision 3, of the Code of Civil Procedure, and that she should have been allowed to testify concerning it. The ruling of the court was against her and the testimony was excluded. I question the correctness of this ruling. As previously mentioned, the writing was at most an admission on the part of Mrs. Sappa and it was ambiguous. Her testimony as to the circumstances under which the writing was signed was admissible unless it was barred by the section; it was barred unless the executor, by placing the writing in evidence, waived the bar. Whether a waiver took place is an open question in this state. Authority elsewhere is meager and conflicting, but I think the better reasoning supports the theory of waiver. In re Enyart's Estate, 100 Neb. 337, 160 N.W. 120, 123, 124; In re Peterson's Estate, 104 Neb. 574, 178 N.W. 187; In re Frothingham's Will, 161 Misc. 317, 291 N.Y.S. 656. If an executor introduces testimony as to oral admissions of a claimant, it would seem that he opens the door for the claimant to testify fully as to his statements, of which the alleged admissions may have constituted only a part, or, if the executor places in evidence portions of a writing which are claimed to be admissions, he opens the door for the claimant to introduce the remainder of the writing. And in principle it would seem that a qualified waiver takes place where the executor places in evidence, and seeks the benefit of, an ambiguous writing.

If a retrial is limited to a determination of plaintiff's right to recover for services subsequent to the date of the receipt, it will no doubt be the contention of the defendant that the receipt evidenced an agreement of the parties as to the value of plaintiff's services, and upon that issue the question will arise whether Mrs. Sappa's tes-

timony would be admissible. If we fail to answer this question, we are inviting another appeal, whichever way the trial court may rule upon it.

In my opinion, the judgment should be affirmed.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.




78 Cal.App.2d 581

**SCHULER et al. v. BORDELON.**

**Civ. 15367.**

District Court of Appeal, Second District, Division 1, California.

March 17, 1947.

**1. Evidence ⇐474(1)**

In action by tenants against landlord for excluding tenants from a portion of rented garage so that tenants were unable to carry on their business of painting, opinions of the tenants as to the practicability of carrying on the business after they were excluded from a portion of the garage was competent.

**2. Landlord and tenant ⇐180(3)**

In action by tenants against landlord for excluding tenants from a portion of rented garage so that tenants were allegedly unable to carry on their business of painting mechanical equipment, evidence supported jury's implied finding that performance of tenant's contract with a trucking company for the painting of trucks was prevented by landlord's act.

**3. Landlord and tenant ⇐180(4)**

In action by tenants against landlord for excluding tenants from a portion of rented garage so that tenants were allegedly unable to carry on their business of painting mechanical equipment, tenants were entitled to recover, in addition to value of unexpired term, compensation for whatever other loss resulted, including loss of profits, that could be ascertained with a reasonable degree of certainty.

**4. Landlord and tenant ⇐180(4)**

Injury to an established business conducted by a tenant on rented premises may constitute an element of damages recoverable by tenant from landlord for an eviction, where the eviction amounts to a trespass, and the injury is the natural, probable, and proximate consequence of the wrong.

**5. Landlord and tenant ⇐180(6)**

In action by tenants against landlord for excluding tenants from a portion of rented garage so that tenants were unable to carry on their business of painting mechanical equipment, landlord's requested instructions advising jury that tenant's damages were limited to amount of profits which could have been made by tenants during unexpired term of one month, were properly refused, since tenants were entitled to recover whatever loss resulted from the unlawful eviction, including good will.

Appeal from Superior Court, Los Angeles County; Ben R. Ragain, Judge.

Action by H. G. Schuler, Sr., and Howard G. Schuler, Jr., partners, doing business under the firm name and style of Schuler Auto Service, against Leo Bordelon to recover damages for defendant's eviction of plaintiffs from part of premises rented by them from defendant. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

James S. McKnight and W. L. Engelhardt, both of Los Angeles, for appellant.

Newton E. Anderson and Arthur E. White, both of Los Angeles (Montgomery G. Rice, of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This is an appeal by defendant from a judgment in favor of plaintiffs for the sum of $1500 actual damages and $10 exemplary damages, rendered upon the verdict of a jury. By their complaint "for damages for trespass" plaintiffs alleged that prior to and on April 24, 1944, they were in lawful possession of certain garage premises at

1615 West 39th Place in the City of Los Angeles, where they were conducting a business of repairing and painting trucks, tractors and other mechanical equipment, and on which premises they kept tools, machinery and supplies; that by reason of the large size of the vehicles which they were repairing and painting it was necessary for them to utilize the whole of the floor space of the garage; that on April 24, 1944, the defendant, maliciously, forcibly and without the consent of plaintiffs, took possession of a portion of the floor space, removed plaintiffs' property from such portion, and built a partition walling off such portion from the remainder of the building, and thereafter excluded plaintiffs from such walled-off portion. It was further alleged that by reason of such exclusion plaintiffs were and ever since have been unable to conduct their business "to any extent or at all"; that plaintiffs had suffered damages in loss of business and good will, loss of a contract with Coast Van Lines, and further loss through the conversion by defendant of certain personal property. The complaint also contained a prayer for punitive damages.

By his answer defendant asserted that he erected the partition with the consent of plaintiffs, denied the conversion of any property, and denied that plaintiffs had suffered any damage.

Defendant was the owner of the premises in question and plaintiffs had been his tenants therein for approximately two years under a month-to-month tenancy. The premises consisted of a portion of a garage approximately 24 by 23 feet, together with a concrete apron about 20 feet wide across the front of the building. Plaintiffs also occupied a garage at 1602 West 39th Place, where they conducted a general repair business.

At the outset it is conceded the verdict of the jury has finally determined, so far as this appeal is concerned, that the defendant took possession of the northerly one-third of the premises and excluded plaintiffs therefrom, without the consent of plaintiffs. The grounds upon which appellant seeks a reversal are that the evidence is insufficient to support a judgment for other than nominal damages and that the court erred in refusing to instruct the jury that in determining damages, the loss of profits, if any, to plaintiffs should be limited to one month (the tenancy being from month-to-month).

The plaintiff Howard Schuler, Jr., testified: "Well, on our contract there were a number of smaller vehicles that were included, and it was a case of doing them all or none. It was necessary to have the entire portion inside. * * *." H. G. Schuler, Sr., testified: "Well, we tried to figure out whether the space was large enough that we could possibly use it, and we couldn't. It was too small, you just couldn't use it. * * *." It was further testified by the younger Schuler that painting operations could not have been carried on after the erection of the partition; that as to the use of this inside portion with reference to the larger vans, "it was necessary to remove the wheels and the hood and various things attached that we didn't want to spray, and take them to the inside for either refinishing or safekeeping, and so that was always used in connection with the work that was going on on the outside." He further testified that on the day the partition was erected he was to repair trucks Nos. 10 and 20 of Coast Van Lines, and "had to call up and tell them not to send them out." The equipment of Coast Van Lines was withdrawn from the premises about a week after the partition was put up. The younger Schuler testified that he searched for a suitable building in the vicinity, but that none was available; that about two weeks after the eviction he found a building a couple of miles away, "but as it seemed the business was no longer with me, there was no use to get it."

As to the work which had theretofore been done by plaintiffs on the premises in controversy, the plaintiff Howard Schuler, Jr., testified: "We did work for individuals and mainly the King Van Lines of Oklahoma and National Van Lines here in Los Angeles, and Arlington." He further testified that no work was done for these firms after the "trespass" or "eviction." It also appeared from his testimony that eight units of Coast Van Lines (a unit consisted of one small vehicle; a larger vehicle, such as

a van, being considered two units) had been completed during the several months preceding the eviction; that he had "worked on every truck in the fleet and knew what work had been done and what needed to be done"; also that on the eight units theretofore painted and repaired they had done mechanical work such as brake relining and clutch repair; that it was customary in the business to reline brakes when the wheels were removed for painting.

The President and General Manager of Coast Van Lines testified to the making of an oral agreement with the plaintiffs about the middle of April, 1944, for the painting of their vehicles at a price of $25 per unit, the paint to be furnished by Coast Van Lines, and the work to be performed at the convenience of Coast Van Lines as and when it could spare a vehicle from its business. He further testified that it was agreed that while in the process of painting a vehicle the plaintiffs should take care of anything necessary in the way of tightening the bodies, straightening fenders, or any mechanical work that would not entail too much delay. There were, at the time of the agreement, 28 units remaining to be painted.

[1, 2] It is urged by appellant that there is no evidence that his trespass prevented the performance of the contract with Coast Van Lines. It is pointed out that work on certain vehicles which were too large to go into the garage had to be done on the concrete apron and as to these vehicles the only purpose for which the garage was used was to store parts from the units being worked on. Appellant contends that there is no evidence that there was not sufficient space remaining in the garage to store these parts, nor any evidence as to how many vehicles were too large to go into the garage or how many could be painted inside the garage. "In other words, there is no evidence from which the jury could conclude that the construction of the partition prevented the performance of the contract other than the conclusions of the two plaintiffs hereinbefore set forth." Appellant also makes the point that there was no direct testimony that the contract was terminated or cancelled. However, as above narrated, it does appear that no work was done after the eviction and Coast Van Lines removed its equipment. It also appears that subsequently Coast Van Lines purchased the spraying equipment of plaintiffs and did its own painting. As to the practicability of continuing operations in the restricted area, the opinions of the two plaintiffs, experienced in their line of work and familiar with the problems involved in the particular job, constituted competent evidence; and it must be held that there was sufficient substantial evidence to support the implied finding of the jury that performance of the contract was prevented by the act of appellant.

[3, 4] It is next contended that the evidence does not show what period of time would have been required for the performance of the contract or the profits, if any, which would have been received thereunder. This point may be considered in connection with the further contention that the court erred in failing to instruct the jury that in determining plaintiffs' loss of profits the same should be limited to one month. The amount which could be realized from the painting work alone under the contract for 28 units at $25 per unit was $700. Whether this amount would have been received within thirty days, six months or a year is immaterial, as the foundation of this action is the loss of the entire amount, caused by the sudden and unexpected loss of one-third of plaintiffs' operating premises. The action sounds in tort, and the plaintiffs are entitled to recover, in addition to the value of the unexpired term, "compensation for whatever other loss results, including loss of profits, where a business is broken up, which can be ascertained with a reasonable degree of certainty and can properly be said to have been the natural or usual result of the breach and reasonably to have been within the contemplation of the parties as the probable result of a breach." 32 Am.Jur. 249. "Injury to an established business conducted by the tenant on the premises may constitute an element of damages recoverable for an eviction, where the eviction amounts to a trespass, and the injury is the natural, probable, and proximate consequence of the wrong." 36 C.J. 280.

That loss of good will is a proper element of damage in a case such as this is indicated in Landon v. Hill, 136 Cal.App. 560, 566, 29 P.2d 281; Risdon v. Hotel Savoy Co., 99 Wash. 616, 170 P. 146; and Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 638, 96 P.2d 122. The specific loss established by plaintiffs was the total loss of the contract with Coast Van Lines, as to which it was shown that at least $700 would have been realized, exclusive of compensation for making repairs. To limit plaintiffs' recovery to what would be realized within thirty days following the eviction would be in effect to deny any recovery. The basis of the action is not the loss of the unexpired term, but the damage to plaintiffs' business and good will by the sudden, unlawful eviction, which gave them no opportunity to make other arrangements to continue to perform their contract with Coast Van Lines. While ordinarily loss of profits is limited to profits which could have been made during the unexpired term (36 C.J. 284), damages to good will may be considered in addition to loss of profits. Landon v. Hill, supra. In the instant case it is true, as contended by appellant, that plaintiffs' profit during the remainder of the term from the Coast Van Lines' contract could not be determined with any accuracy, as the contract was to be performed at the convenience of Coast Van Lines as and when its vehicles could be spared. Nevertheless, there was substantial evidence that the loss of this contract was a proximate result of the wrong committed by appellant. It was within the province of the triers of fact to determine the loss suffered by respondents not only because of the cancellation of the Coast Van Lines contract, but the damage resulting to their business and the good will thereof occasioned by the sudden and unlawful eviction from part of the demised premises. Plaintiffs had built up a good will for their business which they might well have retained for themselves at another location had they been given the requisite notice of termination of the tenancy, thereby enabling them to advise their customers of their removal and the address at which they would continue business. Bearing all these factors in mind, it cannot be said that an award of $1500 actual damages was either unsupported by the evidence or excessive.

In determining the amount of damages that should be assessed against appellant herein, the jury was entitled to estimate as best they could from the evidence before them, the loss sustained by respondents in the cancellation of the Coast Van Lines contract, the loss of other business, as well as the good will thereof. Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing the damages resultant from appellant's wrongful eviction of respondents, but it must not be forgotten that such difficulty would have been avoided had appellant taken care that no occasion should arise through his tort requiring such assessing of damages.

[5] Finally, appellant assigns as error the refusal of the court to give three proffered instructions on the measure of damages should the jury find in favor of respondents. These instructions were properly refused because by them the jury would have been advised that damages were limited to the amount of profits which could have been made during the unexpired term of one month, when as we have herein pointed out, in a tort action such as the instant one a plaintiff is entitled to recover whatever loss results from the unlawful eviction which with a reasonable degree of certainty can be ascertained and which can properly be said to have been the natural or usual result of the tort.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

78 Cal.App.2d 618

## MERCHANTS' ICE & COLD STORAGE CO. v. GLOBE BREWING CO. et al.

## SOZZI v. MERCHANTS' ICE & COLD STORAGE CO.

Civ. 13141.

District Court of Appeal, First District, Division 2, California.

March 20, 1947.

Rehearing Denied April 19, 1947.

Hearing Denied May 15, 1947.

1. Limitation of actions ⇐177(3), 195(5)

When an action predicated upon fraud is not commenced until more than three years after commission of alleged fraud, burden is upon plaintiff to plead and to prove that he did not discover facts constituting fraud until within three years before commencement of action. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions ⇐195(5)

The statute limiting actions for fraud to three years from discovery of fraud is an exception to general rule that limitation runs from act giving rise to cause of action, and, to come within exception, plaintiff must establish that he was not negligent in failing to make an earlier discovery and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 19.

3. Limitation of actions ⇐100(13)

Where cross-complainant became a director and vice president of corporation and took joint control of its funds with another after he made an investment in corporation upon an alleged fraudulent representation as to value of corporation, cross-complainant upon assuming directorship had means of knowledge equivalent to knowledge, so that three-year limitation on action for fraud began to run notwithstanding that cross-complainant allegedly did not discover fraud until sometime later. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 19.

4. Fraud ⇐22(1)

Where a plaintiff is under a duty to make inquiry concerning existence of facts upon which he claims fraud is based and inquiry would reveal those facts, he is charged with knowledge of their existence and, if facts are presumptively within his knowledge, he will be deemed to have actual knowledge of their existence.

5. Limitation of actions ⇐195(1)

Where cross-action for fraud was commenced more than 4½ years after date of alleged fraud and evidence established that cross-complainant presumably had knowledge of facts which he claimed were concealed from him within a little more than two months after alleged fraud was perpetrated, cross-action was barred by three-year statute of limitations. Code Civ.Proc. § 338, subd. 4.

6. Appeal and error ⇐1029

Where evidence established that cross-action was barred by limitations, errors complained of by cross-complainant were harmless. Code Civ.Proc. § 338, subd. 4; Const. art. 6, § 4½.

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Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Merchants' Ice & Cold Storage Company against Globe Brewing Company and others to foreclose a chattel mortgage on brewing equipment, wherein defendant L. L. Sozzi cross-complained. The complaint was dismissed and, from a judgment for cross-defendant Merchants' Ice & Cold Storage Company, cross-complainant appeals.

Affirmed.

Charles Reagh, of San Francisco, for appellant.

George M. Naus and Louis H. Brownstone, both of San Francisco, for respondent.

JONES, Justice pro tem.

The action in which this appeal was taken was commenced by the Merchants' Ice & Cold Storage Company to foreclose a chattel mortgage on brewing equipment owned by the Globe Brewing Company. The complaint named as defendants the Globe Brewing Company, two additional corporations, A. J. Scampini, L. L. Sozzi and M. Maffei. On September 20, 1940, Sozzi

filed his answer and an unverified cross-complaint alleging fraud, naming as cross-defendants the plaintiff and the other co-defendants. Before trial the complaint was dismissed by the plaintiff with prejudice. The cross-complaint was amended a second time, but without change as to the cross-defendants. The cross-defendants, other than the Merchants' Ice & Cold Storage Company, demurred to the second amended cross-complaint, which demurrers were sustained with leave to amend. Sozzi declined to amend a third time, and judgment was entered against him on the demurrers. An appeal was taken from these judgments and the judgments reversed. Merchants' Ice & Cold Storage Company v. Globe Brewing Company, 73 Cal.App.2d 828, 167 P.2d 503. The plaintiff Merchants' Ice & Cold Storage Company, however, did not demur to the second amended cross-complaint, but answered. In addition to a general denial of the allegations of fraud, the answer pleads the bar of the statute of limitations. Subdivision 4, section 338, Code of Civil Procedure. The case proceeded to trial before a jury, which found for the cross-defendant Merchants' Ice & Cold Storage Company, and from the judgment entered on the verdict Sozzi, the cross-complainant, has appealed.

The appeal is predicated upon the asserted erroneous giving of certain instructions by the trial court, and the refusal of the court to give others.

Turning to the evidence, we find that Sozzi and Scampini first became associated in the reorganization of the Italo Petroleum Corporation. This company was in receivership in the Federal Court in Los Angeles, and in 1931 Sozzi commenced buying its stock on the market at around fifty cents a share. He continued to buy until he had acquired about 3500 shares. The defendant Scampini and a Mr. Hugh McKevitt were large stockholders in the corporation, and in 1934 formed a committee to try and effect a reorganization. The stockholders were circularized, and it was through one of these circulars that Sozzi met Scampini. Sozzi was made chairman of the stockholders' committee, McKevitt became treasurer, and Scampini vice-president and general counsel for the corporation. After the committee was formed, the price of the stock on the open market advanced to around $4.00 or $5.00 per share. This price was attained in January, 1936.

The Globe Brewing Company was organized in May, 1933, to engage in the brewery business, and commenced operations in the same year. Its plant was located on the premises of the Merchants' Ice & Cold Storage Company, and it purchased from the latter considerable refrigeration space for its product. At first its operations were profitable, but after a price war in the beer industry it found itself in receivership in December of 1935. The company was originally organized with paid-up capital of $100,000. During the prosperous year or two of its existence a considerable portion of its profits was reinvested in the business. At the time of its receivership its indebtedness exceeded $100,000, with the Merchants' Ice & Cold Storage Company as one of its principal creditors and to an amount in excess of $23,000.

In January, 1936, Sozzi and Scampini attended a meeting of the stockholders of the Italo Petroleum Corporation at its place of business in San Francisco. With respect to this meeting, Scampini testified that Sozzi there said to him: "Have you got any more reorganizations like this one where we can all make some money * * * If you see anything that comes your way, let me know." At that time Scampini, who was then the attorney for and a director in the Merchants' Ice & Cold Storage Company, had under consideration some informal statements and balance sheets of the Globe Brewing Company. About February 10, 1936, he telephoned Sozzi to come to his office, and he there showed him some audits prepared by Messrs. Lester, Herrick and Herrick, certified public accountants, which were addressed to the board of directors of the Globe Brewing Company. These audits showed as of October 31, 1934, total assets of the company in excess of $300,000, with deferred liabilities of approximately $69,000. As of December 5, 1935, the date on which the Globe Brewing Company went into receivership, the audit disclosed that the assets amounted to

$232,364.03, with liabilities other than capital investment totalling $156,296.66. This audit indicated an equity on the date of the receivership in an amount of $76,000. Upon being called to the witness stand, Sozzi admitted having read these balance sheets and having talked them over with Scampini previous to February 15, 1936.

After considering the financial statements, Sozzi and Scampini went to the brewery and examined the premises. According to the testimony of Scampini, other meetings and conversations were had between him and Sozzi, in which Sozzi indicated that he wished to get out of the scavenger business in which he was then engaged and get into the brewery business. Scampini eventually stated that he thought that it would take about $25,000 in cash to effect a reorganization of the Globe Brewing Company and take it out of receivership. He suggested that Sozzi advance $17,500, and that the Merchants' Ice & Cold Storage Company put up the balance of $7,500. Sozzi indicated that it would be difficult for him to raise more than $14,000 in cash, and suggested that he would feel better about the deal if Scampini, too, would go into it. The negotiations finally resulted in Sozzi agreeing to advance $14,000, Scampini $3,500 and the Merchants' Ice & Cold Storage Company $7,500. The Merchants' Ice Acceptance Corporation, a subsidiary of the Merchants' Ice & Cold Storage Company, was to act as reorganization agent, and Scampini was to act as attorney in the reorganization proceedings. This agreement was reduced to writing as of February 15, 1936, and signed by the contracting parties. In accordance with its terms, the moneys were advanced, the reorganization effected, and the Globe Brewing Company discharged from receivership about the 23d of May, 1936.

On this date Sozzi became a director and vice-president of the Globe Brewing Company, and continued as such until September, 1937, when he became its president. During this period he was active in the management of the company, and his signature was required on all company checks. Monthly balance sheets of the company were always presented to him. In June, 1936, application was made to the Commissioner of Corporations by the Globe Brewing Company for a permit to issue for sale to the public 10,000 shares of its 7% cumulative participating preferred stock of the par value of $10.00, at a price to net 85% of its par value to the company. Consolidated profit and loss statements covering the periods May 1, 1934, to April 30, 1935, and May 1, 1935 to April 30, 1936, were appended to an amended application filed with the Commission on July 7, 1936. These statements showed that in May, 1934, the company had earned $23,957.93. A permit to sell the stock was granted on July 24, 1936, with an amended permit on October 16, 1936, which stated the assets of the company to be $268,777.08, and its liabilities as $157,191.41, indicating an equity of $111,585.67. In November, 1936, Sozzi was issued a license to sell this stock, and he succeeded in disposing of a considerable portion of the issue. All sales were made on a subscription form which recited the assets and liabilities of the company as stated in the permit.

In July, 1936, Scampini severed his connections as attorney for the Globe Brewing Company, and in his place the company employed Messrs. Ellis & Steindorf. At about the same time he also severed his connections with the Merchants' Ice & Cold Storage Company, both as attorney and as a director. It was under the legal guidance of Messrs. Ellis & Steindorf that the permit to sell the preferred stock of the Globe Brewing Company was obtained. During this entire period Sozzi attended the meetings of the board of directors when the matters pertaining to the stock issue were discussed. The company failed to prosper, and in August, 1938, it again went into receivership. About June 15, 1938, a firm of accountants employed by Sozzi to make an audit of the company's books reported to him that the Merchants' Ice & Cold Storage Company had been overcharging the brewery for refrigeration. It is at this point that Sozzi claims discovery of the frauds alleged in the cross-complaint, but which was not filed by him until some two years later. He testified that upon re-

ceiving this report he went to Scampini and requested him to bring suit against the Merchants' Ice & Cold Storage Company to recover the overcharges, and then learned for the first time of the true condition of the Globe Brewing Company, and that Scampini had been acting as attorney for and was a director in the Merchants' Ice & Cold Storage Company in 1936, when the reorganization of the Globe Brewing Company was undertaken.

Sozzi alleges in his second amended cross-complaint that on February 10, 1936, the respondent entered into a conspiracy with the other cross-defendants to induce him to invest large sums of money in the Globe Brewing Company for their benefit; that in furtherance of the conspiracy, and on or about February 15, 1936, it was represented to him by Scampini that the assets of the Globe Brewing Company were worth $300,000, and that less than $75,000 would clear up all the liabilities; that the company had made as much as $24,000 in one month, although operating in receivership; that if he, the appellant, would raise $17,500, the Merchants' Ice & Cold Storage Company, a creditor of the Globe Brewing Company, could be induced to advance $7,500, which sums together would be sufficient to take the company out of receivership. He further alleges that Scampini stated to him that if the Globe Brewing Company were reorganized, it would be easy to sell it at a profit of $100,000 in thirty days; that Scampini also represented to him that Mr. Herbert Fleishhacker had conversed with him on the telephone and wanted to buy the brewery, and that Mr. Tom Walker and the Grace Bros. Brewing Company were looking at the brewery with a view to buying it, and wanted it.

Shortly after Sozzi became a director and vice-president of the company, a representative of Grace Bros. Brewing Company inspected the plant, but nothing came of the visit. Scampini denies in his testimony that he ever mentioned the name of Herbert Fleishhacker to Sozzi. Sozzi's testimony is directly to the contrary. However, he does say that when he asked Scampini about Fleishhacker in April or May of 1936, at about the time he, Sozzi, went on the board of directors, he was informed by Scampini that Fleishhacker had turned his attention to a brewery in San Jose and was no longer interested in the Globe brewery. Assuming that Sozzi's version is the correct one, he knew when he first went on the board of directors that there was no prospect of selling the brewery to Fleishhacker. According to Scampini, he never mentioned Walker to Sozzi, but when the Globe Brewing Company was about to go into receivership for the second time, Sozzi suggested Walker as a person who might pull the company out of its difficulties.

[1, 2] When an action such as this is not commenced until more than three years after the commission of the alleged fraud, the burden is upon the plaintiff to plead and to prove that he did not discover the facts constituting the fraud until within three years before the commencement of the action. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437, 159 P.2d 958. This is upon the theory that the provision of subdivision 4 of section 338 of the Code of Civil Procedure tolling the operation of the statute is an exception, and, to bring himself within it, the plaintiff is required to establish facts not only showing that he was not negligent in failing to make an earlier discovery, but also that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Hobart v. Hobart Estate Co., supra. To meet this burden, it must be made to appear that he had no knowledge of facts which would make a reasonably prudent person suspicious of the fraud complained of. This is the purport of section 19 of the Civil Code, which provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

[3, 4] Sozzi had at his command every means for verifying each statement attributed by him to Scampini from May 23, 1936 forward. On that date, he became a director and vice-president of the company and took joint control of its funds. He was also active in the management of the

affairs of the concern. Moreover, in 1936 he joined in an application to the Corporation Commissioner for a permit to sell 10,000 shares of the stock of the company on the representation that the difference between the assets and liabilities of the company was in excess of $111,000. He personally sold substantial blocks of this stock on the authority of the permit. If Sozzi believed the statements allegedly made by Scampini, that Fleishhacker and Walker were interested in buying the brewery, it became his duty to his stockholders on acceding to the offices of director and vice-president to investigate the prospects of a sale in these quarters. When he and the other directors offered to the public 10,000 shares of the stock of the company at $10 per share in October, 1936, it is presumed that he knew its financial condition. In the case of Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810, cited in Hobart v. Hobart Estate Co., supra, it is said: "As the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts." This rule applies where failure to make inquiry under the circumstances would amount to a negligent omission. Tarke v. Bingham, 123 Cal. 163, 55 P. 759. So where a plaintiff is under a duty to make inquiry concerning the existence of facts upon which he claims the fraud is based and inquiry would reveal those facts, he is charged with knowledge of their existence. And again, if the facts are presumptively within his knowledge, he will be deemed to have actual knowledge of their existence. It is incumbent upon him who seeks to bring himself within the exception to the general rule, as is said in Lady Washington Consol. Co. v. Wood, supra, to "show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed."

[5] The appellant has alleged here that the alleged conspirators concealed the financial condition and the lack of prosperity of the Globe Brewing Company from him from the 15th of February, 1936, until he made discovery of its true condition in June of 1938. The proof, as has been pointed out, reveals that from May 23, 1936, he was a director and vice-president of the company, and that in October of 1936 he was offering for sale to the public 10,000 shares of stock of the company for $100,000 under a permit issued by the Commissioner of Corporations. Under such circumstances, it must be presumed that he had knowledge of the facts which he alleges were concealed from him. Such being the case, he has failed to meet the burden of proving himself within the exception to the general statute. Having so failed, and the cross-action having been commenced more than four and one-half years after the date of the alleged fraud, it is barred by the three year statute.

[6] Since time has raised the bar of the statute, the errors complained of are rendered abstract. The rule applicable is stated in 2 Cal.Jur., p. 1004, section 595, as follows: "It is a general and well-settled rule that judgments will not be reversed because of errors that are harmless, that is to say, because of errors which do not prejudice the substantial rights of the appellant or affect the result of the action." Section 4½ of Article VI of the Constitution is to the same effect. It thus becomes unnecessary to discuss in detail any of the specifications of error made by the appellant.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

78 Cal.App.2d 358

## PEOPLE v. STANLEY.

Cr. 4088.

District Court of Appeal, Second District, Division 2, California.

March 4, 1947.

1. Criminal law ⇐1043(2)

If a general objection to the introduction of evidence is overruled, such objection cannot avail the objector on appeal, unless it appears that such evidence was inadmissible for any purpose.

2. Criminal law ⇐1043(2)

In prosecution for contributing to the delinquency of minors in that defendant sold alcoholic beverages to them, general objection by defendant to testimony of a witness, who saw the minors shortly thereafter, to the effect that minors were very hilarious, was insufficient upon which to predicate error on appeal, since testimony was admissible for purpose of showing the condition of minors after drinking the alcoholic beverage. Welfare and Institutions Code, § 702.

3. Criminal law ⇐1170(1)

In prosecution for contributing to delinquency of minors in that defendant sold alcoholic beverages to minors, refusing to permit lay witnesses to testify concerning physical condition of defendant during a period shortly prior to time of committing offense was not prejudicial error, where trial court permitted defendant's lay witnesses to testify as to her physical condition during the time when offense was charged as having been committed. Welfare and Institutions Code, § 702.

4. Criminal law ⇐1166½(12)

In prosecution for contributing to delinquency of minors by selling them alcoholic beverages, trial judge's remark during examination of a witness what difference it made whether defendant knew whether a particular drink contained alcoholic liquor was harmless, since offense consisted in furnishing alcoholic beverage to the minors and not in their knowledge of its alcoholic content. Welfare and Institutions Code, § 702.

5. Criminal law ⇐507(1)

In prosecution for contributing to the delinquency of minors by selling them alcoholic beverages, minors who testified to the sale of the beverages were not "accomplices" whose testimony was required to be corroborated. Welfare and Institutions Code, § 702; Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

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Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Madeline Stanley was convicted of contributing to the delinquency of a minor under section 702 of the Welfare and Institutions Code, and she appeals.

Affirmed.

Andrew Renetzky, of San Luis Obispo, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty of violating Section 702 of the Welfare and Institutions Code (contributing to the delinquency of a minor) after trial before a jury, defendant appeals.

The testimony discloses that defendant operated a cafe in San Luis Obispo County known as "Ducky's", and that she had a permit to sell intoxicating beverages. On the evening of June 7, 1946, at about 8:00 o'clock, Joe Angelo, age 15, Leroy McLaury, age 15, Dorothy Russ, age 15, and Frieda Voltz, age 17, entered defendant's bar and sat at a table. Joe Angelo and Leroy McLaury went to the bar where they purchased from defendant two beers, a Tom Collins and a Coca-Cola. The boys took the drinks back to the table where each boy drank a beer, Miss Voltz drank the Tom Collins and Miss Russ drank the Coca-Cola. After having consumed their first drinks defendant sold the boys two additional beers, two drinks of whiskey and a whiskey sour. The boys drank the beer and the whiskey and Miss Voltz drank the

whiskey sour. Following their sojourn at "Ducky's" the minors repaired to the home of Rev. John L. Mildrum, at which time a bible class was organized.

Defendant urges reversal of the judgment on four propositions which will be stated and answered hereunder consecutively:

First: *The trial court committed prejudicial error in permitting Reverend John L. Mildrum to testify as follows:*

*"Q. And at that time did you notice anything unusual about any of the children? A. Yes, I did.*

*"Q. What did you notice about them? A. Well, some of them were very hilarious.*

*"Q. Which ones? A. Well, that would include—*

*"Mr. Renetzky: I object to this as incompetent, irrelevant and immaterial.*

*"A. The ones that I—*

*"The Court: Well, I think it is corroborative. That is what you are offering it for?*

*"Mr. Harris: Both for corroboration and also to show the effect.*

*"The Court: Well, yes, I think that is proper. Overruled."*

[1, 2] This proposition is untenable. The law is established by a uniform line of decisions that if a general objection to the introduction of evidence is overruled such objection cannot avail the objector on appeal unless it appears that such evidence was inadmissible for any purpose whatsoever. (People v. Conterno, 51 Cal.App.2d 167, 169, 124 P.2d 610; People v. Mason, 37 Cal.App.2d 407, 409 et seq., 99 P.2d 567; People v. Cotton, 117 Cal.App. 469, 471 et seq., 4 P.2d 247.) It is apparent that the evidence in the instant case was admissible for the purpose of showing the condition of the minors after they had left defendant's bar; hence the general objection to the admission of the evidence was insufficient upon which to predicate error in presenting the matter to this court.

[3] Second: *The trial court committed prejudicial error in refusing to permit certain defense witnesses, concededly non-experts, to testify concerning the physical condition of defendant during the period from May 23, 1946 through June 3, 1946.*

This proposition is untenable. The offense with which defendant was charged was alleged to have been committed on June 7, 1946, and the trial court permitted defendant's lay witnesses to testify as to her physical condition in the period from June 4, to June 10, 1946. Hence there was no error in refusing to permit testimony as to her physical condition at other times.

[4] Third: *The trial judge committed prejudicial error in asking counsel during the examination of Frieda Voltz what difference it made whether or not she knew whether a whiskey sour contained alcoholic liquor.*

There is no merit in this contention since the trial judge's remark was directed to counsel, and in fact it was entirely immaterial whether the minor knew whether the beverage which was furnished her by defendant contained an alcoholic beverage or not. The offense consisted in furnishing the alcoholic beverage to the minor and not in the infant's knowledge of its alcoholic content.

[5] Fourth: *The minors who testified were accomplices of defendant and since their testimony was not corroborated the evidence is insufficient to sustain the judgment.*

This proposition is totally devoid of merit. In a prosecution for contributing to the delinquency of a minor pursuant to Section 702 of the Welfare and Institutions Code, corroboration of the minor's testimony is unnecessary since in such case the minor is regarded as a victim and not as an accomplice whose testimony it is necessary to corroborate under the provisions of Section 1111 of the Penal Code. (People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R.1485; People v. Dorland, 2 Cal.2d 235, 239, 40 P.2d 474; People v. Doetschman, 69 Cal.App.2d 486, 489 et seq., 159 P.2d 418.)

In view of the fact that the record is free from error the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

78 Cal.App.2d 355

**USSERY et al. v. JACKSON et al.**

**Civ. 15631.**

District Court of Appeal, Second District, Division 2, California.

March 4, 1947.

Hearing Denied May 1, 1947.

**1. Vendor and purchaser ⇐16(1, 3)**

Where written instrument set forth terms on which owners would sell property described therein and contemplated signature by purchasers beneath statement "We hereby agree to purchase said property on the foregoing terms and conditions" and owners signed it and gave it to broker representing purchasers, the instrument was a valid offer to sell goods until withdrawn, and was binding on all parties where signed by purchasers before attempted withdrawal by owners. Civ.Code, § 1550.

**2. Evidence ⇐450(8)**

Where written instrument set forth terms on which owners would sell property described therein and contemplated signature by purchasers beneath statement "We hereby agree to purchase said property on the foregoing terms and conditions" it was unambiguous and parol evidence was inadmissible to alter or explain terms thereof.

**3. Specific performance ⇐28(1)**

To warrant specific performance of a contract all the material terms of the agreement must be sufficiently certain to make the precise acts clearly ascertainable.

**4. Specific performance ⇐25**

Where written instrument set forth terms on which owners would sell property described therein and contemplated signature by purchasers beneath statement "We hereby agree to purchase said property on the foregoing terms and condition" and the instrument was signed by the owners as well as by the purchasers, the instrument constituted a contract capable of specific performance.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Homer Ussery and La Verne Ussery against Wallace W. Jackson and Marcella Jackson for specific performance of an agreement for the sale of real property. From a judgment for defendants, the plaintiffs appeal.

Judgment reversed.

William H. Keepin, of Glendale, for appellants.

Joseph O. Edwards and Glen Whitney, both of Glendale, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action for specific performance of an agreement for the sale of real property, plaintiffs appeal.

The undisputed facts are these:

In September, 1945, plaintiffs were shown certain real property belonging to defendants by a real estate broker. Some two or three weeks later plaintiffs called upon another real estate broker, Mr. W. H. Coffinberry, and asked him to see what kind of arrangement he could make with defendants for the purchase of their property. Thereafter Mr. Coffinberry called upon defendant Wallace W. Jackson and learned that his property was for sale at $26,000. On Wednesday evening, October 17, 1945, Mr. Coffinberry went to Mr. Jackson's home about 8:00 o'clock and stated to him that some prospects for the purchase of his property were available. After discussing the terms Mr. Coffinberry prepared an instrument which was signed by defendants. The next morning Mr. Coffinberry arrived at plaintiffs' home and they delivered to him a check for $1,000 and signed the instrument previously executed by defendants, which instrument reads as follows:

"October 17, 1945

"The undersigned W. W. Jackson owner of the following property known as:

"October 17, 1945

"The undersigned W. W. Jackson owner of the following property known as:

2611 and 2613 } Canada Boulevard
2611A and 2613A } Glendale, Los Angeles
2611B and 2613B } County, Los Angeles

does by these presents, agree to sell the above described property and furnish a clear title on the following terms to wit:

"$1,000.00 cash at the time of signing escrow on or before November 3, 1945

"10,000.00 cash to be paid to said escrow on or before the closing of said escrow July 1, 1946

"14,000.00 to be represented by a note of even amount at the rate of 5% interest on deferred payments, including payments of $200.00 per month, including interest all in favor of Wallace W. Jackson and Marcella J. Jackson, his wife. Additional payments of multiples of $100.00 to be accepted at the date of any monthly payment.

"Present owner, W. W. Jackson to remain in Unit #2611 now occupied by him free of rent to July 1, 1946 and to collect all rents from the other five units, pay all taxes, insurances, and water rentals to July 1, 1946 all of which is a part of the consideration. And further said W. W. Jackson shall have the right to occupy said #2611 from July 1, 1946 upon the payment of $50.00 per month in advance.

"Both taxes and fire insurance pro-rate at close of escrow.

"Wallace W. Jackson
"Marcella J. Jackson

"We hereby agree to purchase said property on the foregoing terms and conditions.
"Homer Ussery
"La Verne Ussery

"I hereby agree to pay W. H. Coffinberry Real Estate Broker a commission of $1,000.00 in the event of the consummation of the above sale.

W. W. Jackson." [1]

On Thursday evening, October 18, 1945, defendants agreed to sell the property described in the foregoing agreement to Dr. Taaford and on Friday morning defendant Wallace Jackson telephoned to Mr. Coffinberry's office and left word that he had sold his property.

There are two questions presented for our determination:

First: *Did the document set forth above constitute an agreement for the sale of property described therein or merely a listing of the property for sale with the real estate broker Coffinberry?*

There can be no doubt that the document set forth above constitutes an agreement or contract for the sale of the real property described therein. The essentials of a valid contract consist in (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4) a sufficient consideration. (Civil Code, section 1550.)

In the present case each of the foregoing elements is present. The parties are capable of contracting, their consent is manifested by their signatures to the agreement, the object was lawful and there was a valid consideration.

[1, 2] The document as originally executed by defendants constituted an offer which was valid until such offer was withdrawn.

It is clear that since the agreement contained, at the time defendant signed it, these words. "We hereby agree to purchase said property on the foregoing terms and conditions", defendants expected to exact as a method of acceptance of their offer that plaintiffs sign the agreement and return it to Mr. Coffinberry who, as appears from the last paragraph in the agreement, was defendants' agent to consummate the sale. Therefore since plaintiffs signed the agreement prior to the time that defendants' offer to sell was revoked, there was a binding and valid contract between the parties for the sale of the property described in the agreement. It is likewise evident that since the agreement was clear and unambiguous on its face, parol evidence was inadmissible to alter or explain the terms of the written contract.

Second: *Was the contract capable of specific performance?*

[3, 4] This question must be answered in the affirmative. To warrant specific performance of a contract all the material terms of the agreement must be sufficiently certain to make the precise acts clearly ascertainable. The facts in the present case fall within the foregoing requirements. The parties are certain, the consideration is definite, and the terms and conditions upon which such consideration was to be

[1] It is to be noted that at the time defendants signed the agreement it included all of the words now appearing thereon excepting the signatures of plaintiffs.

paid are precisely stated as well as a description of the property to be sold.

Easton etc. Company v. Millington, 105 Cal. 49, 38 P. 509, relied on by defendants, is clearly inapplicable for the reason that in the cited case the instrument was not clear, mutual or certain either as to the subject matter or the parties involved.

For the foregoing reasons the judgment is reversed.

MOORE, P. J. and WILSON, J., concur.




78 Cal.App.2d 353

**BELL v. BELL et al.**

**Civ. 15616.**

District Court of Appeal, Second District, Division 2, California.

March 4, 1947.

Hearing Denied May 1, 1947.

**Divorce ⇐161**

The refusal to grant husband's motion to set aside default which had been entered against husband in wife's divorce action was not abuse of discretion, where husband failed to show any excuse for not having sooner employed an attorney and taken appropriate steps either to prevent entry of default or to have default set aside. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Divorce action by Minnie Bell against Kelly Bell, also known as Kelley Bell, and Farmers & Merchants Bank of Watts, a corporation. From an order denying the motion of the first-named defendant to set aside his default and permit him to file an answer and a cross-complaint, the first-named defendant appeals.

Order affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Curtis C. Taylor, of Los Angeles, for respondent.

McCOMB, Justice.

From an order denying defendant's motion to set aside his default and permit him to file an answer and a cross-complaint to plaintiff's complaint for divorce, defendant Bell appeals.

These are the undisputed facts:

On or about October 17, 1945, plaintiff commenced an action for divorce against defendant. Thereafter defendant was served with the complaint and summons issued thereon, and on October 19, 1945, an order to show cause was issued directing defendant to appear on October 25, 1945, and show cause why he should not pay a reasonable sum for attorney's fees and court costs. This order was served on defendant and thereafter regularly continued until November 2, 1945, when an appropriate order was made. After the commencement of the action plaintiff took possession of an automobile owned by defendant, whereupon defendant wrote a letter to Judge Baird concerning the matter. Judge Baird advised him to employ a lawyer, whereupon defendant went to the public defender of the City of Los Angeles, who advised him that his office could not appear in the cause. On December 10, 1945, defendant went to see attorney Earl C. Broady and engaged him to represent him in the defense of his action. However, on November 30, 1945, defendant's default had been entered and on January 8, 1946, the case was set for trial and an interlocutory decree of divorce was granted on January 23, 1946.

On April 22, 1946, defendant's motion to set aside his default was denied.

This is the sole question necessary for us to determine:

*Did the trial court abuse its discretion in denying defendant's motion under section 473 of the Code of Civil Procedure to set aside the default which had been entered against him?*

This question must be answered in the negative. A default may be set aside under the provisions of section 473 of the Code of Civil Procedure where it is

shown that a default has been entered due to the (1) mistake, (2) inadvertence, (3) surprise, or (4) excusable neglect of defendant. In the instant case there is no showing bringing the present motion within any of the grounds mentioned in said section. It was more than a month after service of summons and complaint upon defendant before plaintiff sought the entry of defendant's default. It was more than another month thereafter before the case was set for trial and some two weeks later the interlocutory decree of divorce was granted. Defendant has failed to show any excuse for not having sooner employed an attorney and taken appropriate steps either to prevent the entry of his default or to have his default set aside.

This case falls clearly within the rules set forth in Elms v. Elms, 72 Cal.App.2d 508, 513, 164 P.2d 936.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




78 Cal.App.2d 578

**BAKER v. FERREL.**

**Civ. 13246.**

District Court of Appeal, First District, Division 2, California.

March 14, 1947.

**1. Appeal and error ⇐1011(1)**

In action to recover balance due for services performed as a draftsman, where draftsman testified that reasonable value of his work was $2.50 to $3 per hour, the fact that draftsman had been paid for some earlier work at rate of $2 per hour at most created a conflict for resolution of trial court.

**2. Release ⇐45**

A release is an affirmative defense which must be specially pleaded.

**3. Release ⇐53**

Where release was not pleaded as a defense, purported release was not admissible as a release but only as an admission, for what it is worth, of payment.

**4. Evidence ⇐263(1), 461(1)**

Where release was not pleaded as defense and was admissible only as an admission of payment, evidence that release was in general form required of all persons receiving stock in defendant corporation and was not intended to cover services sued for was competent to explain claims actually covered by the release.

**5. Appeal and error ⇐1151(2), 1171(2)**

A clerical error of $5 in judgment might be ignored on ground of de minimis but where it was admitted it could be cured by appellate court.

**6. Appeal and error ⇐891**

Motion to produce additional evidence before appellate court would be denied where evidence could have been presented on trial of case and no facts were offered to excuse failure to produce such evidence at trial. Rules on Appeal, rule 23(b).

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Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Clarence M. Baker against Clyde Farrel and another to recover for services performed. From an adverse judgment, defendants appeal.

Judgment modified and as modified affirmed.

A. L. Crawford and Bruce McMullen, both of San Francisco, for appellants.

Frank T. McGrath, of San Francisco, for respondent.

DOOLING, Justice.

Appellants Ferrel Ordnance Inc. and Clyde Ferrel appealed from a judgment against them for $1,570. Respondent is a draftsman who between 1939 and 1942 did certain work for the appellants. Appellant corporation was incorporated to take over the assets and business of Ferrel Ordnance Trust (a Massachusetts trust). 900 shares of the capital stock of appellant corporation

were issued to respondent upon his signing the release in October, 1940, which is hereinafter discussed. On January 9, 1942 appellant Ferrel gave respondent a memorandum in writing acknowledging an agreement to give respondent 7500 shares of appellant corporation (inclusive of the 900 already issued) "in settlement of all your claims to and against the Ferrel Ordnance Inc." The corporation refused to issue the stock pursuant to this agreement and respondent commenced this action seeking to recover $6,600 (the par value of 6600 shares of stock at $1 per share) as the balance due for the services performed. Appellants filed answers denying the allegations of the complaint.

The court found that respondent had expended 986 hours in said work, that the reasonable value of such work was $2.50 per hour, that $900 was paid on account of such work in the form of stock certificates having a par value in that amount and that there was a balance due of $1,570.

The appeal of appellant Ferrel Ordnance Inc. has been dismissed for failure to pay its franchise tax. Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P.2d 969.

[1] On appeal it is claimed that there is no evidence to support a finding that the work performed had a reasonable value of $2.50 per hour. Respondent testified that the reasonable value of his work was $2.50 to $3 per hour. The court accepted the lesser figure. The fact that respondent had been paid for some earlier work at the rate of $2 per hour at most created a conflict for the resolution of the trial court.

Respondent testified to work done for appellants during the period in suit covering 1013½ hours. He conceded that 27 hours of service rendered following the execution of the memorandum of January 9, 1942 should be excluded. This left 986½ hours. The court disregarded the one-half hour in its findings.

[2-4] The chief claim on appeal is that the release executed in October, 1940 forecloses the consideration of all services rendered by respondent prior to that date. To this claim there are two answers. 1. The release was not pleaded as a defense and a release is an affirmative defense which must be specially pleaded. Great Western Gold Co. v. Chambers, 153 Cal. 307, 314, 95 P. 151; Weaver v. Atlantian Const. Co., 84 Cal.App. 154, 161, 258 P. 114; 22 Cal.Jur. 765; 45 Am.Jur. 704. 2. The purported release was therefore not admissible under the pleadings as a release but only as an admission, for what it is worth, of payment. There is evidence that it was in a general form required of all persons receiving stock in appellant corporation and was not intended to cover the services herein sued for. This evidence was competent to explain the claims actually covered by it. Carpenter v. Markham, 172 Cal. 112, 115, 155 P. 644; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273, 86 P. 509, 691; Brown v. Crown Gold Milling Co., 150 Cal. 376, 389, 89 P. 86.

[5] Respondent admits a clerical error of $5 in the judgment. This might be ignored on the ground of de minimis but since it is admitted it can be cured by us on appeal.

[6] An application was made by both appellants (before the dismissal of the appeal of Ferrel Ordnance Inc.) to produce additional evidence before the court under Rule 23(b), Rules on Appeal. This evidence, so far as material to any issue here presented, could have been presented on the trial of the case. The trial court had the same matters before it in affidavits filed in support of a motion for new trial and neither in that court nor here are any facts shown to excuse the failure to produce such evidence at the trial. Rule 23(b) requires: "If the facts relate to events which occurred prior to judgment, the affidavit shall state the reasons why evidence thereof was not produced or offered in the superior court." Cf. Kemp v. Lynch, 220 Cal. 505, 507, 31 P.2d 375; Springer v. Angeles Credit Co., Ltd., 44 Cal.App.2d 712, 716, 113 P.2d 7.

The motion to produce evidence is denied.

The judgment is ordered reduced from $1,570 to $1,565 and as so reduced is affirmed, respondent to recover his costs on appeal.

NOURSE, P. J., and GOODELL, J., concur.

**HATCH v. MURPHY et al.**

**Civ. 15533.**

District Court of Appeal, Second District, Division 1, California.

**March 17, 1947.**

**Rehearing Denied April 7, 1947.**

**Hearing Denied May 15, 1947.**

War ⇐4

Where conditional purchaser of used automobile exercised his option, under agreement executed on day before OPA regulation on used automobiles became effective, to return the automobile within five days and apply money paid on it as a credit on immediate purchase of another used automobile within same price range, there was only one transaction, which was excepted from the OPA regulation as an "arrangement" entered into before its effective date.

See Words and Phrases, Permanent Edition, for all other definitions of "Arrangement".

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Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Leon Hatch against W. J. Murphy, doing business under the fictitious name of Murphy Motors, and others, for damages for sale of automobile at price exceeding maximum fixed by Office of Price Administration. From a judgment for plaintiff, defendants appeal.

Reversed.

Charles W. Rollinson, of Los Angeles, for appellants.

Kenneth Sperry, of Long Beach, for respondent.

WHITE, Justice.

By his complaint in the within action plaintiff alleged that on or about July 12, 1944, the defendants sold him a used automobile for the sum of $1795 plus taxes, license and transfer fees; that at the time of the sale the maximum price fixed by the Office of Price Administration was $1090 plus sales taxes and other charges, making the total maximum price $1133.25, and resulting in an overcharge of $724.53. It was further charged that the alleged violation of OPA regulations was willful on the part of defendants. The prayer was for damages in the amount of three times the overcharge, plus attorney's fees. After trial before the court, sitting without a jury, findings were made in favor of plaintiff, fixing his damages at $1,000 plus attorney's fees of $350, and judgment was entered accordingly. From such judgment defendants prosecute this appeal. An appeal by plaintiff, on the ground that the court should have awarded him treble damages, has been dismissed.

On July 9, 1944, prior to the establishment of an OPA ceiling on used cars, plaintiff entered into an agreement for the purchase of a used Pontiac coupe from defendant Murphy Motors, the sale being handled by the defendants Flynn, a salesman, and Neill, the sales manager. The transaction was evidenced by a "car order" for the car in question as well as insurance thereon, the price of the car being $1695, plus sales tax of $42.38, license and transfer fees of $17.90, a total of $1755.28. The plaintiff on this date made a cash payment of $735.28 and took delivery of the vehicle. It was provided in the agreement that plaintiff might pay the balance of $1020 in cash by July 15, that he should have a "5-day trial exchange", and that "title of ownership does not pass to me (plaintiff) until the final cash payment is made." With the delivery of the car plaintiff also received a so-called "Good Will Automobile Guaranty," which included in its terms the provision that "this car may be returned by the purchaser within five days if it proves unsatisfactory and the money paid on it will be applied as a credit on the immediate purchase of any other car of equal or greater price (new or used) which is our property, providing the car being returned is in the same condition as when originally delivered."

On July 10, 1944, a ceiling was placed on the price of used cars by Maximum Price Regulation 540. Under the regulation the price of a car of the type purchased on July 9 was fixed at $995 "as is," plus 25% if sold under the warranty prescribed by the regulation.

On July 12, 1944, plaintiff returned the Pontiac coupe to Murphy Motors and availed himself of the option to apply the money theretofore paid toward the purchase of a different used car. He chose a Pontiac 4-door sedan, for which he was charged the pre-ceiling price of $1795 plus the usual tax and transfer fees. The ceiling price of this second car was $1090 "as is" plus 25% if accompanied by the prescribed regulation warranty.

It is urged as grounds for reversal that the court erred in giving judgment for plaintiff when in fact the plaintiff suffered no loss (the difference between the OPA price of the respective cars being very near the difference between the pre-ceiling price of the same two cars); that as a matter of law no violation took place; and that if there was a violation it was not willful and the judgment should have been limited to the actual amount of the overcharge. In this connection appellant contends that both cars were sold as "warranted" cars and that the net difference between the total warranted price of each car was $121.72. The difference charged to plaintiff upon the exchange was $102.50.

Under the facts present in this case we fail to perceive wherein any violation of the OPA Maximum Price Regulation No. 540 occurred. On July 9, 1944, prior to the effective date of the regulation, respondent contracted with appellants to purchase a 1941 Pontiac coupe. The transaction was in the form of a conditional sales agreement under the terms of which it was agreed that "the title of ownership does not pass" to the purchaser "until the final payment is made." As part of the same transaction, it was further agreed in writing that respondent purchaser was to be permitted to take the vehicle out on approval and should the same prove unsatisfactory the purchaser was entitled to return it within five days "and the money paid on it will be applied as a credit on the immediate purchase of any other car of equal or greater price (new or used)" which was then the property of appellant Murphy.

Availing himself of this privilege, respondent, within the requisite five days, returned the automobile purchased on July 9, and selected a 1941 four-door Pontiac sedan, upon the purchase price of which he was given credit for the money paid by him on the July 9th contract. Obviously, the latter transaction was had in accordance with and fulfillment of the contract of purchase entered into on July 9, 1944, prior to the effective date of the ceiling price regulation. The regulation in question provides: "* * * (c) Nothing in this regulation shall prevent the fulfillment of any written contract for the purchase of a used car whether in the nature of a conditional sales agreement, rental contract providing for purchase *or other arrangement,* entered into before July 10, 1944, and under which the used car has been delivered prior to July 10, 1944."

In holding that a violation of the OPA regulation occurred the trial court fell into error through its assumption that there were two separate and distinct contracts, one on July 9 and another on July 12. The so-called purchase of the second automobile on July 12 was simply "in fulfillment" of the terms of the contract of July 9. Respondent purchaser was not entitled to rescind in its entirety the original contract of July 9, but by its terms he was limited to retaining the automobile he had purchased or within five days to return it and select another in the same price class. The negotiations with reference to the second automobile were all pursuant to the terms of the original agreement of July 9. There was but one transaction, a transaction in which a used car was delivered prior to the effective date of the regulation, which was July 10; and as an incident to and a part of the contract of July 9 respondent was entitled to return the delivered vehicle and choose another. As heretofore pointed out, the regulation expressly excepted from its terms "any written contract * * * *or other arrangement,* entered into before July 10, 1944, and under which the used car has been delivered prior to July 10, 1944." The transaction with which we are here concerned comes squarely within the exception just referred to.

The judgment is reversed.

YORK, P. J., and DORAN, J., concur.

## WILLIAMSON v. PACIFIC GREYHOUND LINES.

Civ. 13140.

District Court of Appeal, First District, Division 2, California.

March 11, 1947.

Rehearing Denied April 10, 1947.

Hearing Denied May 8, 1947.

**1. Trial ⇐165**

On motion for nonsuit made at conclusion of plaintiff's case, court is bound, for purpose of motion, to accept and treat as true every piece of evidence tending to establish plaintiff's case and to reject all tending to disprove it, and every reasonable inference must be indulged in plaintiff's favor, and if two reasonable inferences may be drawn from established facts, one favorable to plaintiff's case, and the other unfavorable, the favorable inference must be accepted and the unfavorable inference rejected.

**2. Trial ⇐165**

On motion by bus company for a nonsuit at conclusion of passenger's personal injury case, if it could be as reasonably inferred from proven facts that company was negligent in operation of bus as that it was not, inference in favor of negligence was required to be drawn, since negligence is but an inference drawn from proven facts, unless it is the result of a presumption, and on motion for nonsuit, the law compels it to be inferred if an inference is reasonably possible from proven facts.

**3. Negligence ⇐121(2)**

When a thing which causes injury without fault of injured person, is shown to be under exclusive control of defendant, and injury is such as, in ordinary course of things, does not occur if one having such control uses proper care, it affords reasonable evidence, under doctrine of "res ipsa loquitur," in absence of an explanation, that injury arose from defendant's want of care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

**4. Negligence ⇐121(2)**

The doctrine of res ipsa loquitur does not shift the burden of proof but presents an inference of culpability which, if left unexplained by defendant, is deemed satisfactory evidence of his negligence, and if defendant offers an explanation of the occurrence which is entirely consistent with due care, the inference of culpability is dispelled.

**5. Negligence ⇐121(2)**

The doctrine of res ipsa loquitur is a rule of necessity to be invoked only when necessary evidence is not readily available to the injured party, and where injury occurs under such circumstances as, when tested by ordinary experience and observation, it may be fairly inferred, in absence of explanation, that person sought to be charged has failed to fulfill some obligation which he owed to the injured party, he having exclusive control of the operation of the agency producing the injury.

**6. Carriers ⇐316(1)**

The doctrine of res ipsa loquitur is applicable to public carriers.

**7. Carriers ⇐320(24)**

In action against bus company for injuries sustained by passenger when a suitcase fell on her from overhead baggage rack when bus went around sharp curve, company's negligence was for jury under res ipsa loquitur doctrine.

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Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Margaret Williamson against Pacific Greyhound Lines, a corporation, to recover for injuries sustained by plaintiff while a passenger in defendant's bus when a suitcase fell from rack and struck plaintiff. From a judgment of nonsuit, the plaintiff appeals.

Judgment reversed.

See also 153 P.2d 990, 67 Cal.App.2d 250.

Clarence N. Riggins, of Napa, for appellant.

Cooley, Crowley, Gaither & Dana, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

JONES, Justice pro tem.

The respondent is a corporation operating stage lines between Napa and San Francisco. On the 4th day of September, 1943, Mrs. Williamson, the plaintiff, bought a ticket at Napa from the agent of the defendant, at the regular fare, for transportation to San Francisco. She boarded the bus of the defendant leaving Napa at 10:45 a. m., taking an aisle seat about four or five seats back of the driver and on the same side of the bus. The adjoining seat was occupied by another woman. The plaintiff was among the first passengers to board the bus, and she noticed racks along both sides above the seats of the passengers. She had no baggage of her own and saw none over the seat which she took. After she was seated she observed some luggage in the portion of the rack to the front of her. No one was seen to inspect the placement of the baggage either at Napa or at Shellville, the next stop.

At a point beyond Shellville, and about 21 miles from Napa, the bus was held up temporarily on account of repairs being made to a bridge. After leaving the bridge, the driver of the bus speeded it up and shortly entered a sharp curve in the highway, at which point the bus swayed and jolted, and crashed with sufficient force to throw Mrs. Williamson against the lady seated next to her. Simultaneously with the jolt, a heavy suitcase fell from the rack, striking her on the head, right shoulder and arm. She was completely dazed by the blow and was rendered sick, nauseated, very nervous, and was in terrible pain and dizzy. She was too sick to notice things about her, and no attention was given her after she was hurt. When she arrived at San Francisco she was still bleeding at the nose. On leaving the bus, she told the driver that a suitcase had fallen on her, and he replied, "Well, some people are careless," and shrugged his shoulders. She was too ill to attend to the purchase of a gift for her daughter, which she intended to make in San Francisco, and returned to Napa by the next bus.

On arriving at her home she tried to telephone her family physician, Dr. Baker, but was unable to reach him. She next called the Victory Hospital, but was told that they had no accommodations for her. She finally located Dr. Baker, who gave her treatment. Dr. Baker testified that his examination disclosed a contusion of the right temple, a contusion of the right shoulder and a contusion of the right arm between the shoulder and elbow, with an injury to the periosteum of the bone. In the opinion of Dr. Baker, she also suffered a post-traumatic neurosis. This diagnosis was confirmed by Dr. Alden, a specialist in neurology and psychiatry.

The case went to trial upon the amended complaint of plaintiff in which she alleged generally that the defendant operated its stage in such a careless and negligent manner as to cause the suitcase to fall and strike her. Specific negligent acts were also alleged, among them being failure to properly inspect the baggage in the racks. Upon the conclusion of plaintiff's case, the defendant moved for a nonsuit upon the ground that no evidence had been produced to show any negligence on the part of the defendant proximately causing the injury. The motion was granted, and it is from the judgment of nonsuit that the plaintiff has appealed.

She was the only witness to testify in respect to the happening of the accident, which she describes in the following language from the reporter's transcript:

"Q. You describe the movement of the bus as giving you a severe jolt? A. Yes. * * * I didn't take any notice of that except this one curve where the bus had swayed—he was going around this sharp curve and the bus swayed.

"Q. I thought I understood you to say that it felt like you had run into a rock or something? A. Yes, at that time—everything happened right at the time of the accident.

"Q. Do you know where the suitcase came from that you say collided with you? A. No, but I would judge it was from overhead because it hit me first on the head.

"Q. Well, the road was smooth, wasn't it? A. Well, except for the rock it felt—when the bus swayed it gave me this jolt. I believed it hit a rock.

"Q. Now, you have described that the movement of the bus threw you into the

passenger, is that right? A. Not right into her, no, but against her.

"Q. Over against her. Well, do you know whether that was a violent—did you feel any violence when it threw you? A. Yes. It felt as though the whole bus had crashed. That is just the feeling it gave me."

[1, 2] Upon a motion for a nonsuit made at the conclusion of the plaintiff's case, the rule is almost axiomatic that the court is bound for the purpose of the motion to accept and treat as true every piece of evidence which tends to establish the plaintiff's case and to reject all which tends to disprove it. Every reasonable inference must be indulged in plaintiff's favor, and if two reasonable inferences may be drawn from the established facts, one of which is favorable to the case of plaintiff and the other unfavorable, that which is favorable must be accepted and that which is unfavorable rejected. If, in the present case, it may be as reasonably inferred from the proven facts that the defendant was negligent in the operation of its bus as that it was not, the inference in favor of negligence must be drawn. Negligence in all cases is but an inference drawn from the proven facts, unless it is the result of a presumption, (Morton v. Manhattan Lunch Co., 41 Cal.App.2d 70, 106 P.2d 212), and, upon a motion for a nonsuit such as is here made, the law compels it to be inferred if it is reasonably possible to do so from the proven facts.

Negligence and proximate cause have frequently been inferred from existing circumstances even when no question of nonsuit was involved and where circumstantial evidence was the only means of proof available to the injured party. In Szopieray v. West Berkeley Express & Draying Co., 194 Cal. 106, 227 P. 720, 722, a three year old child was seen playing at the left hind wheel of a standing dray to which a team of horses had been left hitched and unattended. There was no other vehicle in the vicinity. Shortly thereafter the child was found lying in the street with his leg so badly crushed that it had to be amputated. The court there said: "It would be entering the realm of pure speculation to hold that any other vehicle or cause other than the heavy truck injured the child." In the case of Alameda County v. Tieslau, 44 Cal.App. 332, 186 P. 398, it was held that the facts surrounding the happening of the accident warranted the inference that the injury was caused by failure of the defendants to maintain lights on a pile of loose rock being used in repair work on the highway. Barton v. Capitol Market, 57 Cal.App.2d 516, 134 P.2d 847, is also to the effect that circumstantial evidence may be the basis for an inference of negligence and proximate cause.

[3-6] It is contended by the plaintiff that under the circumstances existing here the doctrine of res ipsa loquitur applies. This is a rule of law designed to equalize the situation when an accident has occurred on account of something under the exclusive management of the defendant. In San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 32 S.Ct. 399, 401, 56 L.Ed. 680, it is said that, "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." It does not shift the burden of proof in a case, but presents an inference of culpability which, if left unexplained by the defendant, is deemed satisfactory evidence of his negligence. If the defendant offers an explanation of the occurrence which is entirely consistent with due care, the inference of culpability is dispelled. It is a rule of necessity to be invoked only when necessary evidence is not readily available to the injured party, and where the injury occurs under such circumstances as, when tested by ordinary experience and observation it may be fairly inferred, in the absence of explanation that the person sought to be charged has failed to fulfill some obligation which he owed to the injured party, he having exclusive control of the operation of the agency producing the injury. The doctrine is applied as frequently in the case of public carriers as in any other class of undertaking. This is because of

the very definite obligation which the carrier owes to his passengers to transport them safely. Reason dictates that one who entrusts his life and person to a common carrier to transport him safely to his destination in a vehicle of the carrier's own selection and under the carrier's exclusive management and control is entitled to an explanation of any unusual occurrence connected with the operation of the vehicle which results in injury. This right of the traveller by public conveyance in case of injury was recognized and the doctrine applied in this state in the early case of Fairchild v. California State Company, 13 Cal. 599, a case reaching the Supreme Court in the July term, 1859. And, as is stated in Bush v. Barnett, 96 Cal. 202, 31 P. 2, 3, "This rule was very clearly enunciated in Boyce v. [California] Stage Co., 25 Cal. 460, and has since been affirmed in Lawrence v. Green, 70 Cal. 417, 11 Pac.Rep. 750 [59 Am.Rep. 428]; Treadwell v. Whittier, 80 Cal. 574, 583, 22 Pac.Rep. 266; [5 L.R.A. 498, 13 Am.St.Rep. 175]." The doctrine is again applied in the recent case of Prunty v. Allred, 73 Cal.App.2d 67, 165 P. 2d 935, 938, where a suitcase fell from the baggage rack of a bus, striking a woman passenger on the head, injuring her severely. At the time of the accident the bus was travelling about 45 miles per hour in passing a truck. As it turned back into its own lane of travel to avoid oncoming traffic, the suitcase fell. The jury was given an instruction on the doctrine of res ipsa loquitur, and in passing upon the propriety of such an instruction the court said: "Under the pleadings and the evidence, an instruction on the doctrine was proper," citing Leet v. Union Pacific Railroad Co., 25 Cal. 2d 605, 155 P.2d 42, 158 A.L.R. 1008. In O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, which involved the fall of an elevator, the doctrine was applied and a judgment of nonsuit reversed.

[7] No question of negligence on the part of the plaintiff is presented here. No danger was apparent to her, and none under the facts presented could have been. The control and operation of the bus was exclusively in the hands of the defendant's driver. He was in a position to know if it was the speed of the bus while rounding a sharp curve that caused it to sway, and what it was that caused the bus to jolt violently and with enough force to precipitate the suitcase from the baggage rack. These happenings do not usually occur in the transportation of passengers over the highways by motor coach without negligence on the part of some one. The plaintiff, occupying an aisle seat in the body of the bus, was not in a position to form an accurate estimate as to its speed, nor of the degree of the curve in the highway which it rounded. Nor was she in a position to see what the bus struck. The situation which these facts present, plus her injuries, entitle her to the inference of negligence on the part of the defendant which the doctrine of res ipsa loquitur affords.

In Prunty v. Allred, supra, the court indicated that two distinct inferences of negligence could be drawn from the facts there established. It said, "An inference of negligence was permissible from the failure of the bus driver to discharge the duty of inspecting the baggage in the racks and seeing that it was properly stowed and securely placed. It is likewise obvious from the statement of facts, that an inference of negligence was permissible from the manner in which the bus was operated. The falling of the baggage was coincidental with the movement of the bus in suddenly coming back into its own lane of traffic to avoid on-coming traffic after passing the the truck." The established facts of this case which are similar in many respects to those in Prunty v. Allred warrant like inferences of negligence on the part of the defendant.

In support of its position the respondent has cited the cases of Wade v. North Coast Transp. Co., 1931, 165 Wash. 418, 5 P.2d 985, and Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38. In the Wade case a piece of baggage fell from the baggage rack in a bus, striking and injuring a child. A jury returned a verdict in favor of the plaintiff, and upon motion the court granted a judgment for the defendant, notwithstanding the verdict. In that case, the driver of a bus rounded a corner at a street intersection and in doing so, passed the left wheels of the bus off of the paved portion of the street. In summarizing the evi-

dence the court there said [165 Wash. 418, 5 P.2d 986]: "The undisputed evidence in this case is to the effect that, in making the turn from East Marginal way into Corson avenue, with a bus the size of the one described, it is necessary that the left wheels thereof pass onto the gravel strip before they reach the pavemant on the south side of Corson avenue." On coming back onto the pavement the bus gave a sudden lurch and jerk. This was a forward movement of the bus, and as the court there held, was an incident of its usual operation and not an unusual occurrence under the circumstances. In Diamond v. Weyerhaeuser a collision occurred between an automobile and a horse-drawn wagon at the intersection of two streets. In sustaining a directed verdict the court said [178 Cal. 540, 174 P. 39]: "There was a total lack of proof of any circumstances from which it might reasonably be inferred that the collision was caused by any want of care on the part of the driver of the automobile, rather than by the negligence of the driver of the wagon, or by accident without fault on the part of anyone."

The respondent has pointed particularly to Creahan v. Pennsylvania R. Co., 123 Pa. Super. 268, 187 A. 51, among other cases cited, in which case a judgment was entered for the defendant, notwithstanding a verdict for the plaintiff. In this case, the plaintiff relied solely upon the fact that a satchel fell from a rack and injured her. As the court there said, "She neither gave nor furnished any evidence to indicate that there was anything defective or of improper construction in the rack, or that the train was operating in a negligent or unusual manner." Nor do any of the other cases cited by respondent indicate anything but a usual incident of the operation of the transportation unit as the cause of the injury.

On the other hand, in the case of Rosenthal v. New York, N. H. & H. R. Co., 88 Conn. 65, 89 A. 888, 889, 51 L.R.A.,N.S., 775, relied on by the appellant, the liability of the defendant was upheld on the ground of an occurrence in the operation of the train out of the ordinary. The court there said: "In this case the witnesses not only characterized the stop as sudden and violent, but they testified to the physical effect on themselves, as throwing them forward in their seats, and to the simultaneous fall of the suitcase which, according to the testimony, had been securely stowed in the rack before the train started. We think that the jury might reasonably have found that the stop was unusually sudden, and caused the suitcase to fall from a position from which it would not probably have been dislodged by the ordinary motion of the train."

As we have already pointed out, upon a motion for a nonsuit such as was here made, only that evidence which is favorable to plaintiff's case may be considered, to the exclusion of all that is adverse. In the case before us the favorable facts and inferences appear ample to make out a prima facie case for the plaintiff.

In our opinion the trial court erred in granting the motion for a nonsuit.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.




## LOVING & EVANS v. BLICK.*

Civ. 3533.

District Court of Appeal, Fourth District, California.

March 14, 1947.

Hearing Granted May 12, 1947.

**1. Licenses ⇐39**

Where only one member of partnership held a contractor's license, a contract entered into and executed by the partnership was unlawful. Business and Professions Code, §§ 7025 et seq., 7031.

**2. Arbitration and award ⇐76**

Where submission to arbitration is on both questions of law and fact, and is unqualified and in general terms, the award will not be set aside unless error appears on the face thereof even though court may

* Subsequent opinion 191 P.2d 445.

differ from the arbitrators on the law of the case. Code Civ.Proc. §§ 1280–1293.

**3. Arbitration and award ⇐76**

Where arbitrators are required by the terms of the submission or by a statute or rule of court under which the arbitration proceeds to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award. Code Civ.Proc. §§ 1280–1293.

**4. Arbitration and award ⇐48**

Where arbitrator was required to make his award according to the legal right of the parties, the arbitrator was required to decide in conformity with the law. Code Civ.Proc. §§ 1280–1293.

**5. Licenses ⇐39**

Where only one member of partnership held a contractor's license, a contract by the partnership was illegal and no action could be maintained on it by them. Business and Professions Code, §§ 7025 et seq., 7031.

**6. Arbitration and award ⇐77**

In passing on a motion to vacate an award, where the motion is supported by affidavits which have not been denied or controverted, court must accept as true the facts stated in the affidavits. Code Civ. Proc. §§ 1280–1293.

**7. Arbitration and award ⇐73**

An appeal from an order denying motion to set aside an arbitration award is in effect an appeal from the judgment. Code Civ.Proc. §§ 1280–1293.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the arbitration between Loving & Evans, contractors, and Frank R. Blick, owner. From orders that motion for order confirming arbitrator's award be granted and that motion to set aside the award be denied and that a judgment for $5,739.87 be entered on the award in favor of the contractors, the owner appeals.

Judgment reversed.

Siemon, Maas & Siemon, of Bakersfield, for appellant.

Burum & Woodruff, of Bakersfield, for respondents.

GRIFFIN, Justice.

On February 8, 1945, Loving & Evans, contractors, a copartnership, hereinafter referred to as respondents, entered into a written contract with Frank R. Blick, hereinafter referred to as appellant, for the repair and remodeling of appellant's premises. The contract was on a "10 per cent cost plus" basis. After the work was completed appellant had paid respondents $13,555. Respondents claimed that a balance of $6,839.61 was still due. The agreement provided that in case of any controversy arising between them in reference to the construction or agreement that such controversy might be submitted to arbitration, under the provisions of secs. 1280 to 1293, inc., of the Code of Civil Procedure. On August 24, 1945, a separate written agreement was signed agreeing that "all rights and obligations of the parties are subject to arbitration"; that the contractors had provided the owner with bills and statements covering work performed and the amount alleged to be due; that the owner disputed the correctness thereof and that differences have arisen in regard thereto; that it is the intent of the parties to submit "said dispute and differences and all matters relating thereto" and "all claims and demands arising therefrom or based on the above-mentioned transaction and the facts and circumstances relating thereto" to arbitration by F. W. Welsh, an attorney, who shall hear, judge and determine said matters so submitted, and who shall make his award in writing "which *said final award,* it is agreed, shall in all things be *well and faithfully kept,* observed and performed by the parties hereto * * * and shall constitute and complete a final adjudication of all matters hereby submitted to arbitration"; that the arbitrator may render his award and judgment in the same form as a judgment in any civil action and "*according to the legal right of the parties*".

In accordance with the agreement, respondents submitted a petition to the arbi-

trator, setting forth their claim. An answer thereto was filed by appellant alleging unreasonable delay in construction, lack of vouchers to support respondents' charges, nondelivery of items charged, and improper charges. He disputed the claimed balance due and denied a charge of $1877.20, representing 10 per cent of cost to contractors as their fee, for the reason that "Loving & Evans * * *" were not licensed by the State of California to act as contractors at the time the work was performed and the services rendered. He also alleged that originally the parties orally agreed to the construction of his auto-court buildings and that work thereon commenced on February 8, 1945; that it was not until March 12, 1945, that the written agreement was signed.

As a special defense to the entire claim, appellant set up the defense that the copartnership did not have a State Contractor's license to do business at the time the agreement was entered into, and that under the provisions of article 2, chapter 9, division 3 of the Business and Professions Code, respondents were forbidden to engage in such business or to so act prior to August 16, 1945, and that under sec. 7031 thereof they were prohibited from maintaining any action for the collection of compensation for the performance of any act for which a license is required by said provisions, and denied any liability for their claim. Appellant counterclaimed for the sum of $13,500 repayment of the sum already paid them and for $2600 damages for claimed delay in completion, in violation of the agreement.

The arbitrator, on March 22, 1946, made his award in writing reciting that "a dispute had arisen * * * in regard to the amount due" and that an agreement had been signed which "provided that the issues of said controversy should be joined by the submission of a petition and answer thereto" and that the arbitrator should determine "the matters submitted to arbitration" and that the "award should constitute a complete and final adjudication" of all matters submitted; that a hearing was had on "all the issues involved"; that after "consideration of the evidence introduced" he awarded Loving and Evans the sum of $5,739.87, as itemized. The contractor's fee was fixed at $1754.08. Thereafter, Loving & Evans filed in the Superior Court of Kern County an application for an order confirming the award of the arbitrator. Attached to the petition was a copy of the agreement of submission and the award. They asked that a judgment be entered accordingly. A notice of motion for such an order was signed. Defendant appeared and objected to the award on the grounds that the arbitrator failed to make a full and final determination of the matters submitted, namely, that the defendant had set up an alleged and special defense that the contractors were not duly licensed to engage in the business as contractors in this state, as alleged in their special affirmative defense, and that by reason thereof, he was not liable to the contractors for any work done or materials furnished; that the arbitrator failed to consider his counterclaim for $2600 damages or pass upon the matters brought in issue by the answer and claimed special defense and the counterclaim as set forth. He prayed that the award be vacated and set aside. Notice of said motion was given stating that it would be based upon the award, the agreement of submission, the petition for award, the answer to the petition (copies of which were attached thereto), and upon the objections to the award, the affidavit of Walter L. Maas, Jr., and the affidavit of Frederick W. Welsh, the arbitrator (copies of which were served therewith). On May 13, 1946, the matter came on for hearing.

The affidavit of the arbitrator recites the filing of the petition and answer, setting out the special affirmative defense; that in the course of the hearing of the matters before him, "it was stipulated by the parties * * * that it was true that at all times from the initial negotiations for the work to be performed by the contractors for the owner, one of the partners of the firm of Loving & Evans, to wit, J. P. Loving, held a contractor's license"; that the other partner did not have such a contractor's license and that the firm of Loving & Evans, a copartnership, did not have issued to it such a contractor's license under the Business and Professions Code: that the initial negotiations for the work, which was eventually performed, were conducted be-

tween J. P. Loving individually, and the owner, Blick; that prior to February 9, 1945, Evans became a partner with Loving in the contracting business.

The affidavit of Walter L. Maas, Jr., corroborates the affidavit of the arbitrator in reference to the stipulation therein mentioned.

The affidavit of R. S. Woodruff, counsel for respondents, recites the making of the stipulation before the arbitrator; that at all times Loving held a general contractor's license; that the firm did not hold one until after the job was completed and that Evans, individually, did not hold one at all; that the stipulation was made with the express reservation that the admission of such facts did not admit that said contractors had not complied with the provisions of the Business and Professions Code, nor admit that said provisions were applicable under the circumstances nor that the question of a license was a proper matter of defense in said hearing; that evidence was introduced that the original contract for the performance of alterations and construction was executed by J. P. Loving and Blick individually, and that at that time Loving was doing business as an individual and was properly licensed as a general contractor.

The judgment of the court recites that the motions were heard and that it was ordered that the motion for the order confirming the award be granted and that the other motion to set aside the award of the arbitrator be denied. Judgment for $5,739.87 was entered on the award. This appeal is based on the judgment roll alone and is taken from the two orders and judgment mentioned. The County Clerk certified that the documents and papers aforementioned constituted the judgment roll and were prepared in accordance with Rule 5 of the Rules on Appeal. Attached to that certificate is the certificate of the trial judge certifying that the three affidavits heretofore mentioned were used and considered by it in the hearing and that they constituted all of the evidentiary matter so used and considered.

There are two legal issues involved: (1) Whether the respondents, under the undisputed evidence, operated in violation of the law; and (2) if so, whether the award of the arbitrator and its approval by order of the trial court can be, nevertheless or otherwise sustained.

Section 7028 of the Business and Professions Code provides that: "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor * * *" Section 7025 provides that: "'Person' as used in this chapter includes an individual, a firm, copartnership * * *." Sec. 7026 defines a contractor. Section 7029 provides that: "It is unlawful for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this State, to jointly submit a bid or otherwise act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation." Section 7031 provides that: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1] It is true that Loving, at all times, possessed an individual contractor's license, but his partner did not, and the partnership, as such, failed to obtain such a license. Under the undisputed facts there has been a violation of section 7025 and 7028 of the Business and Professions Code by the partnership, as such. We see no escape from this legal conclusion.

Haas v. Greenwald, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493, was an action to recover compensation for procuring a purchaser for real property. The services were to be performed jointly by two real estate brokers and an attorney. The attorney was not a licensed real estate broker. The Supreme Court held that since the contract was void as to the attorney it was void as a whole, because the serv-

ices of all were the consideration for the contract.

Likewise, Wise v. Radis, 74 Cal.App. 765, 242 P. 90, was an action brought to recover commissions by an unlicensed real estate broker, where two real estate brokers entered into an agreement to work together as brokers in negotiating the sale of real estate. One of them did not procure a license, as required by the Real Estate Brokers' Act. The court there held that the failure to obtain the license required by the Act rendered the transaction illegal and void and no recovery of the commission could have been enforced by the parties against the owner of the property. At page 775 (Syllabus 6) of 74 Cal.App., at page 94 of 242 P. the court said:

"No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim. In Moore v. Moore, 130 Cal. 110, 62 P. 294, 80 Am.St.Rep. 78, our Supreme Court quotes Judge Duncan in Swan v. Scott, 11 Serg. & R., Pa., [155, at page] 164, as follows: 'The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'"

And at page 776 (syllabus 7) of 74 Cal. App., at page 94 of 242 P. it is said:

"If the issuance of a copartnership license was a necessary prerequisite to the legality of the firm transactions which appellant and respondent jointly carried on as copartners, then, since no such license was ever issued, or was ever even within the contemplation of the partners, the partnership contract was illegal from its inception, for in that case the partnership contract necessarily would involve the performance of illegal acts."

To indicate the apparent harshness of the rule and the extent to which the courts have gone in denying a right of recovery in any action by a person or partnership who or which has failed to obtain a contractor's license, we need but cite Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114. It was there held that a general licensed contractor is denied the right to recover from an owner moneys paid by him to a subcontractor who was not a licensed contractor. It was there stated that the sub-contract was illegal and void (citing various California cases), and that a party to an illegal contract may not rest his cause or recover judgment based on such a void agreement. See also, Firpo v. Murphy, 72 Cal.App. 249, 236 P. 968, where it was held that the Real Estate Brokers' Act was a statute designed for the protection of the public and that a penalty is prescribed for the violation thereof; that such penalty is the equivalent of an express prohibition and that a contract made contrary to the terms thereof is void; that whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. See, also, Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364; Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661; Chateau v. Singla, 114 Cal. 91, 94, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63; Moore v. Moore, 130 Cal. 110, 113, 62 P. 294, 80 Am.St.Rep. 78; and Wise v. Radis, supra.

Respondent relies mainly on Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, where a judgment in favor of plaintiff contractors was affirmed although no contractor's license in the name of the partnership under which they had been operating had been issued to the two plaintiff contractors as such. But each of the contractors individually, at the time the contract was made, possessed a contractor's license. During the performance of the contract the two plaintiffs and a third party were issued a partnership license. The court therein discussed the gen-

eral rule and the cases cited, and pointed out that in Wise v. Radis, supra; Holm v. Bramwell, supra, and Phillips v. McIntosh, 51 Cal.App.2d 340, 124 P.2d 835, the contracts were executed at a time when the broker or contractor was unlicensed, and it held that the Gatti case was distinguishable, under the circumstances there related, because, at the time the contract was made, each of the two members of the partnership possessed a license in his own name as an individual. The majority opinion then held that the plaintiffs had substantially complied with the statutory requirements and also held that [27 Cal. 2d 687, 166 P.2d 266]: "If defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." The dissenting opinion by Mr. Justice Edmonds points out that the decision is directly contrary to the plain and positive language of the statute regulating the contracting business, and that: "Wisely or unwisely, the Legislature has specified that two persons individually licensed may not, as partners, engage in the contracting business without having obtained a license in the name of the partnership." And he endeavors to analyze some of the cases cited and relied upon by plaintiffs therein.

The undisputed facts before us indicate a violation of the law, and the decision of the arbitrator, as confirmed by the trial court, is contrary to the plain and positive language of the statutes regulating the contracting business. The Supreme Court may be willing to go one step further and hold here, as it did in the Gatti case, that there was nevertheless, under the circumstances related, a substantial compliance with the law. We, as an appellate court, do not feel justified, under the cases above cited, and in the absence of corrective legislation by the Legislature, to carry the rule further. We will therefore turn our attention to the second question involved.

It is pointed out in Pacific Vegetable Oil Corporation v. C. S. T., Ltd., 29 Cal. 2d 228, 174 P.2d 441, that ordinarily the merits of a controversy between parties to an arbitration proceedings are not subject to judicial review, and that arbitrators are not bound by strict adherence to legal procedure and to rules of admission of evidence expected in judicial trials. Under sec. 1288 of the Code of Civil Procedure, the Superior Court has power to vacate an award upon the several grounds there stated. Subdivision (c) states: "Where the arbitrators were guilty of misconduct, in refusing to * * * hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced." " (d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." We must examine the facts established to see if appellant has brought himself within any of these provisions requiring the court to vacate the award.

The agreement of submission to arbitration clearly recites that the correctness of the bills, the amount due, all matters relating thereto, and all claims and demands arising therefrom, or based on the above-mentioned transaction, are submitted to arbitration "according to the legal rights of the parties." From the record it is apparent that appellant claims that no sum was due respondents at all because of the fact that the partnership was not licensed to do a contracting business at the time, and also, on the same ground, claims a refund of monies already paid to them. These issues were presented by the agreement, petition and answer in the arbitration proceedings. It is equally clear that the arbitrator did receive evidence on the subject. His signed award recites that fact. It also recites that "after consideration of all the matters of said controversy as *set forth in the agreement of submission* and *in the allegations of the petition and answer filed herein*," and "after consideration of the evidence introduced at the arbitration hearing," he found against the

claim of the owner Blick and in favor of the contractors and fixed that sum at $5739.87.

[2] The record establishes that the arbitrator did act on the matters submitted. Whether he acted "*according to the legal rights of the parties*," as specified in the agreement of submission, and whether that question is now open to and presentable for judicial review is the question. It is the general rule that in case a submission to arbitration is on both questions of law and fact, and is unqualified and in general terms, however different the judgment of the arbitrators may be upon the law of the case from the opinion entertained by the court, if the arbitrator has acted honestly, the award will not be set aside unless the error appears on the face of the award. In re Frick, 130 Cal.App. 290, 19 P.2d 836; Brodhead-Garrett Co. v. Davis Lumber Co., 97 W.Va. 165, 124 S.E. 600; 6 C.J.S., Arbitration and Award, § 105, p. 252, 6 C.J.S., Arbitration and Award, § 48, p. 190.

[3] On the other hand, if the arbitrators are required, by the terms of the submission or by a statute or rule of court under which the arbitration proceeds, to determine the rights of the parties *according to law*, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award. 6 C.J.S., Arbitrators and Award, § 105, p. 252; Utah Construction Co. v. Western Pac. R. Co., 174 Cal. 156, 162 P. 631; Howe v. Patrons' Mutual Fire Ins. Co., 216 Mich. 560, 185 N.W. 864; Adams on Equity, p. 192; Greenough v. Rolfe, 4 N.H. 357; White Mountains Railroad v. Beane, 39 N.H. 107; Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392; Sanborn v. Murphy, 50 N.H. 65; 4 Century Digest (Arbitration & Award) p. 290, sec. 315; 5 Corpus Juris, p. 184, § 470; see also 6 C.J.S., Arbitration and Award, § 105; Bartlett v. L. Bartlett & Son Co., 116 Wis. 450, 93 N.W. 473; Cyclopedia of Law & Procedure, vol. 3, p. 740; Am. & Eng. Encyclopedia of Law, vol. 2, 2d Ed., p. 783; Morse on Arbitration & Award, p. 300.

In Utah Construction Co. v. Western Pac. R. Co., supra [174 Cal. 156, 162 P. 634], the terms of the submission of the controversy to the arbitrator were quite similar to those in the instant case and under the terms of that submission the arbitrator was required to "* * * make his judgment and award, *according to the legal right of the parties* * * *." It was there said, quoting from authorities (174 Cal. at pages 160-162, 162 P. at page 633):

"An award made upon an unqualified submission cannot be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice. * * * A different rule is applicable here because of the terms of the submission. 'Whenever the arbitrators are required, by the terms of the submission, * * * to determine the rights of the parties *according to law*, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award. * * *'" The court then said: "The submission in this case was not without qualification. * * * the provisions above mentioned bound the arbitrator to decide in conformity with the law, and left him without authority to do otherwise. 5 Cor.Jur. 183; Morse on Arbitration, 302."

This case has been cited in the textbooks as authority for this rule of law, although on page 163 of the decision in 174 Cal., on page 634 of 162 P., it is said:

"Our final conclusion on the merits renders it unnecessary to determine whether the submission agreement, when properly construed, did or did not empower him to decide the law wrongly as well as rightly. We may assume, for the purposes of the case, that he was empowered only to decide correctly as to the law, and proceed upon that theory without deciding the point."

[4] In view of the rule of law reiterated by Mr. Justice Shaw in the decision in that case, we must conclude in this case that the submission, in the language of the agreement, that the arbitrator shall make his award "according to the legal right of the parties," was not a general, unqualified submission but was, on the other hand, a qualified submission and bound the ar-

bitrator to decide in conformity to the law, and left him without authority to do otherwise. 3 Cal.Jur. p. 87, sec. 44.

[5] The affidavits, considered by the trial court, show an invalidity of the contract and a violation of the law; that the partnership had not obtained a contractor's license as required; and the partnership was not authorized to bring or maintain this action or proceeding for the enforcement of its award and judgment for the reasons expressed. Pleaters & Stitchers Ass'n v. Davis, 140 Cal.App. 403, 35 P.2d 401.

[6] It has been held that in passing on a motion to vacate an award, where the motion is supported by affidavits which have not been denied nor controverted, the court must accept as true the facts stated in the affidavits. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353.

[7] The appeal from the order denying the motion to set aside the award is, in effect, an appeal from the judgment. Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 147 P.2d 60.

For the reasons expressed the judgment is reversed.

BARNARD, P. J., and MARKS, J., concur.




78 Cal.App.2d 511

**HARTMAN v. HUMASON et al.**

**Civ. 3532.**

District Court of Appeal, Fourth District, California.

March 11, 1947.

**1. Set-off and counterclaim ⇐44(2)**

Factor was entitled to set-off against amount due shipper from proceeds of sale of potatoes amount advanced to shipper by factor individually on shipment of onions which were not of the quality guaranteed by shipper, were rejected by buyers, and became a total loss, where both transactions were handled as parts of a mutual and current account, notwithstanding secret agreement, between factor and his purported agent with whom shipper dealt, to share profit or loss on potatoes and secret agreement between such agent and shipper to share profit or loss on onions.

**2. Appeal and error ⇐878(6)**

Defendant, not having appealed from portion of judgment denying him relief on his cross-complaint, could not complain of error in such ruling on appeal by plaintiff.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Oren Hartman against Edwin Humason and others to recover portion of proceeds from sale of potatoes shipped to defendants to be sold on consignment deducted on account of another transaction, wherein named defendant filed a cross-complaint. From the judgment, plaintiff appeals.

Judgment affirmed.

Mack, Werdel & Bianco, of Bakersfield, for appellant.

G. V. Weikert, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to recover a portion of the proceeds from the sale of two carloads of potatoes.

The defendant Humason was a car-lot distributor and broker dealing in fruit and produce at Los Angeles. During the season of 1944, the defendant Walker solicited fruit and produce in the vicinity of Kern County to be handled by Humason. There was an oral agreement between them that they would share equally in the profits or losses resulting from the business thus produced by Walker. By private arrangement between them an account of such business was carried on Humason's books as the "Walker-Humason Company" account.

The plaintiff was engaged in the business of shipping produce at Bakersfield. On the solicitation of Walker he shipped a total of 35 cars of produce to Humason during this

season, to be sold on consignment for his account. Among these were the two cars of potatoes here in question. It is conceded that the net amount due to the plaintiff from the sale of these potatoes was $1598.40. In accounting therefor, Humason deducted $1200 on account of another transaction and sent Hartman his check for $398.40 in payment of the balance.

The other transaction referred to, for which this $1200 was deducted, relates to four cars of onions which were also shipped to Humason for sale on consignment. In that one instance, without the knowledge of Humason, Walker and Hartman had purchased a crop of onions from a grower, agreeing to share equally in the net profit or loss. The onions were shipped by Hartman to Humason, to be sold on consignment in the same way, insofar as Humason knew, as were the potatoes. At the request of Hartman, conveyed through Walker, Humason advanced to Hartman $300 a car or a total of $1200 as an accommodation advance on these onions before they were sold. Before that advance was made and as a condition therefor, Hartman guaranteed to Humason that these onions would be of a certain grade under federal marketing regulations. The onions were not of that grade and when they arrived at certain destinations in the east they were found to be spoiled, and were rejected by the prospective buyers obtained by Humason. A number of efforts to salvage something from the onions failed and the result was a complete loss, as far as these four cars of onions were concerned. Humason deducted the $1200 advanced on the onions from the proceeds of the potatoes.

Hartman brought this action to recover the $1200 thus deducted. Humason answered denying that anything was due to the plaintiff, and alleging an accord and satisfaction. He also filed a cross-complaint seeking to recover $656.27 from the plaintiff on account of freight charges and brokerage fees in connection with the four cars of onions.

The court found in favor of the defendant Humason with respect to the $1200. It was found, among other things, that these onions were shipped to Humason on the representation and understanding that they were to be sold on consignment for the account of Hartman; that Hartman guaranteed that the onions would be of a certain quality; that as an accommodation advance Humason advanced to Hartman $300 on each of these four cars of onions; that none of the cars of onions were of the quality represented and guaranteed by Hartman; that the onions were rejected by the prospective buyers in the east and became a total loss; that Humason became obligated for freight charges and brokerage on these cars of onions which, with brokerage due to him, amounted to $656.21, which amount Hartman refused to pay; that the 35 cars of produce shipped by Hartman to Humason were sent to Humason as a factor to be sold on consignment for the account of Hartman and that all of such transactions were mutual, open and current accounts between them; and that Humason had deducted the sum of $1200 from the proceeds of the two cars of potatoes and had paid Hartman $398.40 in full payment of the balance due on the said two cars of potatoes. As conclusions of law, it was found that the plaintiff Hartman was entitled to nothing from the defendants, or any of them, and that Humason was entitled to nothing from the cross-defendant Hartman by reason of his cross-complaint. Judgment was entered to that effect, and Hartman has appealed.

The appellant contends that the accommodation advance on the onions was not a proper setoff against the amount due on the potatoes because there was a lack of mutuality between the parties and the debts. It is argued that he was the owner of the potatoes while he and Walker, jointly, were the owners of the onions. And further, that while the accommodation advance on the onions was made by Humason, individually, the potatoes were handled under the joint account arrangement between Humason and Walker; that they were handled by the Walker-Humason Company; that this was a partnership; and that, therefore, the individual advance of Humason on the joint onion account of Hartman and Walker cannot be offset against a partnership debt owed by the Walker-Humason Company to Hartman individually.

[1] While the principle of law contended for by the appellant may be conceded it has no application here under the evidence and the findings. While Walker and Humason had an agreement between themselves for sharing in the profits or losses arising from that part of Humason's business which was produced by Walker in Kern County, it is immaterial whether or not a partnership existed between them for this limited purpose. There is evidence that Hartman was dealing throughout with Humason, individually, through Walker as his purported agent. The onions and potatoes were shipped and handled in exactly the same manner insofar as Humason knew or was concerned. Humason personally made the advances to Hartman upon the guarantee which was made to him by Hartman. Humason was in no way bound by, or concerned with, the secret arrangement between Hartman and Walker by which Walker shared in the purchase and ownership of the onions. Humason accepted the onions from Hartman and made the advances to him upon his guarantee. The entire transaction was handled as the other transactions had been, as a part of a mutual and current account between Hartman and Humason. It is not contended that any of the findings are without evidentiary support and the findings support the judgment insofar as the $1200 is concerned.

Under the conclusions reached on the main point raised it is unnecessary to consider the further question raised by appellant as to whether the facts and circumstances were sufficient to constitute an accord and satisfaction.

[2] Since the court found, in effect, that he had become obligated for certain freight and brokerage charges on the cars of onions shipped, and that he had entered on his books a charge for his own brokerage on these onions as against Hartman, the respondent Humason argues that the judgment should be modified by adding thereto a provision awarding him $656.27 as against Hartman. While the findings in this regard are not quite complete they do indicate that Humason should have been allowed to recover on his cross-complaint. However, Humason did not appeal from that part of the judgment which denied him any relief on his cross-complaint and the judgment has become final as to that phase of the case.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




## PEOPLE v. GREER.*

Cr. 2420.

District Court of Appeal, First District, Division 2, California.

March 1, 1947.

As Amended March 5, 1947.

Rehearing Denied March 19, 1947.

Hearing Granted March 31, 1947.

**1. Rape ⇐52(1)**

Evidence sustained conviction for statutory rape. Pen.Code, § 261, subd. 1.

**2. Infants ⇐20**

Evidence sustained conviction under statute punishing lewd and lascivious acts against a child under 14 years. Pen.Code, § 288.

**3. Criminal law ⇐1209**

Where there was ample evidence to sustain defendant's conviction for lewd and lascivious acts with a child under 14, wholly apart from evidence relied on to sustain defendant's conviction of statutory rape, defendant was not entitled to reversal of convictions under both charges on ground that double punishment was imposed because evidence was allegedly the same in support of both counts. Pen.Code, § 261, subd. 1; § 288.

**4. Criminal law ⇐1116**

The alleged fact that trial judge denied defendant his constitutional right to offer evidence in support of his pleas of once in jeopardy and former acquittal could not be sustained on appeal, where record did not show an offer of proof of former jeopardy

* Subsequent opinion 184 P.2d 512.

and acquittal, and no transcript reference was supplied.

**5. Criminal law ⇐739(4)**

Generally, former jeopardy is a question of fact and hence should be passed on by the jury, but, in certain circumstances, it may become purely a question of law.

**6. Criminal law ⇐1116**

Jury's failure to return a separate verdict on defendant's pleas of former jeopardy and former acquittal was not ground for reversal, where the record failed to show an offer of proof of former jeopardy and acquittal, and no transcript reference was supplied.

**7. Criminal law ⇐204**

If a defendant does not produce evidence in support of his jeopardy plea, that defense is waived.

**8. Criminal law ⇐775(3), 810**

Alibi instruction that defendant was not required to prove by a preponderance of the evidence that he was not present where offenses were committed and alibi instruction that, if satisfied of defendant's guilt beyond a reasonable doubt, it was jury's duty to convict, notwithstanding evidence of alibi, were not conflicting or misleading.

On Petition for Rehearing.

**9. Criminal law ⇐200(7)**

Conviction of defendant, on former trial, for contributing to delinquency of a minor and disagreement of jury on charges of statutory rape and lewd acts against a child under 14 years, did not require granting of defendant's pleas of once in jeopardy and former acquittal in subsequent prosecution for statutory rape and lewd acts against a child under 14 years, though offenses may have been committed at approximately the same time against the same child. Welfare and Institutions Code, § 702; Pen.Code, §§ 261, 288.

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Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Albert Greer was convicted of statutory rape and of lewd and lascivious acts against a child under 14 years, and he appeals.

Judgment affirmed.

Morris Oppenheim, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Vincent J. Mullins, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

The appellant was accused by information in separate counts of violating subdivision 1 of section 261 and section 288 of the Penal Code. He pleaded not guilty, former jeopardy and former acquittal. A verdict of guilty was returned on each count and the appellant was sentenced to serve one year in the county jail on the 261 charge and sentenced to the state prison on the 288 charge. From the judgment of conviction and from the order denying a new trial this appeal was taken.

At the time in question the appellant had been married to the mother of the prosecutrix for about 3 years. They have since been divorced. The prosecutrix was 13 years of age, the daughter of appellant's wife by her former marriage. The appellant, his wife and step-daughter resided together in San Francisco. Appellant was the driver of a motor truck hauling freight between San Francisco and San Luis Obispo.

Offenses in violation of both sections were alleged to have been committed on the same occasion on November 1, 1945, about noontime. According to the prosecutrix there had been about eight similar occurrences between the latter part of August, 1945, and November 1, all in the home and while the girl's mother was out shopping.

The prosecutrix said nothing to her mother until the day before Thanksgiving. She had, however, confided in three other persons. One of them was a woman friend of her mother's and her first disclosure to her was between the middle and end of September after the third or fourth occurrence. It was she who finally prevailed on the girl

to tell her mother, and she was with her when she did so. The reason given by the prosecutrix for not immediately complaining to her mother was that she was in fear of her life as the appellant had threatened on the first occurrence and several times thereafter to kill her if she told, and on one occasion after the third or fourth occurrence he had shown her a pistol. The delay of the girl in making complaint to her mother, while at the same time taking the other three persons into her confidence, is one of the circumstances on which appellant bases his argument that the girl's story is inherently improbable and unbelievable. One of the persons in whom she confided was a nun, another a priest, and what she told him was in the confessional according to the girl's testimony.

[1] The testimony of the prosecutrix is attacked as incredible for other reasons. Three physicians testified in the case, two on the side of the people and one for the defense. The first, a woman doctor connected with the Juvenile Court, examined the girl a day or so after Thanksgiving. The second, the family doctor, had examined the girl in February 1945, some months before the period in question and again on November 22 the day on which the mother was told. He testified as to a changed condition on the second examination, which might or might not have been caused by the 261 offense. The third doctor, who testified for the defense, did not examine the girl but testified in answer to hypothetical questions with respect to the possibilities of the case. It is sufficient to say, and fair to say, that from the testimony of all three doctors the jury might have concluded that the 261 offense could not have been committed. There was really no conflict in the medical testimony. The doctor first referred to testified that the condition she found was rarely found where there had been as many as eight or nine such occurrences. The doctor who testified for the defense (who was extremely fair and candid in his answers) characterized the said condition, given to him in the hypothetical questions, as "quite rare," but both of them said that such condition was still possible, that is, it could exist even after such occurrences. The family doctor was not asked his opinion on this, as were the other two. From the testimony of the three doctors, and from that of the prosecutrix, the jury might have concluded either that the 261 offense had been committed within the meaning of the second sentence of section 263 or that it could not have been.

[2] The only testimony respecting the 288 offense was that given by the girl, but it was sufficient to support the verdict. From her testimony the jury could have drawn the inference that section 288 was violated either before, after, or at the same time as, the 261 offense.

The appellant, when confronted by his wife with the girl's accusation, denied any improper conduct whatever, and likewise denied it on the stand.

In addition to such denials the appellant claimed that on the day in question, his wife had been in the home during all the time when he and the prosecutrix were there; that he had gone out for a short time to get a washing machine which a friend of his had helped him bring home; that his wife was at home when it was set up and after setting it up he received a call from his employer requiring him to leave on another trip down the coast on his truck, whereupon he left the house in the company of his wife, rode with her part way in town and when they parted he went directly to his place of employment where he reported for work at 12:20, where he stayed until he left town on his truck for San Luis Obispo a little before 2 p. m. and was in Gilroy by 3:30 p. m. Appellant's account of that day's happenings, if believed, would have eliminated all opportunity for the misconduct with which he was charged. Appellant's wife testified that she did not go in town with her husband; that she attended a luncheon that day with the woman friend already mentioned, and on returning therefrom in the afternoon found appellant at home. She testified that it was after she returned that he received the call from the office and that he then left to report for work. The friend who drove him home with the washing machine testified to the occurrence, and to the approximate time of day when he was with appellant, but on cross-examination he was unable to say

whether it was on November 1 or on some other day. The prosecution produced the auditor of the motor transport company with office records which showed that appellant's truck was not cleared or ready to leave San Francisco before 3 p. m. This testimony, if believed, was of course inconsistent with appellant's assertion that he had left San Francisco about 2 or was in Gilroy at 3:30 and consistent with his presence at home—where the prosecutrix said he was—around noontime.

Motive is brought into the case by appellant's testimony respecting his wife, her woman friend, and the girl. He testified that he had reprimanded his step-daughter on several occasions, had disciplined her by prohibiting her going to shows for some days as a penalty for some infraction, and that she had said a number of times that she would get even with him. This was borne out to some extent by the girl's own testimony although she said she never resented her step-father's discipline when she deserved it.

In the information two prior convictions were charged, which appellant admitted. They were for violations of the National Motor Vehicle Theft Act, 18 U.S.C.A. § 408. Appellant testified that his wife never knew of this record until August 1945; that when she learned of it she called him a "jailbird," threatened to divorce him, and that her whole attitude toward him changed.

Appellant claimed that he had had words with his wife's woman friend; had ordered her not to come to the house, in short, there was extremely bad feeling between them. The lady in question admitted having called him a "beast" over the telephone. Appellant testified that she used a stronger epithet. So there may be said to be corroboration of the appellant on practically all this testimony touching motive. It was the theory of the prosecution that appellant's attitude toward his wife's friend was based on a suspicion that the prosecutrix had confided in her.

All four features of the case (1) whether or not the offense was committed; (2) delay in complaint; (3) alibi, and (4) motive, presented questions of fact for the jury. There unquestionably was a long delay in the complaint to the mother. From August 25 to Thanksgiving was a period of three months and the evidence shows that there were several occurrences after the prosecutrix spoke to the three persons. The explanation that the girl's delay in complaining was because she was in fear of her life was one which the jury could have accepted or rejected; it was purely a jury question.

The physical and medical facts likewise presented questions of fact. The medical testimony showed a rare case, according to medical treatises and according to the doctors' own professional experience, but not an impossible one. Both doctors who were questioned on the subject gave as their opinion that the 261 offense could have been committed. (In this connection see People v. Gallagher, 108 Cal.App. 128, 130, 291 P. 626). There was no medical question connected with the 288 offense.

The testimony addressed to the defense of alibi was purely a fact question, and from what has been said, with the appellant's witness not at all certain as to the day, and the representative of appellant's employer corroborating the appellant only to the extent that he departed that day but several hours after appellant said he departed, does not add up to a very strong case on its alibi side.

Under the heading that the evidence is insufficient to justify the verdict the appellant has cited several cases where convictions were reversed because the evidence was inherently improbable. The facts of each case of course are different, and not much is gained by comparing them. The case of People v. Fremont, 47 Cal.App.2d 341, 117 P.2d 891, 895, cited by the respondent contains a good discussion of the rule applying where it is claimed that the evidence is "so palpably false and incredible that it cannot afford a basis for the verdict." That case quotes from 8 Cal.Jur. 590, section 582, a full statement of the rule including this: "Nor is testimony inherently improbable merely because it is unusual or out of the ordinary" which applies to this case. The case is authority, also on the point that where the prosecution is under subdivision 1 of section 261 the failure

of the prosecutrix to make complaint has little weight or relevancy, although it may be considered by the jury in connection with the credibility of the witness, the rule in that respect being predicated on cases where force and violence are charged.

The appellant was accused of violating subd. 1 of section 261 and section 288 of the Penal Code.

[3] The appellant's three following points may be considered more or less together. The first is that double punishment was imposed by the sentences in that the same evidence was introduced in support of both counts. Section 288 deals with lewd acts "including any of the acts constituting other crimes provided for in part one" of the Penal Code. From this language it is argued that statutory rape is an "included offense" within section 288 and therefore that "a conviction or acquittal of one bars a prosecution for the other regardless of whether it be the lesser or the greater, citing People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L.R.A. 578, 92 Am.St.Rep. 81; People v. Defoor, 100 Cal. 150, 34 P. 642, and People v. Stephens, 79 Cal. 428, 21 P. 856, 4 L.R.A. 845. Those three cases deal with "included offenses" in the sense long known to the criminal law and exemplified by the three cases themselves. Section 288 does not, however, use the word "including" in that sense. This is clear from a number of recent decisions. The present language of section 288 simply means that in some circumstances a person may be prosecuted under that section for acts which are, at the same time, offenses under other sections dealing with sex crimes.

In People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939, 941 the defendant, as in this case, was accused of violating both sections 261 and 288. He was found guilty of both offenses committed on the same occasion. It was claimed that the 288 offense "became merged in the rape charge, for which reason appellant could not be punished under the provisions of section 288 * * *," which is the claim now made by appellant. The court in the O'Donnell case held otherwise and cited a number of authorities, all of which apply to the pending case. See, also, People v. Stangler, 18 Cal.2d 688, 695, 696, 117 P.2d 321; People v. Amick, 20 Cal. 2d 247, 125 P.2d 25; People v. Kearney, 20 Cal.2d 435, 126 P.2d 612; Rodriguez v. Superior Court, 27 Cal.2d 500, 165 P.2d 1; and cases there cited; People v. Bush, 56 Cal.App.2d 877, 133 P.2d 870; People v. Paris, 59 Cal.App.2d 699, 139 P.2d 671; People v. Pollock, 61 Cal.App.2d 213, 142 P.2d 328. In the case at bar there is ample evidence (without detailing it) to sustain the conviction under section 288, wholly apart from that relied on to sustain the conviction under section 261. In any event it may safely be said that under the evidence the jury might have concluded that the 288 offense was committed before, or after, or at the same time as, the 261 offense (see People v. Paris, supra, 59 Cal.App.2d 699, 702, 139 P.2d 671).

[4] Second: the appellant complains that the trial judge denied him "his constitutional right to due process of law in refusing to permit him to offer any evidence in support of his pleas of once in jeopardy and former aquittal" and refers to a "statement of certain oral proceedings settled by the trial judge", supposed to show an offer of proof of former jeopardy and acquittal. We fail to find this in the record and the fact that no transcript reference is supplied, indicates that it is not therein.

An appellate court cannot be expected to reverse when the appellant does not show in the record that which was before the trial court. In People v. Russo, 85 Cal.App. 672, 674, 259 P. 1020 the court said: "Appellant has not incorporated this matter in the record, nor even stated its substance, and consequently we must assume that the ruling complained of was correct."

It does not appear that after the court had indicated that the evidence would not be received any formal offer of proof was made.

What was said in People v. Harris, 169 Cal. 53, 64, 145 P. 520, 524, is in point: "Council in this case, if he deemed the matter of sufficient importance, should have made a formal statement or offer of what he intended to prove. Such a proceeding is in harmony with the rule governing appeals that error warranting a reversal must affirmatively appear in the record and to

also permit this court to determine whether a substantial right of a defendant has been prejudiced by a ruling assigned. People v. Brotherton, 47 Cal. 388; People v. Brent, 11 Cal.App. 674, 106 P. 110." See, also, People v. Babcock, 160 Cal. 537, 543, 117 P. 549; People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. McGann, 194 Cal. 688, 694, 230 P. 169; People v. Erno, 195 Cal. 272, 280, 232 P. 710; People v. Heape, 72 Cal.App. 226, 233, 237 P. 66; People v. McDonald, 110 Cal.App. 183, 187, 293 P. 883; People v. Owens, 11 Cal.App.2d 724, 727, 54 P.2d 728; People v. Ratten, 39 Cal.App. 2d 267, 270-271, 102 P.2d 1097; People v. Brown, 43 Cal.App.2d 430, 433, 110 P.2d 1059. Counsel is frank in saying that no such statement or offer was made, for in the closing brief he says, "Moreover, the offer of proof was in general terms, and no objection was made either by the district attorney or the trial judge as to its sufficiency. The latter merely stated that she would not permit *any* evidence to be offered in support of the pleas. She could not know in advance from the offer what that evidence would be * * * There is absolutely nothing to show upon what facts appellant would have relied in support of the pleas,—this for the good and sufficient reason that he was cut off in limine by the refusal of the trial court to hear *any* evidence as to these defenses."

We are not told even now how the claimed former jeopardy or acquittal arose. These are important defenses and if they would have cleared the defendant in this case they should have been presented to the trial court in such a way that a reviewing court could say whether they were meritorious or not.

Third: in addition to pleading not guilty appellant pleaded former jeopardy and former acquittal to each count. There was a failure to return a separate verdict on these two pleas. The appellant contends that the judgment must be reversed because of such failure, citing People v. Kinsey, 51 Cal. 278; People v. Helbing, 59 Cal. 567; People v. Fuqua, 61 Cal. 377; People v. Hamberg, 84 Cal. 468, 24 P. 298; People v. Tucker, 115 Cal. 337, 47 P. 111, and Ex Parte King, 10 Cal.App. 282, 101 P. 810, all of which hold that such failure is reversible error. However the case of People v. Frank, 75 Cal. App. 74, 81, 82, 241 P. 924, 927, after citing all six cases, says that "Since the above cases were decided, there have been some decisions * * * which, while not directly overruling these cases, or for that matter even referring to them, appear to enunciate a somewhat different rule. * * * From these later decisions, we question whether the strict rule invoked in the earlier cases above referred to can now be considered the law in this state." In that case the failure to make a separate finding on the jeopardy plea was held not prejudicial. A petition for hearing was denied by the Supreme Court.

In People v. Grace, 88 Cal.App. 222, 232, 263 P. 306, where, likewise, the Supreme Court denied a hearing, there was a similar holding.

[5] While, generally speaking, former jeopardy is a question of fact, and hence should be passed on by the jury, in certain circumstances it may become purely a question of law. People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Cummings, 123 Cal. 269, 55 P. 898; People v. Newell, 192 Cal. 659, 221 P. 622; People v. Wilkison, 30 Cal.App. 473, 477, 158 P. 1067; People v. McNeer, 8 Cal.App.2d 676, 683, 47 P.2d 813.

[6, 7] As appears from the discussion of the preceding point we have no means of knowing from the record the grounds on which the appellant relied under his special pleas. From what has been quoted from People v. Frank, supra, it is clear that the failure to return separate verdicts on these special pleas is not necessarily error. In the absence of a showing now of what facts or circumstances were relied on we cannot assume that the court erred. Under the settled rule (see People v. Newell, supra, 192 Cal. 659, 221 P. 662), if a defendant does not produce evidence in support of his jeopardy plea that defense is waived. In the state of this record we must conclude that the special defenses were not pressed or followed through.

[8] The appellant's final point is that the instructions were conflicting, misleading and erroneous on the subject of alibi. One of them reads as follows: "I instruct you

that the defendant is not required to prove by a preponderance of the evidence that he was not present where the offense is alleged to have been committed, but that he is entitled to an acquittal if the testimony tends to establish an alibi raising a doubt in your minds that he was present at the place at which the crime charged is alleged to have been committed."

The complaint is that whatever beneficial effect that instruction had was nullified by the following:

"I instruct you that the evidence of the defendant establishing an alibi tending to show that the defendant was not present at the actual place where the offense or offenses charged in the information were supposed to have been committed, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to the guilt of the defendant. However, if you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt of the offense or offenses stated in the information, it is your duty to convict the defendant notwithstanding such evidence of an alibi."

Appellant's objection is to the last sentence of the last instruction; namely, that that instruction "permitted the jury to disregard the evidence tending to prove an alibi, if they were satisfied of the guilt of the accused from the *other* evidence."

The first instruction told the jury that the defendant was not required to prove his absence, but sufficient if the testimony raised a sufficient doubt as to his presence. The second told them that the defendant's evidence as to absence should be weighed "as any other fact established" and that it "might be sufficient to create a reasonable doubt" as to his guilt. When read together these two instructions thus far cannot be said to be objectionable. The addition of the sentence opening with "However" was cautionary, as we see it, telling the jury that if from *all* the evidence (not from the *other* evidence) they were satisfied of defendant's guilt they should not permit the alibi evidence to deter them from finding a verdict of guilty. It is self-evident that to become convinced of guilt they must find he was present, not absent, and the language in question simply sold the jury that if they found guilt they should discard the alibi evidence. We do not find the two instructions conflicting or misleading.

In connection with the language that the defendant's evidence respecting alibi "should be weighed as any other fact established" it might be noted that the jury was told in two other separate instructions that the defendant's *testimony was to be weighed in the same manner and measured according to the same standards as the testimony of any other witness.*

No authority is cited by appellant holding that an instruction in the language now criticized is erroneous. His authorities are simply to the point that the giving of a correct instruction does not repair or offset the harm resulting from others which are erroneous.

We find no error whatever in the record.

The judgment and order denying a new trial are, and each of them is, affirmed.

NOURSE, P. J., and DOOLING, J., concur.

On Petition for Rehearing.

PER CURIAM.

[9] The petition for rehearing supplies a tender of proof admittedly missing from the record on appeal, showing that appellant at the second trial offered to prove that at the first trial he was convicted of a violation of section 702, Welfare and Institutions Code, and that the jury disagreed as to the alleged violations of sections 261 and 288 Penal Code, which tender the court rejected; that appellant then moved for a dismissal "on the ground that, because of said former trial and verdict and disagreement, defendant had been acquitted and had been in jeopardy" which motion was denied. Treating the record now submitted as part of the original record, still the trial court did not err in rejecting the tender and denying the motion to dismiss, for the 702 offense was neither identical with, nor included within, either the 261 or the 288 offenses although it may have been committed at approximately the same time as they were. People v. Bevans,

19 Cal.App.2d 288, 65 P.2d 92; People v. Tenner, 67 Cal.App.2d 360, 154 P.2d 9; People v. Lett, 69 Cal.App.2d 665, 160 P.2d 112; see also cases cited in opinion under heading of double punishment.

The petition is denied.




78 Cal.App.2d 571

## EATON v. QUEEN.

Civ. 13136.

District Court of Appeal, First District, Division 2, California.

March 14, 1947.

**1. Attachment ⇐122(1)**

Complaint and affidavit could be amended before hearing on motion to discharge an attachment. Code Civ.Proc. § 537.

**2. Attachment ⇐5**

An attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. Code Civ.Proc. § 537.

**3. Attachment ⇐8**

In action for damages for breach of contract, fact that the damages are unliquidated is not determinative of whether an attachment will lie, but contract sued on must furnish a standard by which amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof. Code Civ. Proc. § 537.

**4. Attachment ⇐8**

In action for damages, complaint for breach of warranty in sale of tractor to plaintiff showed that damages were readily ascertainable by reference to the contract and that the basis of the computation was reasonable and definite, entitling plaintiff to an attachment. Code Civ.Proc. § 537.

**5. Attachment ⇐5**

The word "direct" as used in statute allowing attachment in action upon contract for direct payment of money is merely surplusage. Code Civ.Proc. § 537.

**6. Attachment ⇐5, 6**

Under statute allowing attachment in action upon contract for direct payment of money, an attachment may be had upon either an express or implied contract, and the essential allegation is that the money sued on is due on contract. Code Civ.Proc. § 537.

**7. Attachment ⇐77, 211**

In establishing the right to an attachment, the pleadings must be considered in their entirety and the complaint must be treated as an affidavit. Code Civ.Proc. § 537.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by William J. Eaton against Paul C. Queen for breach of contract. From an order granting a motion to discharge an attachment, plaintiff appeals.

Order reversed.

Jefferson E. Peyser, of San Francisco, for appellant.

Freed & Freed, Eli Freed, and Emmett F. Gebauer, all of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order granting a motion to discharge an attachment.

The appellant sued for damages for breach of contract. An affidavit and undertaking were filed and a writ was issued and levied.

[1] The respondent promptly moved to discharge the attachment. When the motion came on for hearing an amended complaint and amended affidavit had been filed. That such amendments before hearing are permissible (Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 507, 229 P. 331) is conceded. Accordingly, the only pleading with which we are concerned is the amended complaint which is in three counts.

The first count (upon which, alone, the appellant relies to support the attachment) alleges that a sale was made by respondent to appellant of a used tractor for the price of $6,418.75 and a used power unit for $578. and the full price was paid. It alleges that at and prior to the sale respondent warranted that the equipment would give service equivalent to new equipment of the same type for a period of 60 days after delivery, and that *if it did not do so respondent would pay appellant the reasonable value of repairs required to place the equipment in a condition equivalent to new condition.* It then alleges that the equipment did not do so, but that within the 60 days it broke down and required repairs to put it in operating condition. It then alleges: "That thereupon plaintiff demanded that defendant pay to plaintiff the reasonable value of the repairs required to place said machines * * * in new condition but that defendant refused; *that by reason of the failure of the machines to do the work for which they were intended, plaintiff was necessarily required to and did expend the sum of $4,474.69 in repairs, which sum was and is the reasonable value of said repairs* to place the said machines in good operating condition; that plaintiff has demanded of defendant the repayment of said sum but that defendant has refused to pay the same or any part thereof to plaintiff and *the whole thereof is now due, owing and unpaid from defendant to plaintiff.* That by reason of said premises plaintiff has been damaged, and *defendant is indebted to plaintiff in the sum of $4,474.69.*" (Emphasis added.)

The second count repeats the allegations of the first and alleges that the warranty was required by an O.P.A. regulation. The third count is simply for damages for breach of warranty.

In the amended affidavit the plaintiff deposes that the defendant is indebted to him in the sum of $4,474.69, "over and above all legal setoffs or counterclaims, or the amount claimed as damages upon an express or implied contract for the direct payment of money, to-wit: For breach of warranty, and for indebtedness for reasonable value of repairs to items of equipment under warranty, as more fully set forth in the Amended Complaint on file herein which by this reference is made a part hereof * * *."

The order granting the motion recites that the writ was improperly issued because the complaint and amended complaint did not "state an action upon a contract, express or implied, for the direct payment of money."

The question presented for decision is whether or not the allegations of the amended complaint taken in connection with the amended affidavit bring this case within the line of authorities starting with Hathaway v. Davis, 33 Cal. 161 and coming down to Redwood Fibre Products Co. v. Miller Mfg. Co., 61 Cal.App.2d 505, 143 P.2d 389, holding that an attachment is allowable and proper in certain actions for damages for breach of contract.

[2, 3] The latest restatement by the Supreme Court of the rule followed by those cases is found in the case of Force v. Hart, 205 Cal. 670, 673, 272 P. 583, 584, as follows:

"It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; De Leonis v. Etchepare, 120 Cal. 407, 419, 52 P. 718; Hamburger v. Halperm, 28 Cal. App. 317, 152 P. 61; 3 Cal.Jur., p. 423, and cases cited. The fact that the damages are unliquidated is not determinative. Willett & Burr v. Alpert, 181 Cal. 652, 657, 185 P. 976; Hale Bros. v. Milliken, supra, [142 Cal.] at page 140, [75 P. 653]. But the contract sued on must furnish a standard by which the amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof. Dunn v. Mackey, 80 Cal. 104, 108, 22 P. 64. The language of the court in Greenebaum v. Smith, 51 Cal.App. 692, [at page] 694, 197 P. 675, 676, may well be applied to the present case, where it is said: 'This being an action for damages for the breach of an executory contract defendant contends that it

cannot be held to be an action on a contract for the direct payment of money. True, this is not an action for a debt in a technical sense, nor for a certain sum of money specified in the contract, but it is nevertheless an action for the breach of a contract for the direct payment of money, and merely because the amount is uncertain, consisting of damages to be proven at the trial, is no reason why an attachment may not issue where, as here, such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it.'"

[4] An examination of the amended complaint and amended affidavit in the light of the foregoing quotation shows that the damages are readily ascertainable by reference to the contract, and that the basis of their computation is reasonable and definite—the same being the cost of the repairs, $4,474.69, which the appellant pleads he paid. Thus as alleged the contract itself furnishes the "standard by which the amount due may be clearly ascertained."

[5, 6] It has been held in several cases that the word "direct" as used in section 537, Code Civ.Proc. is merely surplusage. McCall v. Superior Court, 1 Cal.2d 527, 539, 36 P.2d 642, 95 A.L.R. 1019; Redwood Fibre Products Co. v. Miller Mfg. Co., supra, 61 Cal.App.2d at page 510, 143 P.2d. It has also been held that "* * * as regards the right to attach, it makes not a particle of difference whether the contract is express or implied * * *." See Simpson v. McCarty, 78 Cal. 175, 179, 20 P. 406, 407, 12 Am.St.Rep. 37, where the words "express or implied" were entirely omitted from the affidavit; see, also, Flagg v. Dare, 107 Cal. 482, 486, 487, 40 P. 804; Hale Bros. v. Milliken, 142 Cal. 134, 138, 75 P. 653; Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 571, 169 P. 238. The essential and material allegation is that the money sued on is due on contract. Donnelly v. Strueven, 63 Cal. 182; Simpson v. McCarty, supra; Hale Bros. v. Milliken, supra.

In Hathaway v. Davis, 33 Cal. 161, supra, an attachment was held proper in an action on a bond on appeal although the amount to be paid would have to be ascertained by proof in court. There the court said, "There is certainly no reason why an attachment should be allowed in an action upon a promissory note, which is not equally persuasive in the present case. The plaintiff can swear to the amount due with equal accuracy, and his right to recover is as clear, and his claim upon the law for the advantages of this remedy no less reasonable and just." The authority of that case has never been questioned.

The situation is not essentially different from that in Donnelly v. Strueven, supra, where the action was on a contract whereby the plaintiffs agreed to sell, and the defendant to buy, hides. The defendant refused to receive and pay for the hides and the plaintiff sued for damages and attached. It is obvious that in such circumstances the plaintiff would have to prove the amount of his damages. In commenting on that case on the point of the claimed uncertainty of amount, the court in Dunn v. Mackey, 80 Cal. 104, 108, 22 P. 64, 65, said, "It is true that the question of uncertainty as to the amount of the debt was not directly determined, but it existed there as clearly as in the case before us, and it was held that the attachment was properly issued." In the same case the court said, "This is as easily done as it would be to prove what the services were worth, in an action on an implied contract for work done or upon an express contract to pay what the services were reasonably worth; and, certainly, such contracts would uphold an attachment."

MacDonald v. Crawford, 106 Cal.App. 193, 288 P. 1088 is substantially the same case on its facts as Dunn v. Mackey, supra, and follows it.

The situation is not essentially different from that in Flagg v. Dare, supra, where the plaintiff purchased from defendants 40 shares of bank stock for $5000, which defendants agreed to repurchase at not less than the same price on 60 days' notice. Plaintiff desired to resell the stock and gave the defendants notice, but they refused to perform. Plaintiff tendered the stock into court and sued for $5000 and interest less $125 which he had received as dividends. An attachment was upheld.

The appellant's chief reliance is on the case of Redwood Fibre Products Co. v. Miller Mfg. Co., supra, an action on an express warranty which was a part of the sale by defendant to plaintiff of certain machinery. It was alleged that if the machinery did not do the work which it was warranted to do, the seller would return to the buyer the whole purchase price and the suit was brought to recover such price. The only difference between that case and this is that here it is alleged that the seller promised to repay to the buyer not the whole purchase price, but what the buyer would have to expend to put the machinery into the condition to do the work as warranted. There is no distinction in principle between the two cases. There the trial court discharged the attachment and its order was reversed. That case is in line with the numerous cases already cited, and on the authority of all of them this order must be reversed.

The respondent's main reliance is on the case of Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976, but that case is just as inapplicable here as it was to the Redwood Fibre case where, also, it was relied on. In distinguishing it the court in the latter case said, 61 Cal.App.2d at page 512, 143 P.2d at page 392: "In support of its main contention that plaintiff was not entitled to an attachment defendant relies largely on the case of Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976, 978, but an examination of the opinion in that case shows that the contract there sued upon was essentially different in its terms from the one here pleaded in that there the contract contained no express promise on the part of the vendor to repay the purchase price or to pay any other sum of money." Furthermore, the distinction appears on the face of the opinion in the Alpert case, where the six grounds of the motion to discharge the attachment are set out. On page 655 of 181 Cal., on page 977 of 185 P., the fifth ground is quoted: "That the action is for damages for alleged breach of contract, and that the *damages are unliquidated, 'and cannot be ascertained with reasonable certainty from an inspection of the complaint, or the affidavit upon which said alleged illegal attachment is based* * * *.'" (Emphasis added.)

In the instant case, as already appears, the damages claimed *can* be ascertained with reasonable certainty from an inspection of the complaint and affidavit.

[7] The respondent invokes the rule that in establishing the right to an attachment the pleadings must be considered in their entirety and the complaint must be treated as an affidavit. That, of course, is true, but this case is not at all like San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 P. 82, cited by respondent, where the action was based on deceit and where the plaintiff in one count sued for money had and received and sought an attachment. It was held that the action was essentially ex delicto, and at page 554 of 211 Cal., at page 83 of 296 P., it was said "* * * by the terms of that contract the defendant never bound himself to repay to the plaintiff the amount of its expenditures [citation]. Therefore it was not entitled to a writ of attachment." In the case at bar a promise to repay *is* alleged. There is nothing about the instant case which savors at all of an action ex delicto. All three counts are clearly based on breach of warranty.

Powers v. Freeland, 114 Cal.App. 146, 299 P. 736 also cited by respondent is similar to the Abraham case, supra.

Sturtevant v. K. Hovden Co., 60 Cal. App. 696, 214 P. 244, is not essentially different from the Alpert case, supra, which it follows. Doud v. Jackson, 102 Cal.App. 213, 283 P. 107 is not in point for there there was no more showing in the complaint and affidavit of a promise to pay money to plaintiff then in the Sturtevant case (see discussion at page 220 of 102 Cal.App., at page 109 of 283 P., where 176 Cal. 569, 169 P. 238, supra, is cited). In the instant case the allegation that the respondent promised, as an integral part of his warranty, to repay to appellant whatever it cost to bring the equipment up to the warranted condition distinguishes it from the cases cited by the respondent.

The appellant makes the point that the respondent's notice of motion to discharge the attachment did not specify the ground on which it was based and that it was error, therefore, to grant the motion. The respondent counters by claiming that this point was waived because it was not urged at the hearing. In view of our conclusion on the primary question it is not necessary to decide this secondary one.

The order discharging the attachment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

# CALIFORNIA REPORTER

## 178 PACIFIC REPORTER

SECOND SERIES

29 Cal.2d 754

### PEOPLE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 17342.

Supreme Court of California, in Bank.

March 3, 1947.

**1. Prohibition ⇐10(2)**

Where defendant state had interposed defense of sovereign immunity from suit, state was entitled to invoke prohibition to prohibit court from entertaining further proceedings in the action, since such defense presented a jurisdictional question. Code Civ.Proc. § 1102 et seq.

**2. Prohibition ⇐3(5)**

The existence of remedy by appeal in action against state, which interposed defense of sovereign immunity from suit, did not preclude state from maintaining prohibition proceedings to prohibit further proceedings in the action, in view of importance of question of state's immunity from suit. Code Civ.Proc. § 1102 et seq.

**3. Prohibition ⇐12**

The fact that peremptory writ might be denied did not preclude court from exercising its constitutional and statutory power to entertain proceedings to prohibit Superior Court from proceeding further in action against the state. Code Civ.Proc. § 1102 et seq.

**4. States ⇐112**

Where state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to statute authorizing suits against state. Pol.Code, § 688; Const. art. 20, § 6.

**5. States ⇐112**

The State of California in operation of State Belt Railroad as a public carrier for hire, but without profit, along five miles of San Francisco waterfront was engaged in a commercial or business enterprise so as to render state liable for negligence in operation of the railroad. Harbors and Navigation Code, §§ 3150-3165; Pol.Code, § 688; Const. art. 20, § 6.

Prohibition by the People against the Superior Court of the City and County of San Francisco and another to prohibit the Superior Court from entertaining further proceedings against the State in an action to recover damages for personal injuries.

Petition for peremptory writ of prohibition denied and the alternative writ discharged.

Prior opinion, 168 P.2d 177.

Robert W. Kenny, Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., for Petitioner.

Emmett R. Burns and Frank W. Prideaux, Jr., both of San Francisco, for respondent.

SHENK, Justice.

This is an application on behalf of the State of California to prohibit the superior court in and for the city and county of San Francisco from entertaining further proceedings as against the state in an action wherein the plaintiff seeks to recover damages for personal injuries. The pending action is entitled "C. V. Pierpont v. Southern Pacific Company, a corporation; State Belt Railroad, State of California, General American Transportation Corporation, a corporation," and others, and is numbered 338296 in the respondent court.

In the amended complaint it is alleged that the State of California "acting in a proprietary capacity," operated, managed

and controlled, along the waterfront in the city and county of San Francisco, the State Belt Railroad, a common carrier for hire in intrastate and interstate commerce; that on May 25, 1944, a railroad tank car leased by the defendant General American Transportation Corporation was conveyed by the defendant Southern Pacific Company to the State Belt Railroad for delivery to W. R. Grace & Co. in San Francisco; that the plaintiff, in the discharge of the duties of his employment, climbed the ladder to the platform on the top of the tank for the purpose of sampling and testing the contents of the tank car; that because of the carelessness of each of the defendants in maintaining the ladder and platform on the tank car in a dangerous and defective condition, the plaintiff was thrown to the ground and suffered the injuries for which he seeks recovery. Rejection of a claim filed with the State Board of Control was also alleged.

The respondent court overruled the demurrer to the amended complaint with leave to answer. By its demurrer the state interposed the legal defense of sovereign immunity. The principal question for determination is whether the state as a sovereign entity may be subjected to liability for the alleged tort.

A preliminary question concerns the propriety of the present proceeding. In the return to the alternative writ it is contended that prohibition is here sought for the purpose of correcting judicial error and that the petitioner should be relegated to the remedy by appeal.

[1-3] The defense of sovereign immunity from suit presents a jurisdictional question. Principality of Monaco v. State of Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282; State of Kansas v. United States, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510. Prohibition may therefore be invoked under the conditions prescribed by section 1102 et seq. of the Code of Civil Procedure. Assuming that there would be a remedy by appeal in the pending action, the importance of the principal question is sufficient to support the present proceeding to the end that the issue speedily be determined. Rescue Army v. Municipal Court, 28 Cal.2d 460, 467, 171 P.2d 8. The fact that the peremptory writ may be denied in no way forecloses the court from exercising its constitutional and statutory power to entertain the proceeding.

The theory of sovereign immunity originated in the fiction that the king can do no wrong. It may be said that the doctrine arose in former times from the practical necessity of enabling the state to exercise its governmental functions unhampered by the demands on the exchequer resulting from the carelessness or mistakes of its officers and agents in the discharge of their official duties. In the words of Story, Agency, 8th Ed., section 319, the government "does not undertake to guarantee to any persons the fidelity of any of its officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." The doctrine has had widespread acceptance as a part of the American common law, and has been deemed to prevail except where it had been departed from by constitutional and statutory law, as interpreted and applied by the courts. See statutes and cases collected in series of articles, vol. 9, Law and Contemporary Problems, p. 179 et seq.; also in article, Limitations on the Doctrine of Governmental Immunity from Suit, 41 Columb.L.Rev. p. 1236.

The general expression of the doctrine of sovereign immunity is that the state may not be sued without its consent. Whittaker v. County of Tuolumne, 96 Cal. 100, 101, 30 P. 1016. Section 6 of article XX of the state Constitution provides that "Suits may be brought against the State in such manner, and in such courts, as shall be directed by law." Const. of 1849, art. XI, § 11, revised 1879. In 1893 (Stats.1893, p. 57) the Legislature enacted a statute providing that "All persons who have, or shall hereafter have, claims on contract or for negligence against the State not allowed by the State Board of Examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the State in any of the Courts of this State of competent jurisdiction, and prosecute the same to final

judgment." The foregoing act preceded section 688 of the Political Code (Stats. 1929, p. 891, as amended), which in turn was superseded by section 16041 et seq. of the Government Code (Stats.1945, p. 511). Section 688, applicable here, provided that any person having a claim "on express contract or for negligence against the State" must present the claim to the State Board of Control in accordance with specified procedure and limitations, but if the claim be not allowed, he was authorized, subject to the conditions contained in the section, "to bring suit against the State on such claim and to prosecute such suit to final judgment."

Prior to the enactment of the statute of 1893, this court was called upon to determine such a question apart from any general statutory consent on the part of the state. Green v. State, 1887, 73 Cal. 29, 11 P. 602, 14 P. 610, involved a canal constructed by a levee commission empowered to straighten the channel of the American River for the protection of the city of Sacramento under an act of 1862. A statute enacted in 1885 authorized the plaintiffs and others to institute actions against the state for damages occasioned by the construction. The principle was approved that when the state authorizes itself to be sued, and there is no statutory or constitutional provision fixing a different liability, its measure of responsibility is to be determined by the same rule as that which determines the liability of one of its own citizens. But the court pointed out that the application of that measure was not to be deemed an admission of liability where the state was acting in a sovereign capacity; that is, where it was engaged in a public work for the common good, or, as it might be said, in a governmental activity, as distinguished from a nonsovereign or commercial enterprise. The construction work there involved was held to be a public work for the common good; and in any event that the state could not be held liable for damage which it was shown was not the natural consequences of the work, but which was remote and could not have been anticipated or expected as the result.

The concept of state liability for tort which the court expressed in the Green case was not entirely new. In 1859, in Western & Atlantic Rail Road Co. v. Carlton, 28 Ga. 180, the question of state liability for negligence in the operation of a railroad was involved. The court said: "When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling. * * * We think, then, that the State engaging in the carrying business, assumes the obligations and liabilities incident to that business when carried on by individuals. * * *" See, also, State Liability for Tort, 30 Harv.L. Rev. 20, and cases there cited.

The petitioner contends that that distinction is not the law of this state in view of subsequently decided cases. Reference is also made to section 400 of the Vehicle Code and similar liability statutes as indicating a policy not to waive immunity from tort liability except where a statute expressly so provides. The later cases will be examined.

In Chapman v. State, 1894, 104 Cal. 690, 693, 38 P. 457, 43 Am.St.Rep. 158, it was said to be well settled that in the absence of a statute voluntarily assuming liability, the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state. The facts there involved occurred prior to the enactment of the act of 1893 (Stats.1893, p. 57), by which state consent to be sued for claims on contract or for negligence was first given. Thirty tons of coal, standing on the wharf in San Francisco which was subject to the jurisdiction and control of the State Harbor Commissioners, had sunk because the wharf gave way due to negligence in failing to maintain it in sound condition. The court pointed out that the loss occurred before the passage of the 1893 act, and held that the constitutional inhibition against making a gift of public money forbade legislative action in creating a liability against the state for any past act of negligence. The question of the prospective effect of the act, that is, whether it was a "statute voluntarily assuming liability."

was left open. The court concluded, however, that a contractual liability existed prior to the 1893 act and that the plaintiff suffered a loss based on the contract right which was recoverable in the action as an additional remedy given by the 1893 act. The judgment entered upon an order sustaining a demurrer to the complaint was reversed on that ground.

A similar situation was presented in Melvin v. State, 1898, 121 Cal. 16, 53 P. 416, where in 1891 the plaintiff was injured by a stand collapsing during the conduct of a state fair. The court rejected the contractual theory as a basis of recovery and followed Chapman v. State, supra, 104 Cal. 690, 38 P. 457, 43 Am.St.Rep. 158, in its refusal to apply the act retroactively in order to create a liability for tort. In the Melvin case it was pointed out that the agency established for the conduct of the state fair existed solely for the purpose of promoting the public interest in the business of agriculture and kindred objects, that it was an agency of the government, and in no sense an organization for pecuniary profit to the state. See, also, Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35.

Denning v. State, 1899, 123 Cal. 316, 55 P. 1000, directly involved the question of prospective operation of the act of 1893 on state liability for tort. There an act of negligence by the Board of State Harbor Commissioners occurred after the passage of the act. However, the court did not take note of the problem left open in the prior cases. It merely applied the language of the decisions in Chapman v. State, supra, 104 Cal. 690, 38 P. 457, 43 Am.St. Rep. 158, and Melvin v. State, supra, 121 Cal. 16, 53 P. 416, as holdings that the statute of 1893 [123 Cal. 316, 55 P. 1001] "did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted." Thus there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort. In the Denning case, however, the question was considered whether in the performance of the plaintiff's duties the state was exercising a business function as distinguished from the discharge of a governmental duty. The court distinguished between governmental and nongovernmental functions of the board, holding that the plaintiff was employed in a distinct branch of the service, viz., the protection against or extinguishment of fires, which even in the case of municipal corporations was uniformly held to be the exercise of a purely governmental function; and that there was just as strong ground for distinguishing between governmental and proprietary functions of the Board of State Harbor Commissioners.

In Welsbach Co. v. State, 206 Cal. 556, 558, 559, 275 P. 436 (an action for refund of taxes paid under protest), it was held that an action on the implied contract was within the act. The court pointed out that prior to 1893, claimants on contract or for injuries due to negligence of state officials or employees were not permitted a recovery against the state in the courts, but were relegated to the uncertain mercies of the Legislature for relief; and that it was doubtless for the purpose of a definite departure from the long held rule of law that the sovereign could not be made a party to actions of any sort against it without its consent, that the Legislature of California, in its wisdom, saw fit to adopt the act of 1893. However, after the adoption of the consent statute the doctrine of sovereign nonliability for tort has been deemed to apply to state governmental agencies in the discharge of official duties. See, also, Walker v. Department of Public Works, 108 Cal.App. 508, 291 P. 907; Rauschan v. State Comp. Ins. Fund, 80 Cal.App. 754, 253 P. 173; Western Assurance Co. of Toronto v. Sacramento & S. J. Drainage Dist., 72 Cal.App. 68, 237 P. 59.

Distinction between governmental operations and those of a proprietary nature was made in The Western Maid, 257 U.S. 419, at page 433, 42 S.Ct. 159, 66 L.Ed. 299, in reference to government liability for negligence committed by a transport vessel. In that case it was said in substance that since the United States had not consented to be sued for torts, it could not be said in a legal sense to have been guilty of a

tort. From this statement the conclusion was drawn by text writers that "If the state or federal government consents to be sued, however, it may be made responsible for torts." Vol. 9. Law and Contemporary Problems, at p. 188. It has also been said that the state enjoys immunity, not because of any inherent perfection, but rather because of a lack of remedy against it. Vol. 9, Law and Contemporary Problems at p. 219.

Exponents of the most extreme application of the doctrine of sovereign immunity hold that the language of a statute giving consent to be sued in contract or tort (although it gives consent to be liable in contract) does not give consent to liability for tort; but that express constitutional or legislative consent must appear before tort liability attaches. This view is expressed in decisions such as Riddoch v. State, 68 Wash. 329, 123 P. 450, 42 L.R.A.,N.S., 251, Ann.Cas.1913E, 1033, where it was held that consent by the state to be sued on a claim imposes no new liability and the immunity of the sovereign is a defense which has not been waived. The Washington court stated that if a distinction existed between state governmental functions and acts considered nongovernmental or commercial, the facts (involving an injury to the plaintiff by the falling of a defective rail from a balcony in the state armory rented for the evening for athletic entertainment), did not warrant the distinction favorably to the plaintiff.

It is of interest to note that prior to 1939 a consent statute of New York included a provision that "in no case shall any liability be implied against the state." Code Civ. Proc. § 264. Smith v. State of New York, 227 N.Y. 405, 125 N.E. 841, 842, 13 A.L.R. 1264. In 1939 the Legislature adopted the New York Court of Claims Act by which the state waived both its immunity from suit and its immunity from liability, and expressly consented to have its liability determined in accordance with the same rules of law as applied in actions against individuals or corporations. Similarly, it is now no longer necessary to seek redress through congressional action for tortious acts committed by agents of the federal government. Effective August, 1946, is the "Federal Tort Claims Act" Tit. IV, Pub. L. 601, ch. 753, 79th Cong. 2d Sess., 28 U.S.C.A. § 921 et seq., which permits suits on tort claims including those for personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.

[4] With the possible exception of Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, which followed Riddoch v. State, supra, 68 Wash. 329, 123 P. 450, 42 L.R.A.,N.S., 251, Ann. Cas.1913E, 1033, the decisions in this state do not foreclose, but seem to favor the proposition that sovereign liability exists for negligence in the state operation of an industrial or business enterprise. Therefore, pursuant to those decisions headed by the case of Green v. State, supra, 73 Cal. 29, 11 P. 602, 14 P. 610, it should be concluded that where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to the consent statute. Insofar as the decision in Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, is not in harmony with the conclusion herein, it is disapproved.

The enactment of liability statutes such as section 400 of the Vehicle Code does not require a different conclusion. That section affords an injured person the right to sue the state (or any of its political subdivisions, etc.) for damages ensuing from the negligence of any officer, agent or employee in the operation of a motor vehicle while acting in the scope of his employment. Section 401 excepts responsibility for acts of members of police and fire departments occurring in the operation of motor vehicles while responding to emergency calls, but not when returning therefrom. Cf. Ed.Code, § 1007, relating to liability of school districts for negligence. It is apparent that the liability expressly consented to by the foregoing provisions of

the Vehicle Code, is that for torts committed in the operation of motor vehicles in the discharge of any duty (with the exception noted), whether of a public and governmental, or a commercial and nongovernmental nature. But it does not follow that prior to the adoption of the Vehicle Code sections and subsequent to the enactment of a consent statute, state liability would not attach for negligence committed in the discharge of a duty connected with a nongovernmental or business enterprise conducted by the state.

The considerations of an asserted subversion of public interests by embarrassments, difficulties and losses, which developed the doctrine of nonliability of the sovereign in former times, are no longer persuasive in relation to an industrial or business enterprise which by itself may be looked to for the discharge of all appropriate demands and expenses growing out of operation.

[5] The State Belt Railroad is operated by the Board of Harbor Commissioners pursuant to sections 3150–3165 of the Harbors and Navigation Code, as a public carrier for hire but without profit along five miles of the waterfront in San Francisco. It serves interstate and intrastate commerce as a connective link between some forty-five wharves, one hundred and seventy-five industrial plants, freight car ferries, and three other interstate rail carriers. Its operations have been described in Maurice v. State, 43 Cal.App.2d 270, 110 P.2d 706; United States v. State of California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; and State of California v. Anglim, 9 Cir., 129 F.2d 455. In those decisions the courts rejected the contention that due to the absence of the profit motive in the operation of the railroad, the state was immune as a sovereign from the application of the statutes there severally involved. There is some support in those cases for the conclusion that the Belt Railroad is a commercial, industrial or business venture distinct from any necessary state governmental function, although it exists for the purpose of facilitating the commerce of the port and no profit is derived therefrom. The fact that the service is conducted for the benefit of commerce and without profit is insufficient to take it out of what otherwise would be an industrial and commercial character. The additional fact that the expense of operation, including damages for negligent operation, is primarily a burden on industry and commerce, and the fact that the business of transportation for hire is usually undertaken by private individuals or corporations and not by government, support the conclusion that the operation of the railroad is not in the exercise of a governmental function, but constitutes a commercial or business enterprise in the negligent operation of which the state may be held liable.

It follows that the respondent court has power to proceed with the pending action as against the petitioner.

The petition for the peremptory writ of prohibition is denied, and the alternative writ is discharged.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, Justice.

Aside from the question as to whether the state is liable for a tort committed in the operation of the Belt Line Railroad, I am of the opinion that prohibition is not an appropriate remedy. Upon that ground I concur in the judgment.

A writ of prohibition may issue only where a lower tribunal acts without or in excess of its jurisdiction, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code of Civ.Proc. §§ 1102, 1103. "It is the universal rule that mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, and that a writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it; or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review to undo what already has been done. This is true both because there has been

no usurpation or abuse of power and because there exist other adequate remedies. Thus, when jurisdiction is clear, an erroneous decision in ruling on the sufficiency of the petition or complaint, or on a motion to dismiss, or on matters of defense, or in rendering judgment, is not ground for a writ of prohibition." 42 Am.Jur. 165, 166; see Lord v. Superior Court, 27 Cal.2d 855, 168 P.2d 14; Howard v. Superior Court, 25 Cal.2d 784, 154 P.2d 849; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 150 P.2d 881; Redlands, etc., School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; 21 Cal.Jur., Prohibition, §§ 4, 9, 10.

In the Redlands School District case, certiorari was denied, the court holding: "Where, as here, the statute does not restrict the power of the court but merely sets up a condition precedent to the establishment of the plaintiff's cause of action, we think the violation of the statutory provision constitutes an error of law rather than excess of jurisdiction." 20 Cal.2d 360, 125 P.2d 497. The court held in Imperial Beverage Co. v. Superior Court, supra, that although a trial court may have erred in granting a second motion to stay proceedings, based on the same state of facts as the first motion, the second order was valid, until revoked, and was not in excess of the jurisdiction of the court. And in Howard v. Superior Court, supra, in a proceeding to review an order of the probate court vacating an allowance of attorney's fees, it was held that the alleged lack of a sufficient affidavit of merits, inadequacy of the showing of mistake, and insufficiency of proposed objections to the allowance of fees, did not affect the court's jurisdiction to act on the motions, but merely indicated the possibility of error in the exercise of jurisdiction. Assuming that the court should have decided that the mistake was due to a negligent failure to ascertain the facts, this court decided, the error could be reviewed only on appeal.

In the present proceedings the trial court has not finally ruled upon the issue as to whether the state, as a sovereign entity, may be subjected to liability for the alleged tort, and, in my opinion, that court retains jurisdiction to rule upon the question. If it rule erroneously, the error may be corrected upon appeal. But an extraordinary writ should not, in the usual case, lie to make certain that a trial court will apply correct legal principles and to allow prohibition would afford the petitioner a means of appealing from an order overruling a demurrer. Furthermore, by overruling the demurrer, the trial court has indicated that it would rule in accordance with the holding of the majority opinion upon the issue of tort liability. But assuming that the trial court would commit error and decline to subject the state to liability, as stated in Ballentine v. Superior Court, 26 Cal.2d 254, 260, 158 P.2d 14, 17, "We cannot presume, on prohibition, that the trial court will commit error. Since there is a lawful way the court can proceed it would be improper to assume that it intends to proceed unlawfully. Prohibition is not available in such circumstances." See Lord v. Superior Court, supra, 27 Cal.2d at page 858, 168 P.2d 14.

This court has said, "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." Abelleira v. District Court of Appeal, supra, 17 Cal.2d at page 291, 109 P.2d at page 948, 132 A.L.R. 715. The cases cited in the majority opinion for the proposition that prohibition is the proper remedy are distinguishable upon the grounds that, in each of them, the court's power was limited by the federal Constitution and the question of whether the defense of sovereign immunity from suits presents a jurisdictional question, in the sense that such suits may be halted by prohibition as that remedy has been restricted by statute, was not involved.

For these reasons, in my opinion, prohibition is not a proper remedy.

78 Cal.App.2d 591

## PEOPLE v. BURDETTE.

Cr. 648.

District Court of Appeal, Fourth District, California.

March 17, 1947.

Hearing Denied April 15, 1947.

1. Rape ⇐51(7)
Robbery ⇐24(3)

In prosecution for robbery and assault with intent to commit rape, establishing defendant's identity as man who committed offense sustained conviction.

2. Criminal law ⇐260(11)

In prosecution for robbery and rape, evidence did not authorize new trial on the ground that the trial judge indicated a doubt as to the defendant's guilt, or that his decision was based upon incidental matters in which he incorrectly referred to the evidence.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Albert Burdette was convicted of assault with intent to commit rape and of robbery, and he appeals.

Affirmed.

Weddell & Petry and Chas. G. Potter, all of San Bernardino, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., of San Francisco, for respondent.

BARNARD, Presiding Judge.

The defendant was charged with assault with intent to commit rape and, in a second count, with robbery. Two prior convictions of felonies were also charged. He pleaded not guilty and denied the prior convictions. A jury having been waived, the court found him guilty on both counts, and further found that the allegations as to the prior convictions were true. Judgment was pronounced sentencing him to imprisonment on each count, the two sentences to run concurrently. From that judgment the defendant has appealed.

On the evening of June 28, 1946, Jose Mendoza and a Mrs. Tyler, having gone for a drive in Mendoza's automobile, parked the car in a field at the outskirts of San Bernardino. While they were sitting in the car, around 10 o'clock, a colored man approached and stuck an automatic pistol into Mendoza's side, threatening to shoot if he did not keep still. This man then took Mendoza's wallet from his pocket, took $27 in bills therefrom and returned the wallet. He then put the money in his pocket and flashed a flashlight into his victims' faces. He then went around the car to the side where Mrs. Tyler was sitting and opened the door. He slapped Mrs. Tyler in the face and pulled her, at least partially, from the car. He then, while still keeping the gun in his hand, did a number of things which it is unnecessary to describe, which are the basis of the charge and conviction of assault with intent to commit rape. He then left, telling his victims not to move until he had gone.

[1] Mendoza and Mrs. Tyler went to a hospital and a complaint was then made to the sheriff's office. Early the next morning sheriff's deputies found shoe prints on both sides of the area where this car had been parked. They followed these footprints to the appellant's house, arriving there about six o'clock that morning. The appellant got up from bed to let the officers in. When asked as to what shoes he had worn on the previous evening he gave the officers a pair of shoes which corresponded identically with the shoe prints left around the car and leading to his house. The officers found a shotgun in appellant's house and when he was asked if that was the only gun he owned he replied that it was. Later, the officers found an automatic pistol with two clips of cartridges in a drawer in the appellant's bedroom. The appellant admitted that these belonged to him. An expert testified as to what he had found from a microscopic examination of various stains and particles found on the clothing of the appellant and that of Mrs. Tyler, and of scrapings from underneath appellant's fingernails.

The appellant, who lived near the scene of the crime, denied any connection therewith, explained the footprints by saying he had been hunting rabbits in that area on the previous day, and by way of alibi attempted to prove that he had been asleep

in his home at the time these crimes were committed.

This appeal is based entirely upon the insufficiency of the evidence, it being contended that the evidence is "incredible, improbable and unbelievable" and that it appears that the decision of the trial court was based upon his mistaken recollection as to certain facts.

With respect to the robbery charge, it is argued that the evidence that the appellant was the man who committed that offense is insufficient because Mendoza failed to identify the appellant as the man who committed the robbery. Mendoza testified that he had known and talked with the appellant before this incident occurred. He testified that he was not sure the appellant was the man, stating that after the light was flashed in his eyes he was unable to see the man well. At another time he stated that he did not think the defendant was the man. The difference between Mendoza's testimony at the trial and his earlier statements is quite noticeable and may have seemed significant to the judge in view of the prior acquaintance of this witness with the appellant. However, the appellant was positively identified by Mrs. Tyler as being the man in question and, in addition, there was considerable evidence which supports the same conclusion. Footprints were found at the scene of the crime whch were traced by the officers to the appellant's home. His shoes corresponded with these footprints. An automatic pistol similar to the one used in the crime was found in his bedroom after he had denied having any gun except the shotgun. $34 in bills were found in the appellant's pockets, a part of them being of the denominations taken from Mendoza. There was also expert testimony based upon a microscopic examination of things found on the clothing and person of the appellant, and the clothing of Mrs. Tyler, which seems to have removed any possible doubt from the question of identity. No insufficiency of the evidence appears in this connection, much less any deficiency which would make it incredible or improbable.

It is further argued that there is no evidence that an attempt was made to commit rape on this occasion. It is unnecessary to set forth the full facts here. This contention is based upon the possibility that an inference could be drawn to the effect that the assailant on this occasion intended to secure sexual satisfaction by a means other than rape. If it be assumed that such an inference is possible the evidence, as a whole, amply justifies another inference which supports the finding and judgment in this connection. The evidence is fairly susceptible of an inference that the assailant attempted to commit rape and that he was prevented from executing his intent by an agency other than his victim, and by something which had gotten beyond his own control.

[2] It is argued that the judge misunderstood and misconstrued the facts because he referred to certain testimony of Mendoza at the preliminary hearing; because he said a certain statement was made by the appellant's mother when it was actually made by the appellant's wife; because he thought there was a conflict between the appellant's testimony and that of his nephew who was put on to support his claim of an alibi; because he referred to the testimony of the expert witness as connecting the appellant with the crime; and because he stated the appellant's home was within a short distance of the scene of the crime. It is argued that the court was mistaken in some of these facts, that the testimony of Mendoza at the trial should govern, that there was no conflict between the testimony of the appellant and his nephew, and that there was no testimony that the scene of the crime and the appellant's home were only a short distance apart since the testimony showed they were at least three-quarters of a mile apart. While in his oral decision the trial judge made one or two slightly incorrect statements, they are entirely immaterial on any question raised on this appeal. There was a real conflict between the testimony of the appellant and that of his nephew, but that fact is of relatively small importance in view of the ample evidence as to the identity of the appellant. The trend of the judge's statement was to the effect that he would be inclined to find the defendant not guilty if he were considering the testimony of Mendoza alone, but that he found it impossible to do so in view of the other testimony which had been

produced. There is nothing in the judge's statement which in any way indicates that he had any doubt as to the guilt of the appellant, or which in any way indicates that his decision was based upon or controlled by any of the two or three incidental matters in which he incorrectly referred to the evidence.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




78 Cal.App.2d 609

**TIMM et al. v. BROWN et al.**

**Civ. 7294.**

**Sac. 5789.**

District Court of Appeal, Third District, California.

March 19, 1947.

**1. Mines and minerals ⇐70(6)**
**Quieting title ⇐34(5)**

Complaint alleging ownership of patented mining claim, the execution of a written lease calling for a specified rental, assignment of lease to defendant and failure to pay rental, and alleging in another count that various defendants claimed some interest in the property which plaintiff owned stated valid causes of action for unpaid rental and to quiet title to mining property.

**2. Mines and minerals ⇐70(6)**

Where plaintiffs in writing leased their mine to defendants, subsequent agreement, assented to by plaintiffs, for the organization of a corporation and sale of stock for sole benefit of lessees as a means of exercising their option to purchase mine had no application to terms of lease or obligation of lessees to pay rent, and alleged failure of plaintiffs to comply with their alleged obligations under agreement did not bar them from maintaining an action for unpaid rent.

**3. Mines and minerals ⇐70(6)**

Agreement of lessors of mine, independent of lease, to proceed diligently to clear title to mine and giving lessee authority to do so at cost of lessor if lessor failed to use diligence did not constitute a condition precedent to the maintenance of an action on lease for stipulated rental or a suit to quiet title against lessees.

**4. Pleading ⇐403(2)**

The omission of a necessary allegation of the complaint is cured by act of defendant in pleading such matter as a defense and by attaching instrument to which allegation related to answer as an exhibit.

**5. Evidence ⇐222(2)**

In action for rent under a written lease, oral statement of assignee of lessees that he was going to live up to terms of lease and continue payments was admissible in view of fact that statement did not alter provisions of written lease, that defendant had previously acknowledged in writing that he was so obligated, and that he was in possession and had previously paid the rental in accordance with terms of lease.

**6. Appeal and error ⇐1050(1)**

The admission of an incompetent statement is harmless where it is merely cumulative.

**7. Mines and minerals ⇐64**

Assignee of mining lease became liable for stipulated rental of mining property while he retained possession and control of mine.

**8. Mines and minerals ⇐64**

Where assignee of a mining lease notified lessor in writing that he was the sole lessee, assignee thereby accepted terms of lease and responsibility for payment of rent.

**9. Landlord and tenant ⇐79(1)**

The assignment of a lease, in the absence of stipulations to the contrary, carries with it the obligations of the covenants contained therein, running with the land, and an assignee of a lessee stands in lessee's shoes and becomes liable for payment of stipulated rent so long as assignee remains in possession.

**10. Landlord and tenant ⇐24(1)**

No particular words are necessary to create a lease provided the agreement shows intention of named lessor to dispossess himself and to grant named lessee right to enter and possess designated premises in subordination to lessor's title for a fixed consideration and period of time.

**11. Landlord and tenant ⇐20**

Primarily a lease creates the relationship of landlord and tenant.

**12. Mines and minerals ⇐70(1)**

Instrument designated a "mining lease and option," executed by owner of mining claim, giving certain parties who desired to work the claim immediate possession and an option to purchase, but requiring stipulated monthly payments, without calling them "rents," requiring a "royalty" of a percentage of net returns from sale of products mined "as rental for use and occupancy of property" and providing that such payments could be applied on purchase price if option were exercised could not be construed as lacking a covenant to pay rent and as requiring merely payment of royalties to be applied on purchase price, particularly where option was not exercised, since monthly payments called for were "rentals" notwithstanding their designation as royalties.

See Words and Phrases, Permanent Edition, for all other definitions of "Rental".

**13. Landlord and tenant ⇐182**

An "express agreement to pay rent" is not merely a promise in exact words to pay a given sum as rental, but is any language necessarily importing an undertaking on part of lessee to pay rent.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Agreement to Pay Rent".

**14. Mines and minerals ⇐70(1)**

In mining leases, the terms "rent" and "royalty" are used interchangeably to convey the same meaning.

See Words and Phrases, Permanent Edition, for all other definitions of "Rent" and "Royalty".

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Wilbur E. Timm and another against Clarence L. Brown and others for unpaid rental due under a mining lease and for other relief. From an adverse judgment, named defendant appeals.

Affirmed.

Charles L. Nichols and William R. Law, both of Los Angeles, and Thomas Maul, of Placerville, for appellants.

Henry S. Lyon, of Placerville, and Gerald B. Wallace, of Sacramento, for respondents.

THOMPSON, Justice.

Plaintiffs brought suit for unpaid rental due under the terms of a written lease to defendants of a mining claim in El Dorado County, together with damages for failure to timber the mine as stipulated, and to quiet title in plaintiffs to the mine. The lease was coupled with an option to purchase the mining property, which option was not exercised. The defendant, Clarence L. Brown, as assignee of the lessees, took possession of the property. In the suit to quiet title it was alleged that defendants claimed some interest in the property. The court adopted findings favorable to plaintiffs on the issues of unpaid rent and ownership of the property. Damages for failure to timber the mine were disallowed. Judgment for unpaid rental in the aggregate sum of $1,800, which accrued from and after October 21, 1941, was rendered against the defendant, Brown, the assignee and tenant in possession, and title was quieted in plaintiffs. The lease was not terminated, nor were plaintiffs awarded possession of the premises. From that judgment the defendant, Brown, has appealed.

The appellant contends that the court erred in, (1) overruling a demurrer to the third amended complaint, for the chief reason that the complaint failed to allege that plaintiffs had fulfilled a covenant of the option to purchase the mining property which stipulated that they would "clear the title" to the mining property; (2) overruling appellant's objection to the introduction of evidence on the ground that the

complaint failed to state a cause of action; (3) overruling objections to plaintiffs' attempt to prove an alleged oral agreement of appellant to pay the rent, which contract was made in March, 1941; and (4) denying appellant's motion for a nonsuit. Appellant also complains that other "irregularities of the proceedings" occurred in the course of the trial.

The first count of the third amended complaint alleges that plaintiffs are the owners of the patented mining claim in El Dorado County, known as "Atlanta Mine"; that on November 21, 1939, plaintiffs leased, in writing, the mine to the named defendants, other than Mr. Brown, for the rental of $300 per month, no part of which rental was paid after October 21, 1941; that the lease contained an option for lessees to purchase the mine for $250,000, upon specified terms contained in that instrument, which is attached to the complaint, marked Exhibit "A" and made a part thereof, including a down payment of $25,000 to be made on or before November 22, 1939, which was the day following the execution of the lease and option; that, on November 21, 1939, the lease was assigned by the original lessees to the defendant, Clarence L. Brown, as authorized by the specific terms of the lease, which assignment is attached to the complaint, marked Exhibit "B" and made a part thereof; that the said Brown took immediate possession of the mining property and subsequently agreed to pay plaintiff said rental of $300 per month as stipulated, which payments he regularly made until October 21, 1941, after which date he failed to make further payments. It is also alleged that plaintiffs were damaged in the sum of $1,500 by appellant's failure to keep up and timber the mine as provided by the lease. But the last mentioned issue was determined against plaintiffs, and it is therefore immaterial on this appeal. In the second count of the complaint plaintiffs merely alleged facts constituting a simple suit to quiet title to the mining property.

The defendant, Brown, demurred to the complaint on the grounds that it fails to state a cause of action, and that certain allegations thereof are uncertain and ambiguous. The demurrer was overruled. The other defendants failed to appear in the action, and judgment was not rendered against them.

The defendant, Brown, answered the complaint, admitting the execution and assignment to him of the lease and option, and that he made no further payments of rent after October 21, 1941. He affirmatively alleged that on November 21, 1939, an agreement in writing for the organization of a corporation to be called Atlanta Gold Mining Company was executed, a copy of which is attached to the answer marked Exhibit "A" and made a part thereof, to consummate the purchase of the mining property and take title thereto, through a designated escrow holder.

That agreement was executed by Clarence L. Brown, through his attorney-in-fact, as party of the first part, by the original lessees as parties of the second part, and by plaintiffs as parties of the third part. The agreement does not indicate that plaintiffs were to become stockholders or that they should have any interest in the corporation. It was evidently signed by plaintiffs as a mere acquiescence in the defendants' proposal to exercise their option to buy the property and to hold title thereto in the name of the corporation according to the terms of that agreement. It provides for the issuance of 500,000 shares of capital stock of the par value of $1 each, and the sale of 100,000 shares for cash, subject to authorization therefor by the Corporation Commissioner of California within a designated limited time, and for the delivery and payment to Brown of all proceeds from sales of all stock; that 50% of all stock should go to Brown and the remaining 50% of stock should be divided equally between the four original lessees. The agreement also provides that Brown would pay to the named escrow holder $25,000 in cash, on or before November 22, 1939, to which sum the original lessees had already contributed the sum of $5,000; that plaintiffs would pay to said escrow holder the sum of $10,000, for the evident purpose of defraying the cost of a clear title in the event of a purchase in the name of the corporation, for the agreement provides for execution and delivery to plaintiffs of the note of the corporation for said sum of

$10,000. The agreement provides that in the event a minimum of 100,000 shares of the capital stock of the corporation are not sold for cash within five months from the time of issuance of the Corporation Commissioner's permit therefor, the assignment of the lease and option to the corporation would become void.

[1, 2] The appellant insists that the third amended complaint fails to state a cause of action and that the court therefore erred in overruling his demurrer to that pleading. We are of the opinion the complaint states valid causes of action for unpaid rental under the terms of the lease and to quiet title to the mining property, and that the demurrer was properly overruled. It is contended that the complaint was defective for failure to affirmatively allege that plaintiffs had fulfilled the covenants of the lease on their part; that a separate agreement between the lessees and their assignee to organize a corporation and to sell capital stock thereof to finance their purchase of the property in the exercise of their option, which was acquiesced in by the plaintiffs, contained a covenant on the part of plaintiffs constituting a "condition precedent" to their right to maintain this action. That agreement had no application to the terms of the lease or the obligation to pay rent. It referred only to the organization of a corporation and the sale of stock, for the sole benefit of the lessees, as a means of exercising their option. If its provisions were necessary allegations of the complaint, that omission was cured by appellant's pleading them as defenses and making that instrument, as Exhibit "A", a part of his answer. The provision of that separate agreement, upon which appellant relies, reads: "It is hereby mutually agreed that said third parties [plaintiffs] will proceed diligently to clear the title to said Atlanta Mine and if the same be not done, then and in that event said first party may do so at the cost and expense of the third parties."

[3, 4] The foregoing quoted clause of the independent agreement does not constitute a condition precedent to the maintenance of an action on the lease for payment of stipulated rental or of a suit to quiet title. The obligation to pay rent was clearly fixed by the terms of the lease independently of the option to purchase the property. But, if it was a necessary allegation of the complaint, it was waived and cured by appellant's pleading it as a defense, and by his attaching that instrument to his answer as an exhibit. Kreling v. Kreling, 118 Cal. 413, 420, 50 P. 546, 549; 21 Cal.Jur. 277, sec. 194. In the Kreling case, a demurrer on the grounds that the complaint failed to state facts sufficient to constitute a valid cause of action, and that plaintiff had not performed the covenants on her part, was overruled. The defendant answered, setting up the omitted agreement as a defense. The court said: "A defect in a complaint may be cured by the averments of the answer, even though a demurrer had been erroneously overruled; and we think the defect complained of here, if any such existed, had been thus cured."

That separate agreement, as to the omission of which the appellant complains, does not contain a condition precedent to the right to maintain this suit for unpaid rental or to quiet title to the mining property. It is not claimed that the lessees or their assignee failed to exercise their option to buy the property, or that they failed to finance the proposed purchase by the sale of stock in the corporation, on account of any fault of plaintiffs. The corporation was organized, but it was unable to sell any stock whatever. That project was abandoned. The effort to buy the mine failed. The covenant on the part of plaintiffs, contained in the separate agreement with respect to the organization of the corporation, to "proceed diligently to clear the title," applied only to the lessees and their assignee's option to buy the mining property, which was waived by their failure to exercise that option. The complaint was not defective on account of the omission of that separate agreement, or at all.

[5, 6] The court did not err in admitting evidence, over the objection of appellant, of the oral statement of Mr. Brown that he "was going to live up to the terms of the lease, that he was going to continue with the payments." That statement did not alter the provisions of the written lease. It

constituted a mere acknowledgment of his liability to pay the stipulated rental as assignee of the lease. He had previously acknowledged in writing that he was so obligated by notifying plaintiffs that he was *sole lessee,* which was a recognition of the status of landlord and tenant between himself and the lessors. Moreover, he was actually in possession and had previously paid the rental in accordance with the terms of the lease. Even if that statement was incompetent, which we do not concede, it was harmless because it was merely cumulative. Nor do we find any error in other rulings or proceedings at the trial. It follows that the denial of a motion for nonsuit was also properly made.

[7, 8] The appellant, to whom the lease was immediately assigned, became liable for the stipulated rental of the mining property while he retained possession and control of the mine. The lease was assigned to him by the original lessees November 21, 1939, and he immediately took possession of the property and paid the stipulated rent for a period of nearly two years. The court so determined by its findings. That finding is supported by the evidence. February 7, 1941, appellant notified plaintiffs in writing that he was the sole lessee of the mining property, thereby accepting the terms of the lease and responsibility for payment of rent. Mr. Brown also orally accepted the terms of the lease and responsibility for payment of the rent. Mrs. Timm testified concerning that verbal agreement which was made to plaintiffs soon after February 18, 1941, that: "Mr. Brown said he was going to live up to the terms of the lease, that he was going to continue with the payments, and that he was going to try to start an operation in the property, himself, that he was now in sole possession, and that he was going to operate it."

[9] The rule is well established that the assignment of a lease, in the absence of stipulations to the contrary, carries with it the obligations of the covenants contained therein, running with the land, and that an assignee of a lessee stands in lessee's shoes and become liable for payment of stipulated rent so long as the assignee remains in possession. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann.Cas.1916E, 830; Treff v. Gulko, 214 Cal. 591, 599, 7 P.2d 697; Ellingson v. Walsh, O'Connor & Barneson, 15 Cal.2d 673, 675, 104 P.2d 507; First National Bank v. Aldridge, 33 Cal.App.2d 485, 490, 92 P.2d 674; 15 Cal.Jur. 751, secs. 166–168; 32 Am.Jur. 320, sec. 374; 36 C.J. 373, secs. 1229, 1230.

[10-12] The appellant contends that the lease does not contain a covenant to pay rent for the use of the mining property. He argues that the only payments which that instrument requires the lessees to make are designated as "royalties" which are to apply to the purchase price of the property under the option contained therein. We cannot agree with that construction of the language. The instrument is designated "Mining *Lease* and Option." No particular words are necessary to create a lease, provided the agreement shows the intention of the named lessor to dispossess himself and to grant the named lessee the right to enter and possess the designated premises in subordination to the lessor's title, for a fixed consideration and period of time. (15 Cal.Jur. 615, sec. 20.) Primarily a lease creates the relationship of landlord and tenant. The lease which is involved in this case contemplated immediate possession of the mining claim by the lessees. It was at one assigned to the appellant, Brown, and he took possession and paid the stipulated monthly sums of $300 per month for nearly two years. The instrument does contain an option to buy the mine on specified terms, which was not exercised. But it also provides in great detail for the operation of the mine by the lessees, in consideration of "a royalty of ten per cent" of the net returns from the sales of quartz or minerals, "*as rental* for the use and occupancy of said property." It is true that the lease also provides that "All of such sums *so paid as rental*" may be applied on the purchase price of the mine in the event that the sale is consummated and plaintiffs are fully paid the *total* sum of $250,000, which was not done. The amount of $300 per month is fixed as a minimum payment of rent for each month. The lease provides that "the second parties shall pay to the first parties the sum of $300.00 per month, * * * commencing * * * in no

event less than nine (9) months from the date hereof." Those payments are called "royalties," but that is immaterial. It is apparent that the parties understood the lessees were to pay *as rental* for the mining property not only 10 per cent of the net receipts from quartz and minerals derived therefrom, but also the additional sum of $300 per month beginning not later than August 21, 1940, which is nine months after the date of the lease.

In the case of Samuels v. Ottinger, supra, it is said [169 Cal. 209, 46 P. 639]: "An obligation to pay rent, without an express agreement to that end, arises from the mere occupancy, as tenant, of the premises."

[13] In the present case there was an express agreement of the lessees to pay that minimum sum of $300 per month as rental for the mining property while it was being operated. The appellant, Brown, assumed that liability by accepting the assignment of the lease and by taking and retaining possession of the property. Moreover, he acknowledged in writing by means of the letter previously mentioned, dated February 7, 1941, that he was holding the property as "sole lessee." And he verbally agreed with plaintiffs that "he was going to live up to the terms of the lease, that he was going to continue with the payments." In construing language constituting an "express agreement" to pay rent, it is said at page 212 of 169 Cal., at page 639 of 146 P., Ann.Cas.1916E, 830 of the last cited authority that: "By 'express agreement,' in this connection, is meant, not merely a promise, in exact words, to pay a given sum as rental. Any language necessarily importing an undertaking on the part of the lessee to pay the rent will satisfy the requirement of the rule, for the distinction to which we have referred rests on the nature of the lessee's obligation. If that obligation arises solely from the fact that he occupies the premises as tenant, if, in other words, it is based on the 'privity of estate' alone, the assignee who succeeds to that privity becomes the party to whom the landlord must look."

[14] The use of the word "royalties" in this case was intended to apply to stipulated rental which the lessees agreed to pay for the use of the property. In mining leases the terms of "rent" and "royalty" are frequently used interchangeably. Elsinore Oil Co. v. Signal Oil & Gas Co., 3 Cal.App.2d 570, 573, 40 P.2d 523, 524. In the case last cited it is said in that regard: "It is apparent that the 'rentals' which were to be reduced upon quitclaiming of the land were not the 'bonus' but the 'royalty,' for here, as in the case of a mining lease, *the amounts stipulated to be thus paid as royalties are not the purchase price* of the oil and gas in place, *but are* '"*the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.*" * * * In mining leases, these words "rent" and "royalty" as used interchangeably to convey the same meaning.'" (Italics added.)

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.




78 Cal.App.2d 498

**HUBERT v. HUBERT.**

**Civ. 15509.**

District Court of Appeal, Second District, Division 1, California.

March 11, 1947.

**1. Process ⇐108**

Statute relating to service of process upon defendant with out of state residence, where residence is known, is satisfied so as to give trial court jurisdiction, by mailing in ordinary way without registering letter. Code Civ.Proc. § 413.

**2. Courts ⇐78**

Acts necessary to give jurisdiction to a court, as specified in an act of the Legislature, cannot be added to or limited by rule of court.

**3. Process ⇐108**

The statute authorizing service of process on out of state residents by mailing

does not contemplate actual receipt of envelope containing copy of summons and complaint. Code Civ.Proc. §§ 412, 413, 416.

4. Divorce ⇐78

In husband's action for divorce, court acquired jurisdiction to enter judgment for the husband where summons and complaint were sent to the wife residing in China by ordinary mail instead of registered mail as required by court rule, where latter method of communication was impossible because of the war, notwithstanding the wife did not receive the papers. Code Civ.Proc. §§ 412, 413, 416.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action for divorce by Charles Emil Hubert against Pang Pao Chi Hubert. A default interlocutory judgment of divorce was awarded plaintiff, and thereafter a final divorce judgment was entered. From an order vacating and setting aside the service of summons and complaint, and interlocutory and final judgments of divorce based thereon, plaintiff appeals.

Reversed.

Brinton N. Bowles, of Los Angeles, for appellant.

No appearance for respondent.

DORAN, Justice.

This is an appeal from an order vacating and setting aside the service of summons and complaint, and interlocutory and final judgments of divorce based thereon. The husband, appellant herein, filed a complaint for divorce on November 16, 1942, alleging cruelty and desertion by the respondent wife. According to the appellant's brief, "Appellant is of the Caucasian race, and while serving in the United States Navy in the orient met respondent and married her. Respondent is a Chinese woman, and according to her affidavit appearing in the record, was a resident of Shanghai, China, and had been from 1937 until a few weeks prior to the filing of her motion herein involved". On November 17, 1942, the appellant husband filed the conventional affidavits for publication of summons, affirming that the wife's residence was outside the State of California, the address being given as No. 49 Fook Tien Terrace, Lane 362, Medhurst Road, International Settlement, Shanghai, China. The affidavit further stated that affiant "received a letter from defendant in November of 1941 and she was at that time still living at the above address. The said letter was lost on the U. S. Aircraft Carrier 'WASP' which sank in the Pacific Ocean several months ago, and on which ship affiant was stationed". Thereafter, an order was duly entered directing that service of summons be made "upon the defendant Pang Pao Chi Hubert by publication in the Los Angeles Daily Journal" at least once a week for two months. The court further ordered that "a copy of the summons and complaint in this suit be forthwith deposited in the United States Post Office, postpaid, directed to said defendant at said place of residence", plaintiff's then attorney being appointed to perform that duty; the order specifying that "He shall send said envelope with its contents enclosed as *registered matter*". (Appellant's italics.) On November 25, Attorney George H. Pratt, representing the plaintiff, presented a further affidavit reciting that "on November 24, 1942, he presented for registration * * * a letter containing said Summons and Complaint addressed to the defendant at No. 49 Fook Terrace, Lane 362, Medhurst Road, International Settlement, Shanghai, China; that he was at that time and place informed by the Clerk that no registered mail was being accepted for delivery in Shanghai, China, and the Clerk of said Post Office refused to accept the letter offered by affiant", for which reason affiant asked permission to "mail said letter to said defendant by ordinary mail". An order was thereupon entered permitting the summons and complaint to be sent by ordinary mail, which order was duly complied with. The record further discloses an affidavit of publication in compliance with the original order. Thereafter, on May 7, 1943, a default interlocutory judgment of divorce was awarded the appellant, and on June 13, 1944, a final divorce judgment was entered at the request of plaintiff's attorney.

It further appears that on December 1, 1945, Donald C. Bodwell, as attorney for the defendant, filed a notice of special appearance for the sole purpose of setting aside the alleged service by publication and vacating both interlocutory and final judgments of divorce for the reason that "the copy of the Summons and Complaint was not mailed by registered mail", and that "the court had no jurisdiction over the person of the plaintiff or of the marriage res". Defendant's affidavit filed in support of the motion to quash, denied plaintiff's allegations of cruelty and desertion, and alleged that "at all times from 1937 until the last few weeks, she was in Shanghai, China; that the Japanese army began to take over control of Shanghai, China in 1939 and 1940 and were in complete control from December 1941 until the Japanese capitulation; that a state of war existed between the United States and the Japanese nation during said period of time; that there was no communication by mail between Shanghai, China and the United States during said period of time". Attached thereto was an envelope with the letterhead of plaintiff's attorney, addressed to the defendant, marked "Returned to Sender by Censor", the return postmark being dated December 14, 1942. The affidavit further stated "that affiant (the wife) had no knowledge of the filing or pendency of this action until one week ago, when she was informed in San Francisco by the plaintiff herein, of the action which he had taken". The record further discloses that on December 27, 1945, Judge Harold B. Jeffery, who had heard the original interlocutory divorce, made an order quashing the service of summons and vacating the interlocutory and final judgments of divorce. Plaintiff now appeals from this order. After notice of appeal had been filed, and on June 3, 1946, Donald C. Bodwell, who had previously appeared specially on behalf of the defendant wife and had secured the order appealed from, moved the court "for an order substituting Pang Pao Chi Hubert in Propria Persona in the place and stead of Donald C. Bodwell as attorney of record * * * on the ground that said Donald C. Bodwell desires said substitution". The attorney's affidavit affirmed that "he has not seen the defendant since the date of the submission of defendant's Motion to Quash Service, etc., in the month of December, 1945"; that affiant had not heard directly from the defendant but had heard indirectly from another person in San Francisco asking Bodwell to act as defendant's attorney, but that no arrangements had been made for payment of costs or attorney fees on appeal. This motion was granted on July 11, 1946. The record reveals no further activity by or on behalf of the defendant wife, nor does any respondent's brief appear of record. Appellant's brief thus comments on the respondent's judicial inactivity: "It is interesting to note that since the granting of the motion and within a very short time thereafter, the defendant and respondent sailed for Shanghai, China, and did not do the one thing the granting of the motion herein contemplates, to wit, defend the action or file her counter suit. The purpose of the motion * * * is so that the matter might be heard on its merits, the purposes therefore being defeated".

The basic question on this appeal concerns the validity of the court order permitting appellant to send the copy of summons and complaint to respondent by ordinary mail rather than by registered mail as required by the order of publication and Rule 26 of the Superior Court. Appellant's brief contends that this order, made necessary by the exigencies of war and the refusal of the post office authorities to accept registered mail, is valid; that such order having been complied with, the court acquired jurisdiction to enter the interlocutory and final judgments of divorce. The subsequent order vacating the divorce, from which order this appeal is taken, recites that "the said default and interlocutory and final decrees were rendered against said defendant without service of summons in any manner upon or appearance by her, and * * * that this is a proper case for exercise of the Courts equitable powers".

At the outset it may be noted that Sections 412 and 413 of the Code of Civil Procedure providing for service by publication, make no requirement that the copy of

summons and complaint be sent by registered mail. Section 412 provides for such substituted service "where the person on whom service is to be made resides out of the State", and appellant's affidavit for the order of publication originally issued in this case, sets forth all that is required to invoke the order made. Section 413 provides for the publication of summons in a newspaper "designated as most likely to give notice to the person to be served", with the additional requirement that "where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence". Rule 26 of the Superior Court, however, requires the copy to be sent by registered mail, and pursuant to this rule the original order of publication directed that the attorney "shall send said envelope with its contents enclosed as *registered matter.*" (Italics added.) As hereinbefore stated, appellant's attorney attempted, in good faith, to comply with such requirement but was prevented from so doing by reason of the existence of a state of war, and did comply with the later order directing the use of ordinary mail.

[1-3] The language of Klokke Inv. Co. v. Superior Court in and for Los Angeles County, 39 Cal.App. 717, 719, 179 P. 728, 729, is directly applicable to the present case: "Assuming that the case was one within section 413, [of the] Code of Civil Procedure (where the residence of the defendant is known), the statute was satisfied when the mailing was made as therein required. The acts necessary to give jurisdiction, as specified in an act of the Legislature, cannot be added to or limited by rule of court." See, also, Porter v. Superior Court of Los Angeles County, 30 Cal.App. 608, 159 P. 222. A similar pronouncement is found in Helbush v. Helbush, 209 Cal. 758, 763, 290 P. 18, 21, where the court said: "Rules of court are adopted to facilitate the business of the court and for the convenience of litigants. * * * But 'the acts necessary to give jurisdiction, as specified in an act of the Legislature, cannot be added to or limited by a rule of court' ", quoting from the Klokke case hereinbefore cited. As pointed out in the appellant's brief, "It is obvious from the provisions of Sections 416 and 412 of the Code of Civil Procedure that actual receipt of the envelope containing the copy of summons and complaint is not contemplated, * * * in other words it is not the actual knowledge of the existence of the action but rather a notice of its existence which is required, * * * it means the statutory instrumentality of knowledge; the form and process emanating from the source and served in the manner prescribed by statute". In this connection it may be noted that Section 416 provides that "From the time of the service of the summons and of a copy of the complaint in a civil action, *or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties,* and to have control of all the subsequent proceedings". (Italics added.)

[4] A consideration of the above citations, together with the circumstances leading up to the order which permitted the use of ordinary mail in place of registered mail when the latter method of communication became impossible, leads to the conclusion that, in the discretion of the issuing court, such order was fully justified. Before granting an order for publication of summons, the court in its discretion, may require further proof of a defendant's nonresidence than that contained in the affidavit presented. Porter v. Superior Court of Los Angeles County, 30 Cal.App. 608, 611, 159 P. 222. So likewise, in the situation here presented, it was clearly within the discretion of the judge to recognize the emergency created by war and to authorize the only form of mailing permitted by the post office authorities. As hereinbefore pointed out, sending of the papers by ordinary mail fully complied with the statute. Due proof of mailing and of publication of the summons appear of record. By reason of these facts, the Superior Court then became vested with jurisdiction to hear the case, and to enter the interlocutory and final judgments; hence the order of De-

cember 27, 1945, which purports to set aside the service of summons and to vacate the divorce was unwarranted.

The order appealed from is therefore reversed.

YORK, P. J., and WHITE, J., concur.




78 Cal.App.2d 771

**CONRON v. WILLIAMS.**

**Civ. 3552.**

District Court of Appeal, Fourth District, California.

March 25, 1947.

**Bills and notes ⇐525**

Evidence justified judgment for plaintiff on note on ground that he was holder in due course, for consideration and without knowledge at time of transfer that note was allegedly given to original payee for gambling debts.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action on a promissory note by Calvin H. Conron, Jr., against Frank E. Williams. From an adverse judgment, defendant appeals.

Affirmed.

Waldo R. Bergman, of Bakersfield, for appellant.

Allen B. Campbell, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action on a promissory note for $1,750 dated March 25, 1943, due four months after date, and given by the defendant to one Harry E. Moore. The amended complaint alleged that the note was assigned and delivered by Moore to the plaintiff on June 1, 1943, and that the plaintiff is the lawful owner and holder thereof. The answer admitted the execution and nonpayment of the note, but denied that it was transferred in due course and alleged, as a separate defense, that the plaintiff took it after maturity, without consideration, and with full knowledge that it was given for a gambling debt. The court found in favor of the plaintiff with respect to all allegations of the complaint, and found that all defense allegations in the answer were not true. The court erroneously found that the note was assigned on July 1, 1943, apparently because that date was alleged in the original complaint. Any error in this connection is immaterial since the evidence shows, without conflict, that the note was assigned on or before June 1, 1943, before it was due. Judgment for the plaintiff followed and the defendant has appealed.

The only points raised by the appellant are that the evidence shows that the note was not taken by the respondent in the usual course of business, and that the evidence was sufficient to raise a presumption that the plaintiff had knowledge of the illegal transactions affecting the validity of the note. These contentions are without merit.

The evidence is conflicting as to whether or not the note was given in payment of gambling debts. While the appellant so testified, Moore testified that it was given to cover a $500 check previously cashed by him for the appellant and which was not honored by the bank, $550 previously loaned by him to the appellant, and $700 loaned by him to the appellant at the time the note was given. There was some confirmation of this testimony in that the $700 check given at the time the note was made was deposited by the appellant at a bank and not cashed at Moore's place of business. The court resolved this conflict in favor of the respondent and the appellant does not attack those findings.

Moore and the respondent both testified that this note was assigned as partial payment for professional services rendered by the respondent to Moore. The respondent testified that Moore told him the note was for money he had advanced to the appellant; that the appellant later verified this fact to him; that he talked to the appellant many times before the note became due; that a

year after the note was due the appellant, for the first time, told him that the note had been given in payment of gambling debts; and that this was the first time he had heard of that matter. This evidence is undisputed with the exception that the appellant testified that he had no conversation with the respondent until some months after the note became due, that he found out that the respondent had the note some time in the fall of 1943, and that he then went to see the respondent and told him all about it and told him that he would come in again "after I got straightened out on the deal, and see if I could do something about it."

The judgment is affirmed.

MARKS, and GRIFFIN, JJ., concur.




78 Cal.App.2d 804

**PEOPLE v. DORSEY.**

**Cr. 2000.**

District Court of Appeal, Third District, California.

March 27, 1947.

**Appeal and error ⇐772**

Where defendant filed, in District Court of Appeal his record on appeal from judgment denying his petition for a writ of coram nobis, but failed to file his opening brief on appeal within time prescribed by Rules on Appeal, his motion to review the records per se without filing of any brief would be denied but with permission to file opening brief within thirty days. Rules on Appeal, rules 13, 17.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding by the People of the State of California against Alfred Joe Dorsey. From a judgment denying defendant's petition for a writ of coram nobis, the defendant appealed but failed to file his opening brief on appeal within time prescribed by Rules on Appeal. On motion to review the records per se.

Motion denied.

A. A. Cardozo, of Modesto, for appellant.

Fred N. Howser, Atty. Gen., and Chas. Johnson, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant filed in this court on the 29th day of January, 1947, his record on appeal from a judgment of the Superior Court of Stanislaus County denying appellant's petition for a writ of coram nobis. Appellant having failed to file his opening brief on appeal within the time prescribed by the Rules on Appeal, the Clerk of this court notified him by mail that if his brief was not filed within 30 days after the date of mailing of said notice, said appeal would be dismissed unless good cause was shown for relief. Appellant has now filed in this court what he designates a "Motion to Review the Records per se," wherein he requests that this court review the record on appeal without the filing of any brief on his part, and proposes to submit the records of the trial court in the hearing had on the writ of error coram nobis in lieu of any briefs.

Rule 13 of the Rules on Appeal provides that every appellant shall file an opening brief, and Rule 17 provides that for failure to file such brief the appeal may be dismissed. This court is not disposed to perform for appellant his duty to file his brief nor to search the record to find whether same contains any matters justifying a reversal of the judgment of the trial court.

Accordingly, said motion is denied, but appellant is granted an additional 30 days from and after the date of this order within which to file his said opening brief.

**STOICA et al. v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACH. OPERATORS OF UNITED STATES AND CANADA et al.**

**Civ. 15468.**

District Court of Appeal, Second District.
Division 1, California.
March 13, 1947.
Rehearing Denied April 1, 1947.
Hearing Denied May 8, 1947.

**1. Associations ⇐5**

The constitution, rules, and by-laws of a voluntary unincorporated association constitute a contract between association and members, and members' rights and duties between themselves and in relation to the association, in all matters affecting its internal government and management of its affairs, are measured thereby.

**2. Associations ⇐7**

Member of association must exhaust rights afforded him by association's tribunals before securing redress from the courts, unless the organization has violated its own laws and regulations and arbitrarily violated member's property rights.

**3. Trade unions ⇐9**

Under union's constitution and by-laws revealing intention to provide for appeal by any member aggrieved from any decision, appeal from first order made by international president's representative after taking over local union under emergency clause was available to review president's jurisdiction to declare emergency, so that court had no jurisdiction to interfere when aggrieved members of local union had not exhausted remedies under constitution and by-laws.

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Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by George J. Stoica and others, individually and as members of and representatives of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 44, against the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and others, for injunction and declaratory relief. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Katz, Gallagher & Margolis and Ben Margolis, all of Los Angeles, for appellants.

Bodkin, Breslin and Luddy, of Los Angeles, Matthew M. Levy, of New York City, Sidney Sampson and Michael G. Luddy, both of Los Angeles, for respondents.

YORK, Presiding Justice.

Plaintiffs instituted the instant action individually and as members of Local 44, against defendants, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada (hereinafter referred to as Alliance), its officers and others, seeking injunctive and declaratory relief.

Alliance, an international labor union affiliated with the American Federation of Labor, is composed of a large number of local unions, including Local 44, which is situated in Hollywood and has assets of $70,000 in personal property and closed shop collective bargaining agreements with motion picture producers covering specified types of work. The Alliance, the local, and the members of both are governed by a Constitution and By-Laws, a copy of which is attached to the complaint herein.

The instant litigation arose when defendant Alliance took control of the affairs and property of Local 44 after the existence of an emergency had been declared. The circumstances surrounding the so-called "take-over" are the following:

On March 12, 1945, the set designers, illustrators and decorators, Local 1421 of the Brotherhood of Painters, Decorators and Paperhangers of America, AFL, declared a strike and established picket lines at the motion picture studios where members of Local 44 were employed and with which said Local had collective bargaining agreements. On the same day, defendant Walsh, as international president of Alliance, issued an order to the effect that

the picket lines of Local 1421 were in direct opposition to the best interest of the general membership of I.A.T.S.E. "Therefore instruct your members that they must not in any manner whatsoever violate the Constitution and By-Laws of the International Alliance by refusing to pass through these picket lines or refuse to render service because of them."

These instructions were followed by members of Local 44. However, the motion picture producers demanded of the members of said local that they perform work not covered by local's collective bargaining agreements and which did not fall within its jurisdiction, i. e., work of painters, carpenters and other crafts, the members of which were respecting the picket lines of Local 1421. This resulted in a dispute between Local 44 and its members on the one hand and the motion picture producers on the other as to whether the members of Local 44 should perform work falling outside their regular craft and not covered by their collective bargaining agreements. International president Walsh "purported to settle the dispute * * * by agreeing that the members of said Local 44 should perform all work which they were called upon to perform by the producers regardless of whether said work was covered by their collective bargaining agreements or whether it fell within the jurisdiction of Local 44."

At a regular meeting of the membership of Local 44 on March 27, 1945, a motion was duly made, seconded and carried that the members of Local 44 should not work out of the jurisdiction of their craft. Immediately after said meeting, a special meeting of the executive board of Local 44 was called, whereupon said board and the officers of said local allegedly "without authority and in defiance of the membership, * * * telegraphed the International Alliance requesting that, by reason of the aforesaid motion * * * it immediately declare a state of emergency and place Local 44 under the supervision of the International office."

Pursuant to the emergency clause contained in Article Seven, section 16 of the constitution and by-laws of the Alliance, defendant Walsh, acting as international president, on March 29, 1945 "proceeded to take over said Local and to oust its members of all control in the affairs and over the property of said Local." Thereafter, defendant Roy M. Brewer, as representative of the international president, appointed the defendant officers of Local 44 as the agents of Alliance and took over and conducted the affairs of said local "thereby depriving the membership * * * of all control over its affairs and its property." On April 16, 1945, charges were preferred against certain of the plaintiffs to the effect that they "refused, when requested, to perform work which they were capable of doing and which prior to the strike had been performed by other crafts." A trial committee was then appointed to try such plaintiffs on the aforesaid charges, the complaint herein alleging upon information and belief that said "Trial Committee has been instructed to and will, unless restrained by this court, order the expulsion from the International Alliance and from Local 44 of the said charged plaintiffs."

This is an appeal by plaintiffs from a judgment dismissing their "last amended complaint," after defendants' objection to the introduction of any evidence, on the ground that said complaint did not state facts sufficient to constitute a cause of action, had been sustained without leave to amend, the trial court holding that it appeared on the face of the complaint that plaintiffs had failed to exhaust the remedies afforded them by the constitution, and therefore the court had no jurisdiction of the controversy.

[1] In the case of Bush v. International Alliance, etc., 55 Cal.App.2d 357, 364, 130 P.2d 788, which involved the same constitution now under consideration here, it was stated, quoting from Dingwall v. Amalgamated Ass'n, 4 Cal.App. 565, 569, 88 P. 597 [55 Cal.App.2d 364, 130 P.2d 792]: "'The constitution and rules and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the as-

sociation, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws.' * * * See, also, Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Greenwood v. Building Trades Council, etc. 71 Cal.App. 159, 233 P. 823; Grand Grove of U. A. O. of Druids of California v. [Garibaldi Grove] (Duchein), 105 Cal. 219, 38 P. 947; and Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 120 P.2d 874."

[2] In Simpson v. Salvation Army, 49 Cal.App.2d 371, 374, 121 P.2d 847, 848, it was stated:

"It is well-settled in this state that a member of an association of this type must first exhaust the rights afforded him by the tribunals of the association before he may secure redress from the courts. (Citing authorities.)

"It is true that there is a limited exception to this rule. Where the organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, such as the right to sick benefits, the member need not exhaust his remedies within the organization before resort is had to the courts. Neto v. Conselho Amor, etc., 18 Cal.App. 234, 122 P. 973; Schou v. Sotoyome Tribe, No. 12, 140 Cal. 254, 73 P. 996. Obviously, that exception is not here involved."

Sections 6 and 7, Article Seventeen of the Constitution of Alliance read as follows:

"Sec. 6. Decisions conclusive. The members of this Alliance shall submit all their rights within the Alliance to the determination of its proper tribunals, and agree that the decision of these tribunals shall be conclusive as to all rights and privileges accruing from membership.

"Sec. 7. Exhausting Internal Remedies. The members of this Alliance further consent to be disciplined in the manner provided by this Constitution and By-Laws, and under no circumstances to resort to the civil courts until all the remedies herein provided shall have been exhausted."

Appellants submit "that the Constitution does not provide for any remedy by appeal and that, therefore, the decision of the lower court that internal remedies must be exhausted before resort to the courts is erroneous." In this connection it is admitted by appellants that while section 16, Article Seven of the Constitution governing the control of local unions in an emergency "does provide for appeal from orders, rules, mandates and decisions *after* the take over is complete," they insist that "nowhere in this section is there any provision for an appeal from the seizure of the local itself."

Before considering said section 16 of Article Seven, it is important to have in mind sections 6 and 14 of the same article, to-wit:

"Sec. 6. Interpret Constitution and By-Laws. The laws of this Alliance as contained in this Constitution and By-Laws shall be interpreted by the International President and his decisions thereon shall be binding upon all individual members and affiliated local unions of the Alliance until amended or reversed in the manner hereafter provided.

"The International President shall render decisions upon questions of law where the Constitution and By-Laws contain no express provisions for the determination thereof—his ruling upon such questions shall be made in conformity with the spirit and substance of the Constitution and By-Laws and with regard to the equities of the circumstances.

"Any decision of the International President rendered pursuant to the provisions of this section, shall be subject to appeal to the General Executive Board in the manner provided hereafter in Article Seventeen. * * *

"Sec. 14. Executive Powers. The President shall be the executive head of this Alliance and his duties shall be those duties usually devolving upon the International President or executive officer of similar voluntary organizations and his authority shall be that ordinarily conferred upon similar officers having broad executive powers and in construing this section it is the desire of this Alliance to insist upon a construction which will support the actions of the International President in carrying out the expressed purposes of the Al-

liance, not only along the lines expressly herein indicated but in a broad general manner, and the International President shall have and is hereby specifically given the power to issue such rules, regulations, orders or mandates as he may deem necessary or advisable in the conduct of his said office. * * *"

Section 16, supra, provides that where the International President believes that the ordinary procedure of the Constitution and By-Laws would prove too slow and cumbersome to adequately protect the rights of Alliance or its locals or membership, he may with the consent of the General Executive Board declare the existence of a state of emergency in a local union, whereupon he shall give notice of such state of emergency, in writing, to the officers of said local union. This notice shall be in the form of a complaint forwarded to the officers by mail or by telegram summoning them to a hearing before said International President or his duly accredited representative within 48 hours at a designated time and place, said notice containing a statement of facts upon which the International President relied. During the 48-hour period the authority of local officers is suspended and status quo required to be maintained. At the hearing the officers of the local are entitled to present evidence to the effect that the facts creating the emergency are non-existent or false. If it appears upon the hearing that a state of emergency does in fact exist, the International President, or his duly accredited representative, "shall have the power during the continuance of such emergency to take over all" of the property of the local union and administer its affairs in every respect. During the period of such emergency neither the local nor the International Constitutions have any operation or effect.

Said section further provides: "The sole authority for the conduct of the affairs of such local union during such emergency shall be the orders, rules, mandates and decisions of the International President, the Executive Board and the Vice-President, or International Representative appointed to conduct the affairs of said local union, provided, however, that any officer or member of such union in good standing shall have the right to appeal from any such order, mandate or decision, on account of which he feels aggrieved, to the General Executive Board and from the decision of said Board to the delegates of this Alliance when assembled in convention, as provided in the Constitution in case of appeals from decisions of the President."

As heretofore stated, appellants would interpret the last above quoted paragraph to mean that an appeal can be taken only by an officer or member of the Local from an order, mandate or decision rendered after the declaration of emergency and that it does not provide for an appeal from such declaration itself.

It is alleged in the complaint that at the hearing provided for by section 16, supra, Roy M. Brewer, the designated representative of the International President, gave to the officers of said Local 44 the opportunity to establish that the facts reported to the International President were not as represented and that a state of emergency did not in fact exist, by the following interrogatory: "Do the officers of Local Union 44 desire to present evidence to the effect that the facts creating the emergency are non-existent or false?" To this no response was made. He then proceeded to read Section 16, Article Seven, and pursuant thereto "did appoint the defendant officers of Local 44 as the agents of the International Alliance."

[3] This was the first order, mandate or decision made by the International President, acting through his duly authorized representative, after the local was taken over under the emergency clause of the Constitution. Under the terms of section 16 of Article Seven, supra, an appeal from such order would bring up for review not only the merits of that order, but also the question of the jurisdiction of the President to declare the emergency itself.

An examination of the Constitution and By-Laws reveals that the framers thereof sought in every way possible to provide for an appeal by any member aggrieved, from any decision, mandate or order made by any officer of the Alliance, because, in addition to providing specific appeals and

in order that there might be no question as to the right of appeal with respect to each and every ruling, Article Seventeen, entitled "Appeals" was incorporated in the Constitution:

"Sec. 1. Right of Appeal. Any member aggrieved by the decision of a tribunal of the Alliance may appeal his case in the following order (1) from the decision of the local union to the International President of this Alliance; (2) from the decision of the International President to the General Executive Board; (3) from the ruling of the General Executive Board to this Alliance in convention assembled; and the latter body shall be the tribunal of ultimate judgment. * * * in the interim, rulings of any proper tribunal of this Alliance shall be enforced pending disposal of appeal."

Article Twenty (Discipline of Local Unions) provides as follows:

"Sec. 6. Appeals. Appeals may be taken from the decisions of the International President upon charges against affiliated local unions in the manner provided by Article Seventeen of this Constitution. Local unions shall exhaust all remedies by appeal within this Alliance and shall be bound by the decisions of its highest tribunal as to all their rights.

"Sec. 7. Emergency. The procedure in cases where a state of emergency exists in a local union as defined in Article Seven, Section 16 of this Constitution, shall be as set forth therein."

There is no doubt that the questions here concern the internal government and management of the affairs of the union, and that an appeal lies from any order of the International President, including the order declaring the emergency and any order made by him affecting the rights of members or of the local itself during the period of the emergency.

The good faith of the International President in the exercise of the power given to him under the emergency clause (section 16, Art. Seven, supra), is not questioned. Appellants in their original complaint charged bad faith in their third cause of action therein. However, prior to trial, appellants voluntarily dismissed this cause of action.

In view of the foregoing, it appears that appellants failed to exhaust the remedies afforded to them by the constitution and by-laws of their own organization, and that therefore the trial court had no jurisdiction of the controversy.

The judgment of dismissal is affirmed.

WHITE and DORAN, JJ., concur.






78 Cal.App.2d 392

**WILCK v. HERBERT.**
**Civ. 15140.**

District Court of Appeal, Second District, Division 3, California.

March 5, 1947.

Rehearing Denied March 26, 1947.

**1. Contracts ⇐153, 154**

A written agreement should receive such an interpretation as will make it operative, reasonable and capable of being carried into effect, if that can be done without violating the intention of the parties, and an interpretation which gives effect is preferred to one which makes it void.

**2. Principal and agent ⇐61(1), 81(4)**

Under provision in contract between playwright and authors' agent that agent would, within ten days after a play had been submitted to her by playwright, notify him whether she would handle the play, there was an implied obligation on agent's part to read the plays submitted, within ten days after submission, and such implied obligation constituted a valid consideration on part of agent.

**3. Principal and agent ⇐81(4)**

Express promise of authors' agent in contract with playwright that she would notify playwright within ten days after submission to her of a play, whether she

would handle the play, was a promise by agent to do something that she was under no legal obligation to do, and constituted consideration on part of agent for the contract.

**4. Contracts ⇐10(1)**

Even if a promise is unilateral in its inception, part performance by the promisee furnishes a valid consideration and cures the lack of mutuality, if any, existing originally.

**5. Principal and agent ⇐81(4)**

Even if contract between authors' agent and playwright for submission of all plays by playwright to agent was unilateral, on ground that it was merely an option whereby agent could either handle or reject plays, part performance by agent furnished a valid consideration and cured alleged lack of mutuality, where agent spent time and money in selling play that parties considered to be covered by the contract, and in seeking to adjust problems arising in connection with production of that play.

**6. Principal and agent ⇐81(4)**

Rule that where an agreement in nature of an option contemplates a series of separate transactions, fact that promisee has accepted terms of agreement, as applied to one or more transactions, will not constitute a consideration as to additional transactions, was not applicable to contract between author's agent and playwright for submission of all plays by playwright to agent, since services rendered by agent in successfully promoting and establishing playwright with respect to one play would be substantial benefit to him in the sale of other plays to be written and offered for sale by him.

**7. Principal and agent ⇐47**

Where authors' agent prepared contract between her and playwright for submission of all playwright's plays to agent, any ambiguity therein was required to be resolved against the agent.

**8. Principal and agent ⇐47**

Provision in contract between authors' agent and playwright for submission of all plays by playwright to agent, that in event agent rejected a play, playwright should be at liberty to submit the play elsewhere without any further claim on the agent's part, did not limit playwright's right to contract personally for the sale of his plays, which were not rejected, for production as moving pictures.

**9. Principal and agent ⇐81(2)**

Ordinarily the mere appointment of an exclusive agent to sell certain property does not prevent the owner from making the sale himself without being liable for the agent's commission.

**10. Principal and agent ⇐81(2)**

Where contract between authors' agent and playwright for submission of all plays by playwright to agent provided that agent was to have 10 per cent. commission under any contract effected and that she had authority to collect all money accruing to playwright by virtue of any contract negotiated under the agreement, playwright had right to sell personally the movie rights to a play that was never submitted to agent, without liability to agent for commission on the sale of the movie rights.

**11. Principal and agent ⇐41**

In action by authors' agent against playwright to recover damages for breach of agency contract, whether playwright sold motion picture rights of play personally, so that he was not liable for commissions for such sale, or whether through a certain agency so that he was liable to authors' agent for commissions, was for jury.

**12. Evidence ⇐543(4)**

In action by authors' agent against playwright to recover damages for breach of agency in contract, expert witness was not qualified to testify that in his opinion the playwright's rights to British production of the play were of the value of $50,000, where witness had not been in England for 10 years, and during that time major economic and social changes had taken place.

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Appeals from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Laura Wilck against F. Hugh Herbert to recover damages for breach of an agency contract. From a judgment in

favor of the plaintiff for $36,312 and from an order denying defendant's motion for judgment notwithstanding the verdict, the defendant appeals, and from the judgment, in so far as it awarded an allegedly inadequate amount, the plaintiff appeals.

Judgment reversed in so far as it fixed the amount of damages, and cause remanded for a retrial to determine amount of damages, and order denying motion for judgment notwithstanding verdict affirmed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant and respondent, Laura Wilck.

Gang, Kopp & Tyre and Hanna and Morton, all of Los Angeles, for appellant and respondent, F. Hugh Herbert.

WOOD, Justice.

In this action for damages for breach of contract, the plaintiff obtained judgment for $36,312. Trial was by jury. Plaintiff appeals from the judgment, limiting her appeal to the question of inadequacy of the amount of damages awarded. Defendant appeals from the judgment, and from the order denying his motion for judgment notwithstanding the verdict.

The amount of the award to plaintiff was a percentage of the income received, and to be received, by defendant from the first class or stage production of a play entitled "Kiss and Tell," which he had written. A contention of plaintiff is that, under her contract with defendant, she was also entitled to a percentage of the income received, and to be received, by defendant from the motion picture production of the play, and the court erred in instructing the jury that such income should not be considered in computing damages. A part of her argument is that, under the contract, she was the exclusive agent for the sale of the production rights, and the evidence as to whether another agent, rather than defendant himself, sold the motion picture rights, during the term of her contract, was such that the issue should have been submitted to the jury. Defendant pleaded, among other things, that there was no consideration for the contract, that plaintiff was discharged for cause, and that she abandoned the contract. The jury impliedly found against defendant upon those issues, having rendered a verdict in favor of plaintiff. Some of the contentions of defendant on appeal are: that there was no consideration for the contract, particularly since the expressed consideration related to a past and completed transaction; that the contract was unilateral; that there were no reciprocal covenants therein; that although, under the provisions of the contract, plaintiff was his exclusive agent, she did not have the exclusive right to sell the production rights to the play, but that he also had the right to sell them.

By reason of the issues on these appeals, and the involved transactions herein, it is necessary to make a detailed statement of facts. Plaintiff will be referred to as Wilck, and defendant will be referred to as Herbert.

Plaintiff is in the business of representing authors, upon a commission basis, in selling their writings to publishers and motion picture companies. Defendant is an author of plays. They became acquainted about 1926 in New York City where plaintiff was then maintaining her office. Soon thereafter she introduced him, in New York, to a representative of the Metro-Goldwyn-Mayer motion picture company, which company employed him as a writer, and he then came to California. She came to California in 1935 and established her office here.

In the early part of August, 1939, Herbert telephoned to Wilck and said that he had written a new play, and that he wanted her to sell it. On August 8, 1939, he read the play to her and she agreed to try to sell it. The play was originally entitled "A Glimpse of Heaven," but later the title was changed to "Quiet Please." She submitted the play to Al Lewis, a producer, on August 12, 1939, and on the next day he agreed orally, upon terms acceptable to Herbert, to undertake to produce it in New York.

On August 17, 1939, plaintiff and defendant entered into the contract which is the

basis of this action. It was prepared by plaintiff and is as follows:

"Hollywood, Cal.
August 17, 1939

Miss Laura Wilck
604 Equitable Bldg.
Hollywood, Cal.

Dear Miss Wilck:

For and in consideration of your efforts in obtaining a production contract for A Glimpse of Heaven with Mr. Al Lewis so quickly, we hearby agree to appoint you our sole and exclusive representative for the term of five (5) years from the date hereof, for any play or plays which we may write singly or together.

That upon our submitting either singly or together any play to you, that you will within ten (10) days notify us whether you desire to handle said play. In the event that you reject said play, we shall be at liberty to submit it elsewhere without any further claim on your part.

That the play or plays that you do handle, you promise to use your best efforts to sell to the best advantage; and that you shall submit to us any offer you may be able to obtain, but no agreement shall be binding upon us without our signatures.

That you shall be entitled to receive as commission as said representative, ten (10%) per-cent of all monies to accrue to us singly or together, under or by virtue of any contract effected, for which negotiations may have been carried on, within the term of this agreement.

And we hereby give our authority to collect all monies to accrue to us in or by virtue of any contract that may be negotiated under this agreement and shall pay over all such monies, less commissions, promptly to us, as and when received, together with box-office statements.

And that this shall be binding upon all parties concerned in this agreement and equally upon their successors in title, except that you shall not assign our representation herein granted, without our written consent.

This is our entire understanding and your signature under the word 'Accepted' shall constitute an agreement between us.

Sincerely yours,
F. Hugh Herbert (Signed)

Hans Kraly

Accepted:
Laura Wilck (Signed)

Laura Wilck."

A question arises herein as to whether "a production contract" with Lewis had been obtained, as stated in the contract just quoted, prior to the time that contract was made. Herbert asserts that the contract had been obtained previously, as recited in the contract, when Lewis agreed orally regarding it, and therefore the expressed consideration, being a past consideration, was no consideration. Wilck asserts that it had not been so obtained, but was obtained subsequently when a written production contract was signed. By reason of such question as to when that production contract was obtained, further facts concerning the Lewis contract should be recited here. At the time Lewis agreed orally to undertake to produce "Quiet Please," that is on August 13, he asked Wilck to prepare a written dramatic-production contract on the standard form of contract required by the Dramatists' Guild. Such form of contract includes the terms of the "Minimum Basic Agreement" as to royalties to be paid to the author, and includes a provision as to the agent's commission. The Guild receives the royalties from the producer, and therefrom remits the commission due to the agent and the balance of royalty due to the author. According to the rules of the Dramatists' Guild, such a contract is not effective until it is countersigned by the Dramatists' Guild, and a play cannot be produced professionally until the "Dramatic Production Contract and Minimum Basic Agreement," has been executed. On August 28, 1939, the production contract was signed by Lewis and Herbert, and was forwarded to the Dramatists' Guild.

Lewis did not produce the play, and in January, 1940, he relinquished his rights under the contract. After Lewis had paid $500 for the option to produce the play, and after Wilck had assured Herbert that Lewis was financially able to produce it, and that the play was ready for rehearsal as soon as Herbert could get to New York, he went there and stayed about three weeks while Lewis tried unsuccessfully to finance the show. After Lewis failed to produce the play, Herbert expressed to Wilck some dissatisfaction concerning her advice which, according to his testimony, caused him to go to New York and to expend considerable money unnecessarily in waiting for the production of the play. He also contended that Wilck should require Lewis to reimburse him for his expenses.

In August, 1940, Wilck sold the play to Henry Duffy, who produced it in Los Angeles for two weeks in October, and then produced it in New York for two weeks in November. It was not a success in New York, and the contract with Duffy ended. She sold the play to him again in January, 1941, but before he was ready to produce it the scenery and costumes were destroyed by fire, and he released his contract. She sold it to him again in April, 1941, and he produced it in San Francisco for three weeks in August, but it was not a success. In addition to making said sales of the play, she submitted it to 35 or 40 other producers. All royalties due to Herbert from the productions in Los Angeles and New York were paid promptly, but there was a long delay in paying a balance of $98 due from the San Francisco production, it not having been paid until December, 1942. Herbert's portion of this was $39.68, after deducting Wilck's commission and certain other charges. As a result of Duffy's failure to make the payment promptly, Herbert requested Wilck on several occasions to collect the money, and, if necessary, to enforce the collection through the Dramatists' Guild. In reply thereto she told Herbert that Duffy had had several failures recently by reason of the depression and war conditions, that he would pay as soon as possible, that since he had been a well known producer for thirty years and had produced this play three times he was entitled to some consideration, that trying to collect the small amount through the Guild would hurt Herbert's reputation, and that she was trying to protect Herbert as well as Duffy. Herbert then asked her whether she was representing Duffy or representing him. On January 2, 1942, she wrote a letter to Herbert stating that Duffy had lost a fortune in the last few weeks, and that nothing could be done about the collection of the royalty at that time.

On January 3, 1942, Herbert wrote a letter to her stating that despite repeated requests to collect the delinquent royalties that she had remained inactive thereby showing a consideration for Duffy which overshadowed her obligations to the author; that Herbert and Kraly (his collaborator) construed her refusal "as a breach of your managerial contract with us"; that "as of this date, you are no longer authorized to represent yourself as the agent of 'Quiet Please!' in any negotiations which may arise in connection with this play." Attached to that letter was a pencil notation to plaintiff as follows: "Dear Laura: No hard feelings; just wanted to make this appropriately official." She did not reply to that letter. He did not submit any other play to her.

On March 2, 1942, about two months after Herbert had written the letter discharging her, he entered into a written contract with the Sam Jaffe Agency whereby he employed it for two years as his exclusive agent to negotiate the sale of his literary and dramatic material, and agreed to pay it for its services 10% of the money received by him. The agreement was signed, on behalf of the agency, as follows: "Sam Jaffe Agency By Mary Baker."

About six months after Herbert had sent the letter discharging Wilck, they met at a motion picture studio, had lunch together, and talked about plays, but no reference was made to the letter of discharge. She asked him, at that time, when he was going to write a new play, and he said he didn't have an idea. Occasionally thereafter, during 1942, they had discussions concerning plays, written by other persons, which she submitted to him for his suggestions as

to improvements thereon. In the latter part of November, 1942, she telephoned to him and said that she understood he was writing a new play, and he replied that was correct and that it was almost completed. She asked whether she was going to see the play, and he replied, according to her testimony, "Yes, some time." According to his testimony, he said that he had an agent who was handling the play and she was not going to see it. She then said that they still had a contract, and he said that she had been discharged almost a year ago. When she repeated that she still had the contract, he said he didn't have a copy of it, and she said she would send him a copy.

On December 3, 1942, she wrote a letter to him stating that she had just received the final royalty check for $98 from Duffy and that she was enclosing a check for $39.68 as Herbert's part of the royalty. At the bottom of the letter there was the following: "P.S. Is this the contract you mean. You may keep it. I have another copy. How is the new play coming on. I look forward to seeing it soon. Good Luck."

On December 14, 1942, Herbert sent a letter to the Dramatists' Guild, requesting that it send to him copies of correspondence he had had with it and Wilck concerning "Quiet Please." In that letter he stated: "I had carbon copies of all this correspondence at one time * * * it is now imperative for me to have a record of the correspondence in order for me to discharge Laura Wilck as play broker. At the time, some three or four years ago, when she first sold 'Quiet Please' to Al Lewis, I signed a managerial contract with her which Miss Wilck has breached innumerable times by neglect and non-performance. I have completed another play, and, before proceeding further with it and turning it over to another play broker, I am naturally anxious to be clear of any legal obligations to Laura Wilck's office."

On December 17, 1942, his attorney wrote a letter to Wilck stating: "Mr. Herbert wishes us to make clear to you that because of your failure to perform in accordance with the terms of the contract of August 17, 1939, he some time ago terminated that agreement with respect to all plays other than the one play 'Quiet Please.' * * * The contract of August 17, 1939 has been terminated by him, and is of no force or effect whatever."

In reply to that letter, her attorney wrote to his attorney on January 7, 1943, stating that she was out of town, but it was his understanding that "a valid contract exists between the parties."

About December, 1942, Herbert finished writing a new play which was entitled "Holy Cow," but later the title was changed to "Kiss and Tell." This play was a success and was referred to as a "smash hit." At the time of the trial in March, 1945, it has been running continuously in New York as a first or stage production for more than two years, and had been successfully produced in many cities in the United States. The total income which Herbert had received, at the time of the trial, from it as a stage production was $303,120.15. It was also produced as a motion picture at a cost of $620,000, and apparently it was a success. The record does not show the amount of income from the motion picture. Presumably that amount was not shown because the court ruled, as above stated, that such income should not be considered in computing damages.

On January 13, 1943, Herbert sold the first class production rights in the play to George Abbott of New York, a producer. The sale was negotiated by Mary Baker of the Sam Jaffe Agency. The production contract provided that if Abbott produced the play in New York for three weeks he would become owner of forty per cent of the motion picture rights in the play. Beginning in March, 1943, Abbott produced the play there for more than three weeks and became the owner of such part of said rights.

On January 14, 1943, Herbert executed another agency contract with the Sam Jaffe Agency which was practically the same as the first contract with that agency, except that it was to continue for seven years instead of two years.

On July 7, 1944, The Abbott-Herbert Corporation was incorporated under the laws of California. Prior to the incorporation, Abbott transferred his rights under the production contract with Herbert to a

limited partnership known as "Kiss and Tell Company," in which several persons were the limited partners, and Abbott and his daughter were the general partners.

Since the incorporation transaction, and the issuance of stock for transfer of interests in the play and for cash, have some bearing upon the question as to whether the motion picture rights were sold, and as to whether, if they were sold, the sale was negotiated by an agent or by Herbert himself, the details concerning the corporation should be stated. On July 11, 1944, Herbert became a director and vice-president of The Abbott-Herbert Corporation. On that same date the directors authorized the issuance of 600 shares of its preferred stock of the par value of $1,000 each, and the issuance of 200 shares of its common stock of no par value for $1 per share, as follows: 200 shares of preferred stock and 80 shares of common stock to Kiss and Tell Company in exchange for the transfer by it of its contract rights in "Kiss and Tell"; 40 shares of preferred to Kiss and Tell Company for $40,000 cash; 300 shares of preferred and 120 shares of common to Herbert for the transfer by him of the copyright and other rights to "Kiss and Tell," excepting the first class production rights for the United States, Canada, and Great Britain; 50 shares of preferred to Herbert for $50,000 cash; and 10 shares of preferred to Abbott for $10,000 cash.

The resolution authorizing the issuance of the stock recited that the fair value of the rights to be acquired from Kiss and Tell Company was $200,080, and the fair value of the rights to be acquired from Herbert was $300,120. The value of the stock proposed to be issued to Kiss and Tell Company and to Herbert for their respective rights in "Kiss and Tell" was in exact proportion to the value of their respective rights as determined by the resolution. In other words, Kiss and Tell Company was to receive 200 shares of preferred stock of the par value of $200,000, and 80 shares of common at the price of $80, for its rights of the asserted value of $200,080; and Herbert was to receive 300 shares of preferred stock of the par value of $300,000, and 120 shares of common at the price of $120, for his rights of the asserted value of $300,120. The additional 100 shares of preferred of the par value of $100,000, authorized to be issued, were to be sold for $100,000 cash, as shown above, as follows: 40 shares to Kiss and Tell Company for $40,000; 50 shares to Herbert for $50,000; and 10 shares to Abbott for $10,000.

On August 2, 1944, a permit to issue stock pursuant to the resolution was granted by the corporation commissioner, and later it was issued accordingly.

On August 6, 1944, Herbert, Kiss and Tell Company, and the Abbott-Herbert Corporation executed a contract whereby: (1) Herbert transferred to The Abbott-Herbert Corporation all copyrights to "Kiss and Tell" and the play itself, subject to the rights of the Kiss and Tell Company and to the rights of British producers, an Australian producer, a publisher, and the holder of an amateur production contract; (2) Herbert reserved certain rights as to use of new material; (3) Kiss and Tell Company transferred to the corporation all its rights under the production contract; (4) The corporation assumed the obligations of Herbert to pay a commission to the Sam Jaffe Agency and Mary Baker of 10% of the royalties on the first class productions, and 10% of the money paid for the subsidiary rights. (The motion picture rights are known as subsidiary rights.)

On the same day last day mentioned, Herbert and the corporation executed a contract whereby: (1) the corporation retransferred to him the first class production rights in the play for the United States, Canada, and Great Britain, and the right to make sequels; (2) Herbert agreed to pay to the Sam Jaffe Agency 10% of all royalties received from the first class rights, and he agreed to certain limitations on his rights as to new material.

On the same day, the corporation and the Sam Jaffe Agency executed a contract whereby: (1) the agency released Herbert from all obligations to pay commissions to it except as to royalties from the first class productions in the United States, Canada, and Great Britain; (2) the agency agreed to render services to the corporation in an advisory capacity with respect

to all motion pictures based upon the play, and to render the services customarily rendered by play agents with respect to the play; (3) the corporation agreed to pay the agency, in consideration of its services and in lieu of the commission agreed to be paid to the agency by Herbert, 10% of the corporation's net motion picture receipts and net other receipts.

The essential results of the transactions above mentioned involving Herbert, Abbott, the Kiss and Tell Company, The Abbott-Herbert Corporation, and the Sam Jaffe Agency, are: (1) The Abbott-Herbert Corporation became vested with the right to produce "Kiss and Tell" as a motion picture; (2) Herbert and the Kiss and Tell Company each received, for the transfer of such right to the corporation, stock of the corporation of a value in exact proportion to the value of their respective interests in the right to transferred; (3) The Sam Jaffe Agency acquired the right to receive 10% of the net receipts of the corporation in lieu of the right to receive from Herbert and the Kiss and Tell Company a commission of 10% of any amount realized as proceeds of the motion picture rights (It is to be noted that under the terms of the production contract between Herbert and Abbott they both designated the Sam Jaffe Agency as their exclusive agent for the sale of the motion picture rights only, and agreed to pay a commission of 10% of the gross purchase price of any sale.); (4) The Sam Jaffe Agency agreed to render the customary services of a play agent with respect to the play.

About August 11, 1944, The Abbott-Herbert Corporation and Columbia Pictures Corporation executed a contract under the terms of which The Abbott-Herbert Corporation has produced "Kiss and Tell" as a motion picture, and under the terms of which Columbia Pictures Corporation advanced credits in the amount of approximately $200,000 toward the cost of the production, and Abbott-Herbert Corporation advanced cash, secured from bank loans, in the amount of approximately $420,000. The said contract provided that Columbia Pictures Corporation should have the exclusive distribution rights of the picture; and that Columbia Pictures Corporation, for making available its facilities and the credits under the contract and for providing its distribution organization, would receive a percentage of the proceeds of the production of the motion picture "Kiss and Tell."

Herbert's Appeal.

As above stated, Herbert contends on his appeal from the judgment that the contract of employment of August 17, 1939, is invalid and unenforceable for want of consideration. He argues that the contract is unilateral in that it is merely an option whereby she can either handle or reject the plays; that its provisions are such as to exclude the possibility of implying reciprocal obligations in that Wilck carefully and definitely protected herself against assuming any obligation until she accepted a play; that there was no extrinsic consideration to support the agreement; that the recited consideration refers to a service which Wilck had rendered pursuant to a pre-existing oral agreement; that at the time the written agreement was executed, they occupied a confidential relation, and Wilck could not acquire the advantage of an option on future plays to be written by Herbert for which she gave no consideration; that services rendered by Wilck in connection with "Quiet Please" cannot be construed as part performance, or to remedy the defect of want of consideration; and that the presumption of consideration which attaches to a written instrument has been rebutted by the evidence.

[1, 2] A written agreement should receive such an interpretation as will make it operative, reasonable and capable of being carried into effect, if that can be done without violating the intention of the parties, and an interpretation which gives effect is preferred to one which makes it void. Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 166, 88 P.2d 698, 89 P.2d 386. The contract herein includes a provision that Wilck will within ten days after a play has been submitted to her by Herbert, notify him whether she will handle the play. By reason of such provision there is an implied obligation on her part to read the plays within ten days after they are submitted to her. The fact that the matter of

rejecting a play is within the discretion of Wilck does not exclude the implication of a duty to examine or read the plays submitted. She was an established literary agent and the continued existence of her business depended upon the quality of her opinions as to the merits of plays. It would seem that it was contemplated by the parties that plays submitted to her would receive careful and intelligent consideration in determining whether she would accept or reject them, and that it was not contemplated that she would reject a play in a wholly arbitrary manner without any examination or study of it. Her previous conduct with reference to her acceptance of one of his plays, namely, "Quiet Please," included a reading of the play. It is obvious that the reading of the plays would be necessary in order that an intelligent acceptance or rejection might be made. There would be no object in submitting them to her unless it was contemplated that she would read or examine them. The language of the contract, the nature of the business they were engaged in, and their conduct warranted the inference drawn by the trial court and jury that there was an implied promise by Wilck sufficient to constitute a valid consideration.

[3] Furthermore, the contract contains an express promise of Wilck to do something that she was under no legal obligation to do, namely, to notify Herbert within ten days whether she would handle a play submitted to her. Under such provision, a benefit was conferred on Herbert, in that, he was assured that a play submitted by him would not be held for an indefinite period of time, but that he would know within a short time after he submitted a play to her whether he could submit it elsewhere without interfering with her efforts to sell the play.

Wilck asserts further that the substantial services, rendered by her in behalf of Herbert after the execution of the agency contract, constituted sufficient consideration, and supplied any lack of mutuality if any existed at the inception of the contract. After the execution of the contract she sold the play "Quiet Please," three times to Duffy, and participated in trying to adjust the problems which arose in connection with the production of it by Duffy. According to her testimony, she devoted about 40% of her time from August, 1939, to August, 1940, to "Quiet Please," and during the following year about 20% of her time; that her average annual expenses in her business amounted to approximately $4,000. According to her testimony, therefore, she expended about $1,600 the first year and about $800 the second year in connection with that play. Herbert argues that "Quiet Please" was never submitted to Wilck under the agency contract, that it had been submitted to her previously and had been accepted by her previously, and that her services in connection with that play "are not referable to the employment agreement." It appears from the conduct of both parties that they considered that her services in regard to "Quiet Please" were rendered pursuant to the agency or managerial contract. When Herbert wrote to the Dramatists' Guild on December 14, 1942, stating that he needed copies of his correspondence with Wilck concerning "Quiet Please" in order that he might discharge her, he wrote in part, as above quoted: "At the time * * * when she first sold 'Quiet Please' to Al Lewis, I signed a managerial contract with her, which Miss Wilck has breached innumerable times by neglect and nonperformance. I have completed another play, and, before * * * turning it over to another play broker, I am naturally anxious to be clear of any legal obligations to Laura Wilck's office." That language indicates that he considered that as to "Quiet Please" she had been acting under the contract of August 17, 1939, especially in view of the fact that at that time the production of "Quiet Please" had long since terminated and the production contracts with Lewis and Duffy relating to it had also ended. That contract of August 17, 1939, was the only written contract he had with Wilck. She was not a party to the production contract relating to "Quiet Please" which was signed by Lewis and Herbert on August 28, 1939, after Lewis had agreed orally on August 13, 1939, to try to produce that play. If her services in connection with that play were not referable to that written contract, it would seem that any neglect or nonperformance on her part with respect to

"Quiet Please" would not be a breach of the managerial contract and would not furnish any basis for terminating that written agreement. Further evidence that they considered that her services respecting "Quiet Please" were rendered under the written agreement of August 17, 1939, is the letter from Herbert's attorney to Wilck, written three days after Herbert's letter to the Guild, which stated in part, as above quoted: "Mr. Herbert wishes us to make clear to you that because of your failure to perform in accordance with the terms of the contract of August 17, 1939, he sometime ago terminated that agreement with respect to all plays other than the one play, Quiet Please. * * * The contract of August 17, 1939, has been terminated by him and is of no force or effect whatever." Furthermore, in his answer Herbert pleaded that the contract of August 17, 1939, was terminated by him and that he had discharged Wilck for cause. The only cause he assigned for the discharge was her acts with reference to "Quiet Please." It appears, therefore, that after the execution of the agency contract the parties considered, throughout their dealings with respect to "Quiet Please," that they were operating under that contract.

It appears also that Wilck's efforts in Herbert's behalf were not limited to "Quiet Please." After the agency contract was executed she made efforts to sell his plays entitled, "Detour," and "Special Delivery."

[4, 5] Herbert refers to a provision in all the production contracts relative to "Quiet Please" to the effect that Wilck should receive 10% of the royalties and advance payments as her commission, and asserts that that provision was made because she did not consider that the agency contract of August 17, 1939, applied to that play, and she therefore desired to have her right to receive the 10% commission fixed in the production contract. She testified that she dictated that provision "from a memorandum given to Mr. Herbert from his lawyer." Wilck was not a party to the production contracts, as above stated, but it appears, nevertheless, that the provision therein was for her benefit and that she could rely thereon as a basis for recovering for services rendered by her. A production contract, as above stated, was not effective until it was countersigned by the Guild, and under the production contracts, the Guild was authorized to receive the royalties and advance payments and to pay therefrom to the agent and the author the amounts due them. One purpose of the provision relative to the agent's commission was to put the Guild and the producer on notice as to the terms of the agreement between the agent and the author, and to notify the Guild as to the amount of the agent's commission so that it might properly disburse the commission and royalties. Herbert argues that the agency contract was applicable to plays to be submitted, and that since the play "Quiet Please" was submitted to her and was orally accepted by her before the agency contract was executed, the agency contract was not applicable to it. The agency contract did provide that "upon our submitting" any play that Wilck would notify Herbert and Kraly within ten days whether she would handle the play, and it is also true that Lewis had agreed orally, before the agency contract was made, to try to produce "Quiet Please." The Lewis production contract, however, terminated in January, 1940, and from that time until she sold the play to Duffy in August, 1940, and another production contract was made, she had no written contract concerning her commission unless the agency contract was such. Likewise, after the various Duffy production contracts terminated, and while she was making further efforts to sell the play, she had no written contract concerning her commission unless the agency contract was in effect. Of course, it was not necessary that she have a written contract, if she had an oral one, but the matter immediately under discussion is whether the parties considered that as to "Quiet Please" she was acting under the alleged oral contract made a few days before the agency contract was entered into or under the agency contract. It appears, as above stated, that they considered that she was acting under the agency contract. Even if a promise is unilateral in its inception, part performance by the promisee furnishes a valid consideration and cures the lack of mutuality, if any, existing originally. In Los Angeles Traction Co. v. Wil-

shire, 135 Cal. 654, at page 658, 67 P. 1086, at page 1088, wherein the contract at the date of its making was unilateral, the court said: "The promised consideration had then been partly performed, and the contract had taken on a bilateral character * * *." In Ruess v. Baron, 217 Cal. 83, 17 P.2d 119, the defendant gave plaintiff the exclusive option to buy or sell certain property within a stated period, and before the end of that period defendant terminated the agreement. The court held that originally there was no consideration, and that subsequently the only consideration was plaintiff's expense and efforts in trying to secure a purchaser. The court said therein, 217 Cal. at page 85, 17 P.2d at page 119: "But if it was purely an agency contract to sell, plaintiff's outlay and labor would supply a consideration sufficient to infuse life into the authorization until the full period named therein had expired." In Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11, the defendant obtained from plaintiff a twenty-year lease on property used as a market, and promised to pay the lessor therefor certain portions of the rentals to be received from numerous sublessees that were contemplated. After defendant had obtained sublessees, the plaintiff lessor contended that the agreement was void for want of mutuality in that it did not bind defendant to any obligation, his only promise being to endeavor to secure sublessees, and he being free to abandon the enterprise at any time. The court, after stating that it thought mutual obligations were in the lease, said, 19 Cal.2d at page 672, 123 P.2d at page 18: "But even assuming that the point is an arguable one and that the contract was unilateral in its inception * * it is clear that the agreement became mutual, valid, and binding upon partial performance by defendant * * *."

[6] Herbert argues further that where an agreement in the nature of an option contemplates a series of separate transactions, the fact that the promise has accepted the terms of the agreement, as applied to one or more transactions, will not constitute a consideration as to additional transactions, and that mere part performance of a contract which is not binding on the parties does not make it binding, so far as it remains executory. He refers to agreements contemplating a series of transactions involving the purchase of goods which agreements are invalid for want of consideration, and he correctly asserts that those agreements are not converted into binding contracts by orders for some of the goods. It is true that accepted orders for goods under such contracts constitute sales of the goods ordered at the prices stated in the contracts, but such orders do not validate the agreement as to other goods which the one refuses to purchase or the other refuses to sell. The cases cited by him in support of that argument are to the effect that part performance of contracts for the purchase of goods does not cure lack of consideration insofar as the contract remains executory. In a case of that character part performance does not affect the executory part of the contract because there is no criterion by which to establish the quantity of goods which, in the future, must be bought or sold. Therefore, in that kind of case it appears that it is not a question of lack of consideration, but is a lack of certainty. In one of the cited cases, Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 10 Cir., 114 F. 77, at page 79, 57 L.R.A. 696, the court said: "Such promises are void, because they lack one of the essential elements of an agreement,—certainty in the thing to be done." It was said further therein, 114 F. at page 80, 57 L.R.A. 696: "The defendant never agreed to order or to pay for any quantity of these undelivered articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take." The principle of law stated in those cases is settled, but it is not applicable herein since the subject matter of this contract is of a character quite different from that in the cited cases. Services rendered by Wilck in successfully promoting and establishing Herbert as a play author, while selling one of his plays several times and attempting to sell others, would be of substantial benefit to him in the sale of other plays to be written and offered for sale by him. It appears that there was sufficient consideration for the contract herein by reason of the express and implied

provisions therein and the part performance by Wilck in rendering substantial services at substantial expense to herself.

Wilck's Appeal.

The court instructed the jury that if it found that Wilck was entitled to damages that the measure of her recovery was 10% of the gross proceeds already received by Herbert, and 10% of the gross proceeds reasonably certain to be received by him in the future from the first class production of the play "Kiss and Tell" in the United States, Canada and Great Britain; that his gross proceeds to March 17, 1945, from such production amounted to $303,120.14, and that if she was entitled to recover she would be entitled to 10% thereof, or $30,312. The jury was also instructed that in estimating the amount of the future gross proceeds of such first class production, if Wilck was entitled to recover, that it might take into consideration the amounts theretofore received by Herbert from such production, and also consider the opinions of persons experienced in theatrical matters respecting future amounts that might be realized from such source. There was testimony by Wilck that in her opinion the reasonable value of Herbert's right to the future proceeds from the first class production of the play in the United States was about $50,000 or $60,000. Apparently the jury found that she was entitled to 10% of $60,000, or $6,000, as her commission on the future proceeds in the United States, since the verdict was for $36,312.00. There was no evidence as to the reasonable value of such future proceeds in Great Britain the court having sustained an objection to the qualifications of plaintiff's witness to give such an opinion.

At the request of Herbert, the court instructed the jury as follows: "You are instructed, if you find upon the evidence and under the instructions of the Court that Plaintiff is entitled to recover damages from the Defendant, and you further find that the Defendant, F. Hugh Herbert, has entered into any contracts for the motion picture production of the play, 'Kiss and Tell,' you must eliminate any income which you believe the said Defendant, F. Hugh Herbert has received or may receive from any such contracts in computing the damages to be awarded to the plaintiff." The court's ruling that income from the motion picture production should be eliminated in computing damages was upon the ground that the motion picture rights had been transferred by Herbert personally, and not through an agent, and that since the contract provided that he appointed her as his exclusive representative, as distinguished from giving her the exclusive right to sell his plays, he was not precluded from transferring the rights personally.

[7] Wilck contends on her appeal, which relates only to the question of inadequacy of damages, that the agency contract precluded Herbert from directly disposing of the motion picture rights, and prevented him from selling his plays except through Wilck. In support of these contentions she refers particularly to the written provision that she shall be entitled to 10% commission "under or by virtue of any contract effected, for which negotiations may have been carried on, within the term of this agreement." She argues that said provision means that she should be paid commissions on all contracts negotiated during the period of the existence of the employment agreement, including those negotiated by Herbert personally. That provision is to be considered in connection with other provisions of that contract. The next paragraph of the contract, succeeding the one wherein that provision appears, states that she is given authority to collect all money to accrue to him "by virtue of any contract that may be negotiated *under* this agreement." (Italics added.) This last mentioned paragraph limits her authority to collect money to contracts negotiated *under* the agreement. It would seem that there would be no reason to give her the right to receive commissions on all contracts negotiated during the term of the agreement, irrespective of who negotiated them, and at the same time to restrict her right to collect to the money accruing from contracts negotiated by her under the agreement. Furthermore, the meaning of the provision that she should have commissions on *any contract* negotiated "within the term of this agreement," is to be

interpreted in the light of the preceding paragraph in the agreement which refers to plays that she handles and to those that she rejects. Under her argument she would be entitled to commissions from plays which she rejected, if they were sold during the terms of the agreement. It is inconceivable that it was intended that she would be entitled to commissions from plays which she did not handle, but which she rejected. The language of the provision relative to any contract negotiated within the term of the agreement must be limited by the context of the whole contract to contracts negotiated by her under her designation in the agency contract "as sole and exclusive representative." She prepared the contract, and if it had been intended that she should be paid commission on contracts which Herbert negotiated personally, she undoubtedly would have expressed such intention in clear language. Since she prepared the contract, any ambiguity therein must be resolved against her.

In further support of Wilck's contention that Herbert did not have the right to sell his plays, she refers to an "Agency Clause" which appeared in each of the four production contracts negotiated by her for "Quiet Please." That clause was to the effect that "in connection with the sale or lease of the subsidiary rights in said play," Herbert appointed Wilck as his agent, and agreed that she should be entitled to commissions of 10% upon the proceeds of such sale or lease of the subsidiary rights. She argues that the provision in said "Agency Clause" in the production contracts for "Quiet Please," that she should have commissions on the "subsidiary rights," constitutes a contemporaneous exposition by Herbert that she was to have the sole right to handle the subsidiary rights, that is, the motion picture rights. It is to be noted that under that provision or clause in the production contracts concerning her commission on the subsidiary rights to "Quiet Please," she is designated his *agent* in connection with the subsidiary rights, and is not thereby given the exclusive *right* to sell or lease them.

[8] In further support of her said contention that he did not have the right to sell his plays, she refers also to a provision in the agency contract as follows: "In the event that you reject said play, we shall be at liberty to submit it elsewhere without any further claim on your part." She argues that said provision means that as to plays which she did not reject Herbert would have no right to submit them elsewhere, and that he did not have the right to dispose of his plays during the term of the agency contract without first submitting them to Wilck. Apparently that provision was for the purpose of permitting Herbert to place rejected plays with other agents. It was necessary to specify that he was released from any obligation to her in regard to plays which she had rejected, since the agency contract designated her as his exclusive representative. The provision, relative to rejecting a play, does not limit the right of Herbert to contract personally for the sale of his plays.

[9, 10] Under the contract she was appointed "sole and exclusive representative." She did not have authority to contract for the sale or other disposition of a play, but had authority only to negotiate and to submit offers in regard thereto, since the agreement provided that she should submit any offer to him but that no agreement should be binding upon him without his signature. No price, terms, or conditions for the sale or disposal of a play were specified in the agency agreement, and it cannot be assumed, in view of the express language thereof, that she was invested with any discretion as to price, terms, or conditions of contracting. Ordinarily the mere appointment of an exclusive agent to sell certain property does not prevent the owner from making the sale himself without being liable for the agent's commission. 3 C.J.S., Agency, § 179, p. 71; 2 C.J. 777. In Restatement, Agency, p. 1058, sec. 449, comment b, it is said: "A contract to give an 'exclusive agency' to deal with specified property is ordinarily interpreted as not precluding competition by the principal personally but only as precluding him from appointing another agent to accomplish the result. On the other hand, the grant of an 'exclusive agency' to sell the products of a manufacturer or dealer in a specified territory is ordinarily in-

terpreted as precluding competition by the principal in any form within the designated section. A contract to give the 'exclusive sale' of specified property ordinarily indicates that the agent is to have the exclusive power. The use of the words 'exclusive agency' or 'exclusive sale' is not conclusive but, as in other cases involving interpretation, all the circumstances must be considered." In Snook v. Page, 29 Cal. App. 246, at page 247, 155 P. 107, at page 107 the court said: "The first question * * * is whether the plaintiffs were constituted the *exclusive agents,* or were they given the exclusive *right* to sell said property? If the former only, the rule is well settled that: 'The owner has the right to sell the same by his own unaided efforts without becoming liable to the broker for commission, that the only effect of such contract is to prevent the owner from placing the property in the hands of another agent, and that the owner does not thereby relinquish his right to sell the property himself independently of the broker.' [citing cases.]" In Faith v. Meisetschlager, 45 Cal.App. 7, at page 9, 187 P. 61, at page 62, the court said: "A contract authorizing real estate brokers to sell property, which merely makes them exclusive agents thereof, does not entitle such brokers to their commission on a sale made by the owner unaided by them. Under such circumstances the owner has the right to sell by his own individual efforts without becoming liable to the agents for a commission." Herbert had the right to sell the play and the subsidiary rights, personally and directly and independently of Wilck, without liability to her for commission.

Wilck contends also that, even if Herbert had the right to sell the play and the subsidiary rights himself, the jury should have been permitted to determine the fact whether he sold the motion picture rights directly or through an agent. If Herbert sold the motion picture rights through an agent he would be liable to Wilck for damages, if any, sustained by her. A question of fact was presented as to whether he sold the motion picture rights directly, or whether he sold them through the Sam Jaffe Agency. As above stated, about two months after Herbert wrote to Wilck discharging her, he employed the Sam Jaffe Agency as his exclusive agent to negotiate the sale of his literary material. Herbert concedes that the sale of the first class production rights to Abbott was made by his agent, the Sam Jaffe Agency, acting through its representative Mary Baker. Mary Baker testified that as Herbert's agent she had preliminary discussions with various major picture companies with reference to the production of a motion picture using the play, "Kiss and Tell"; that as part of her negotiations as his agent she "ultimately came in contact with Columbia Pictures Corporation"; that she sat in on the negotiations that led up to the contract of August 11, 1944, between Columbia Pictures Corporation and The Abbott-Herbert Corporation; that Mr. Martin Gang, the attorney for Herbert and for the Jaffe Agency, negotiated the contract. Mr. Siegel, a director of The Abbott-Herbert Corporation, testified that he had been a producer at Columbia Pictures Corporation; that while he was such producer negotiations were started with Columbia Pictures Corporation for its equipment and financial assistance in connection with the production of the motion picture; that the negotiations were commenced by Herbert with the aid of Mr. Gang and Mary Baker; that he (the witness) did not attend all the conferences that were held with the executives of Columbia Pictures Corporation, but in one or two of those conferences, which he attended, Mary Baker was there. Several letters and writings, comprising Exhibit 48 for identification, were offered in evidence by Wilck, but Herbert's objection thereto upon the ground that they were irrelevant was sustained. It was stipulated that the letters were forwarded, on or about the dates that they bear, by the persons purporting to sign them and to the addressees named in the letters.

[11] One of those letters, dated May 21, 1943, from Jaffe to Abbott, outlined a plan for the organization of a corporation to produce a motion picture from the play, "Kiss and Tell," and indicated a proposed corporate set-up aimed at sustaining a capital gain rather than current income. Another letter, dated September 21, 1943, from Mr. Gang to Columbia Pictures Corporation,

stated that he and Mary Baker had carefully considered a memorandum from Columbia Pictures Corporation regarding production of the picture, and he requested that the corporation prepare a contract so that it might be sent to New York for examination by Abbott and Herbert and their attorneys. Another letter, dated October 13, 1943, from Abbott to Herbert (a copy being sent to Mary Baker), criticized the proposed corporate set-up from a tax standpoint, and stated further: "We are obligated to the Jaffe Agency for 10% of the picture sale less the Arbiter's fees. I think that they can be of great value to us, and I think we should retain them giving them 10% of everything we make on the picture." Another letter, dated January 14, 1944, from Mary Baker to Mr. Gang, outlined the basic terms of the proposed deal with Columbia Pictures Corporation. It stated in part: "You asked me to outline the basic terms of the Columbia deal." The transaction as consummated, for the production of the picture, was similar to the proposals and efforts made by the Jaffe Agency. It proposed that an organization be formed to handle the picture in order to realize capital gains. The result was that a corporation was formed and the picture rights were sold to it in an effort to realize capital gains. It proposed that the new corporation produce the pictures, and that was the result. It commenced discussions with Columbia Pictures Corporation to obtain financing and to secure that company as distributing agent. That company furnished a large part of the financing and became the distributor. It proposed that consideration be given to obtaining Shirley Temple for a part in the picture and to obtaining Mr. Siegel as producer. The result was that she had a leading part in the picture, and he was the producer. It appears that the letters, above referred to, were relevant to the issue whether Herbert sold the picture rights independently of an agent or through an agent. (By reason of that conclusion, it is not necessary to determine herein whether other letters or writings in Exhibit 48 for identification were admissible in evidence.) The creation of the corporation, the execution of the contract with Columbia Pictures Corporation, and the issuance of stock to Herbert for the transfer of his motion picture rights might have been viewed as one transaction. The question as to whether Herbert sold the motion picture rights directly and independently of his agent, the Jaffe Agency, or whether those rights were sold through the negotiations of his agent or with the aid of his agent, should have been submitted to the jury. By reason of the failure to submit that issue of fact to the jury, it is necessary to reverse the judgment for a reassessment of damages.

[12] Another contention of Wilck is that the court erred in sustaining an objection to the proffered testimony of her witness Jackson as to whether, in his opinion, the play "Kiss and Tell" would be a success in Great Britain, and as to the fair market value of the author's rights in the British production of that play. The witness testified that he was a playwright and author; that he was at the time he testified a writer for United Artists; that his first play was produced in 1915; that he had written several plays which were produced successfully in the United States and England; that he went to England in 1925 and wrote several plays there; that he came back to the United States in 1935, and had not been in England since that time; that he had read the play, "Kiss and Tell." He was asked by Wilck's counsel: "In your opinion, will that play be a success in Great Britain?" Counsel for Herbert objected thereto on the ground that it was incompetent and that no foundation had been laid. The objection was sustained, the court stating in part: "I will uphold the objection to his qualifications to pass on the value of a play produced in England at this time, in view of the fact that it is not shown that he has been there for the last ten years, and therefore is not in a position, in the Court's opinion, to properly evaluate the play in England at this time." Counsel for Wilck then offered to prove that the witness would state that he had an opinion as to the present fair market value of the author's rights to the British production of the play, and that he would state that in his opinion such rights, in that respect, were of the value of $50,000. An objection to the offer of proof

was sustained. Wilck argues that the ruling of the court was a declaration that as a matter of law the absence of the witness from England for ten years disqualified him as a witness to give such opinion, and argues further that such absence would relate only to the weight to be given to his testimony. The play had not been produced in London, but had been "tried out of town there," and there was a delay in producing it in London by reason of robot bombing in England. From 1935, when the witness left England, to the time of the trial England had experienced major economic and social changes. World War II had caused great damage in England. At the time of the trial robot bombing in England continued, and the outcome of the war was uncertain. The ruling of the court as to the opinions of the witness was correct.

The judgment is reversed as to that portion thereof which fixes the amount of damages payable to plaintiff, and the cause is remanded for a retrial for the sole purpose of determining, in accordance with the views herein expressed, the amount of damages which should be awarded to plaintiff. The order denying Herbert's motion for judgment notwithstanding the verdict is affirmed. Plaintiff to recover costs.

DESMOND, P. J., and KINCAID, J. pro tem., concur.




78 Cal.App.2d 493

## AMERICAN MUT. LIABILITY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSON et al.

Civ. 13311.

District Court of Appeal, First District, Division 2, California.

March 11, 1947.

**1. Workmen's compensation ⇐1371**

In workmen's compensation proceeding, defense of intoxication of employee as cause of injury is an affirmative defense and burden of proving it rests on the employer. Labor Code, §§ 3600, 5705.

**2. Workmen's compensation ⇐1604**

In proceeding for compensation for death of employee fatally injured in autobile accident, evidence sustained Industrial Accident Commission's finding that injury to employee was not caused by his intoxication. Labor Code, §§ 3600, 5705.

**3. Evidence ⇐188, 557**

A specimen taken from a human body for purpose of analysis must be identified before such specimen or analysis made from it attains standing as evidence of condition of person whose conduct is questioned.

**4. Workmen's compensation ⇐1604**

In workmen's compensation proceeding, failure to identify sample as blood of employee rendered testimony of chemist as to alcoholic content and testimony of pathologist, as to effect such alcoholic content would have, of no evidentiary value. Labor Code, § 3600.

Proceeding by American Mutual Liability Insurance Company for a writ of review to review an award of the Industrial Accident Commission of the State of California granting compensation to Aurore G. Wilson and Hermine Gauthier on account of death of Frank Wilson, employee of Dromedary Company, Inc.

Award affirmed.

Burbank, Laumeister & McFarland, of San Francisco, for petitioner.

R. C. McKellips and Edward A. Sarkisian, both of San Francisco, for respondent Ind. Acc. Comm.

JONES, Justice pro tem.

The petitioner in this proceeding seeks the annulment of an award made by the Industrial Accident Commission on account of the death of Frank Wilson. The decedent was employed by the Dromedary Company, Inc., a food manufacturing and distributing concern, as a salesman calling on jobbers only. The cities of Stockton, Sacramento, Santa Rosa and Petaluma

were in the territory assigned to him. He lived in Los Altos. At about 2 p. m. of August 13, 1945, he left his home for Stockton to call upon the trade in that and the other cities mentioned. The automobile in which he was travelling, a Chevrolet coupe, belonged to his employer. At a point in San Joaquin County on the highway south and west of Stockton he met with an accident, was injured, and from this injury he died four days later without regaining consciousness. The Commission made an award to his widow of $4,740 as a death benefit, and to his mother-in-law who was partly dependent upon him, in the amount of $1,260.

[1, 2] As a defense to the claim of the dependents, the petitioner set up the intoxication of Wilson as the cause of his injury (Section 3600, Labor Code). This is an affirmative defense, and the burden of proving it rests on the employer. Section 5705, Labor Code; Pacific Freight Lines v. Industrial Accident Commission, 26 Cal. 2d 234, 157 P.2d 634. The issue here goes to the sufficiency of the evidence to sustain this defense.

No witness was produced who saw Wilson from the time he left his house in Los Altos until he was received in the San Joaquin General Hospital in Stockton after the accident. A traffic officer testified that he received a call at about 10:15 p. m. on August 13th to proceed to a point on the highway south of Stockton. According to his testimony, he there found the automobile in which Wilson had been riding faced southerly with the top and right side of the car badly damaged. On the opposite side of the road a truck with a trailer attached was parked but headed northerly. The left rear and side of the trailer showed some evidence of a recent impact. This witness testified that the left rear wheel of the trailer was not over eight inches off the paved portion of the highway. Nothing appears as to the overhang, if any, of the bed or body of the truck or trailer above the pavement. In Wilson's car the officer found two empty pint beer bottles, and one full one.

On the day following the accident one Leon Happel, who at the time was employed to make chemical analyses for the peace officers of San Joaquin County, received a bottle containing some fluid purporting to be blood. He stated that he received the bottle and contents from the Highway Patrol. The bottle bore a label, "Tuesday, 8/14/45, Frank Wilson, San Joaquin County Hospital." The contents of the bottle were subjected by Happel to a chemical test, which showed the fluid to contain 3.2 milligrams of alcohol per cubic centimeter. Dr. Jesse L. Carr, a pathologist, testified that 3.2 milligrams of alcohol per cubic centimeter in the blood of an individual would indicate inebriation, and a staggering and toxic condition. Happel did not know Wilson, and as far as he knew he had never seen him. Neither did he know that he had met with an accident.

The wife and adult daughter of Wilson visited him at the hospital at about 7:30 on the morning of August 14th, and each testified that she could ascertain no signs of liquor about him at that time. A certificate by Dr. W. S. Bridwell, Chief Resident Physician of San Joaquin General Hospital, was received in evidence, the body of which certificate reads as follows:

"Re: Frank W. Wilson.

"This is to certify that at the time of admittance examination of the above named patient, the clinical symptoms did not indicate to me that the patient was intoxicated."

Upon these facts, the Commission made a finding upon the issue of intoxication, as follows: "The evidence adduced herein by the defendant is insufficient to sustain their contention that the injury to said Frank Wilson and his death proximately resulting therefrom was proximately or at all caused by his intoxication." This finding, in effect, is that the injury to Wilson was not caused by his intoxication.

The petitioner contends that the finding is contrary to the evidence, and argues that the facts show without contradiction that Wilson was intoxicated at the time he was injured. The contrary appears to be the true situation.

Outside of the two empty beer bottles found in Wilson's car, the petitioner's case rests entirely upon the analysis of the

blood sample made by the chemist, Happel, and the opinion of Dr. Carr based on this analysis. It may be assumed that the fluid analyzed by Happel was blood, although there is no evidence to show from what manner of body it came, nor when. But, assuming that it was, there is a complete lack of identification of it as the blood of Wilson. The only indication that it might be Wilson's blood is a label with his name on it put on the bottle by somebody, but no one knows who. Even assuming it to be Wilson's blood, there is no showing that it was in the same condition when Happel received it as it was when the sample was taken, nor that Wilson had not taken, or been administered as a measure of first aid, a strong alcoholic stimulant after the accident. The whole matter is one of assumption and pure speculation.

[3, 4] It is rudimentary that a specimen taken from a human body for the purpose of analysis must be identified before such specimen or any analysis made from it attains standing as evidence of the condition of the person whose conduct is questioned. Without identification, there is no connection between the two. Reason dictates that the testimony of a witness that a blood sample contains alcohol without some evidence to show that the blood is that of the person charged amounts to no proof at all. The situation here presented in respect to identification is analogous to that presented in the case of People v. Smith, 55 Cal.App. 324, 203 P. 816, 817. In that case the stomach was removed from the body of a woman who purportedly had been poisoned. The autopsy surgeon did not know the woman, and no one identified the body from which the stomach was taken as her body. A chemist made an analysis of the contents of the stomach, and testified that he found that the contents contained cyanide. The defendant was convicted of murder, and upon appeal the case was reversed, the court saying: "It was upon the contents of this stomach that the entire case for the prosecution rested. It was the sole basis for Dr. Wagner's opinion that the person from whose body it was taken died of cyanide poisoning. It was the sole basis for the evidence given by Professor Maas and the other experts who testified as to the character of the stomach contents. * * * If there was no legal evidence to identify it as the stomach of defendant's deceased wife, then, manifestly, to permit the prosecution * * * to introduce evidence of its contents was not only error but highly prejudicial error." The failure to identify the sample as the blood of Wilson renders the testimony of Happel and Dr. Carr of no evidentiary value at all.

The pint beer bottles considered alone have little significance. They were not taken from the possession of Wilson. They were found in his car after he had been removed, but no one knows how long after. The fact that there was some broken bottle glass on the pavement in the vicinity of the parked truck would be more to the point that there was drinking going on in the vicinity before Wilson arrived. No suggestion, let alone proof, is offered as to how any bottles got from the inside of his car to the pavement.

The certificate of Dr. Bridwell that the examination of Wilson upon his admission to the hospital did not indicate that he was intoxicated, and the testimony of his wife and daughter that they could ascertain no signs of liquor about him at the time of their visit emphasize the futility of the blood test and the beer bottles as items of proof. There appears no sound basis for challenging the finding of the Commission.

As the decedent was operating his employer's car in the furtherance of his employer's business at the time of his injury no serious contention can be, and none is, made that he was not injured in the course of his employment.

The award is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

## DEPARTMENT OF MOTOR VEHICLES, CALIFORNIA HIGHWAY PATROL, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13318.

District Court of Appeal, First District, Division 2, California.

March 20, 1947.

Hearing Denied May 15, 1947.

1. Workmen's compensation ⇐840

An award for temporary disability may not be paid to a highway patrolman who is drawing full pay while on leave of absence on account of injury. Labor Code, §§ 4800, 4803, 4804.

2. Workmen's compensation ⇐840

Under provisions of Labor Code providing that injured highway patrolman should be entitled to leave of absence for a year without loss of salary in lieu of disability payments, that such provision referred to temporary disability only, and that no temporary disability should be paid concurrently with wages, injured patrolman was entitled to permanent disability indemnity while drawing full pay while on leave of absence. Labor Code, §§ 4800, 4803, 4804.

3. Workmen's compensation ⇐840

An injured highway patrolman was not precluded from receiving permanent disability indemnity concurrently with salary while on leave of absence because of disability on ground that salary paid while on leave of absence constituted temporary disability which, under provision of Labor Code, could not be paid concurrently with permanent disability indemnity, in view of another provision of Labor Code that such salary was in lieu of disability payments. Labor Code, §§ 3207, 4661, 4800.

4. Statutes ⇐205, 206

A statute must be read and considered as a whole, in order that true legislative intention may be determined, and all parts of statute must be construed together and harmonized so far as possible.

5. Statutes ⇐207

When a general intention is expressed in an act and a particular intention incompatible with general intention, the particular intention is to be considered as an exception and both are to have effect in their respective spheres.

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Proceeding by the Department of Motor Vehicles, California Highway Patrol, against the Industrial Accident Commission of the State of California and another to annul an award of the commission against the petitioner.

Award affirmed.

Donald Gallagher, Royle A. Carter, and Edward J. Gibbons, all of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondent Industrial Accident Commission.

JONES, Justice pro tem.

This is a proceeding to annul an award of the Industrial Accident Commission Commission against the Department of Motor Vehicles, California Highway Patrol.

On April 2, 1944, Clarence W. Cope, a traffic officer of the California Highway Patrol, sustained an injury to his back while engaged in active law enforcement, resulting in a total permanent disability. The degree of this disability was established at 82 percent. The Commission also found that a total temporary disability resulted which extended over two periods, one from April 2, 1944 to May 17, 1944, and the other from February 2, 1945, to January 20, 1946. Following his injury, Cope took a leave of absence with full pay. This leave commenced on April 2, 1944, the date on which he was injured, and continued for 52 weeks.

An award was made on account of the permanent disability in the sum of $6,000, payable at the rate of $25 per week, and commencing as of April 10, 1944, one week after the injury. Section 4650, Labor Code. Attorney fees, medical expenses, and a pension allowance were also awarded, but no question is made of these items. In the award for total permanent disability the employer was given credit for all sums paid on account of temporary disability at the rate of $25 per week. The petitioner

claims that it is also entitled to a credit for all payments made on account of the permanent disability allowance while Cope was drawing full pay on leave of absence. The argument advanced in support of this claim is that the full pay for one year allowed by Section 4800 of the Labor Code is, by the terms of the Code, substituted for all disability allowance.

[1] With reference to those members of the highway patrol whose principal duties consist of active law enforcement, Section 4800 provides that: "Whenever any member of the California Highway Patrol is disabled by injury or illness arising out of and in the course of his duties, he shall become entitled, regardless of his period of service with the patrol to leave of absence while so disabled without loss of salary, in lieu of disability payments under this chapter, for a period of not exceeding one year." Reading this Section with Section 4804 which provides that no temporary disability shall be paid concurrently with wages or salaries, and Section 4803 which declares that Section 4800 refers to temporary disability only, it is clear that no indemnity on account of any temporary disability may be paid to a patrolman who is drawing full pay while on leave of absence on account of injury.

[2] With reference to the payment of a permanent disability indemnity concurrently with salary received while on leave, the problem is not so simple. In Department of Motor Vehicles v. Industrial Accident Commission, 14 Cal.2d 189, 93 P.2d 131, 134, it was held that an indemnity for permanent disability might be paid to an injured patrolman who since his injury had returned to work and was drawing full pay. This holding is in conformity with the general rule that an employee is entitled to an award for permanent disability without regard to the receipt of wages after the injury. However, in arriving at its conclusion, the court construed the prohibitory provisions of Section 4804, as it then stood, as applying only to the salary received by an injured patrolman while on leave, and as in no way abrogating the general rule referred to. Section 4804, then, read: "No disability indemnity shall be paid to said member concurrently with wages or salary payments or for time after the effective date of retirement under the State Employees' Retirement System." In regard to this Section, the court said: "This section appears to have been drafted to prevent the payment of both salary and indemnity during the one-year period, or payment for both indemnity and retirement. The admonition that no disability indemnity shall be paid concurrently with salary seems, under the circumstances, to refer solely to the one-year period when the highway patrol officer is on leave due to injury, and on full salary which is expressly paid in lieu of disability payments."

This is exactly what the petitioner is contending for here. Its interpretation of Section 4800 is that the salary which it authorizes for the one-year period when the patrolman is on leave of absence on account of injury takes the place of all disability allowances for the year. If Section 4800 were to be taken alone, it might be so construed. This, however, may not be done. It is to be read in connection with the other sections of the Labor Code relating to the same subject, and construed so that all may be given effect if possible. The case cited, holding that the provisions of Section 4804 applied to the one-year period while the patrolman was on leave and prohibited the payment of all disability allowance to him during this period while he was on full pay, was decided in August, 1939. At the 1943 session of the legislature, Section 4804 was amended to read: "No disability indemnity shall be paid to said member as temporary disability concurrently with wages or salary payments." The declaration that the disability payment mentioned in Section 4800 "refers to temporary disability only" was added to Section 4803 in 1939, and became effective September 19th of that year. These changes have brought all of the provisions of the Labor Code relating to highway patrolmen in line with the general rule that an employee who has received a permanent disability is entitled to receive both salary and permanent disability indemnity, and have avoided any abrogation or suspension of the rule in so far as paying permanent disability indemnity to an

injured patrolman who is drawing full pay while on leave of absence is concerned.

[3-5] It is further argued by the petitioner that the salary paid to a patrolman while he is on leave of absence on account of injury is in itself a temporary disability allowance, and being such, no permanent disability indemnity may be paid concurrently therewith under the provisions of Section 4661 of the Labor Code. This contention is based on an interpretation of Section 3207 defining compensation. It is urged that the salary paid to a patrolman while on leave is compensation as the term is defined in Section 3207, that is, a disability allowance, or compensation for his injury, as distinguished from salary. Such an interpretation, however, produces an immediate conflict with the express provision of Section 4800 that the salary is in lieu of disability payments. If the legislature had intended the salary to be paid as a disability allowance, it undoubtedly would have said so. What it did say is exactly to the contrary and any seeming conflict with this expression must be resolved to give it effect if reasonably possible. The courts have repeatedly stated, as is set forth in Cal.Jur. vol. 23, p. 760, Sec. 134, that: "It is a cardinal rule of construction that a statute must be read and considered as a whole, in order that the true legislative intention may be determined. All the parts of a statute must be construed together, and harmonized, so far as it is possible to do so without doing violence to the language or to the spirit and purpose of the act, so that the statute may stand in its entirety. For the purpose of harmonizing apparently conflicting clauses, each should be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy. Sections, paragraphs and sentences may be transposed, elegance of composition may be sacrificed, and the meaning of words and phrases may be restricted or enlarged. A provision or clause must, of course, be read as a whole, and sections which are parts of one act, dealing with the same general subject, will be construed together and harmonized, so far as possible." In consonance with this rule, as is stated in Marshall v. Williams, 85 Cal.App. 507, 259 P. 970, 972, "When a general intention is expressed in an act and also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception, and both are to have effect in their respective spheres."

Viewing the several sections of the Labor Code under consideration in the light of the established rules of construction, it is manifest that it was intended by the legislature to provide an injured patrolman with his full pay for a year in the place of any temporary disability allowance, but in no way to limit his right in accordance with the general rule to receive an award of permanent disability indemnity concurrently with his salary.

The award is affirmed.

NOURSE, P. J., and GOODELL, J., concur.




78 Cal.App.2d 604

**PEOPLE v. TRAWICK.**

**Cr. 1988.**

**District Court of Appeal, Third District, California.**

**March 18, 1947.**

**1. Kidnapping ⇐5**

Evidence that prosecutrix was forcibly restrained from leaving automobile when it turned off highway in a direction away from her home sustained conviction of occupant of automobile of kidnapping, regardless of purpose for deviating from direct route to prosecutrix's home and though prosecutrix entered automobile voluntarily and defendant did not drive the automobile. Pen.Code, § 207.

**2. Kidnapping ⇐1**

Defendant's intent is not a material element of the offense of kidnapping. Pen. Code, § 207.

**3. Rape ⇐51(4)**

Evidence as to use of force was sufficient to sustain conviction of forcible rape. Pen.Code, § 261, subd. 3.

**4. Criminal law ⇐1160**

Sufficiency of evidence to sustain conviction of kidnapping and rape was conclusively established, where jury's verdict was supported by substantial evidence and trial court denied motion for new trial.

**5. Criminal law ⇐1158(4)**

Conflicting evidence as to whether statements made by defendants to police officers were voluntarily made or induced by threats and promise of reward presented an issue for determination by trial judge in the first instance and his ruling in such respect would not be disturbed unless without substantial support in the evidence.

**6. Criminal law ⇐406(3)**

Defendants' statements to police admitting intercourse with prosecutrix but denying use of force were not "confessions" of guilt, but merely partial "admissions against interest" and therefore admissible in prosecution for rape and kidnapping regardless of their voluntary character.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession" and "Admission Against Interest".

**7. Criminal law ⇐822(1), 829(1)**

Instructions must be taken and read as a whole and if, when so considered, the entire charge fully and fairly presents the law applicable, judgment will not be reversed for unimportant defects therein or for refusal to give repetitious instructions.

**8. Criminal law ⇐1173(2)**

Whether failure to give appropriate cautionary instruction is reversible error must be determined by the circumstances of particular case.

**9. Criminal law ⇐829(1)**

Refusal to give requested cautionary instruction was not reversible error, where court gave a modified version of requested instructions besides full instructions pertaining to rights of defendants and presumptions which the law raises for their protection.

**10. Criminal law ⇐673(4)**

Where two defendants were tried jointly for participation in same offenses, admission of evidence relating to acts and conversations occurring outside of presence of one defendant under instructions that evidence against one defendant was not to be considered in any way against the other was not error.

**11. Criminal law ⇐1171(1)**

Refusal to allow defense counsel to refer to defendants, 30 and 33 years of age respectively, as "boys" was not prejudicial, though defendants were in the armed service.

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Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Cecil Trawick and another were convicted of rape and kidnapping, and from the judgment of conviction and order denying their motion for a new trial, named defendant appeals.

Judgment and order affirmed.

Frank B. Graves, of Napa, for appellant.

Fred N. Howser, Atty. Gen., and Jas. Reavis, Dep. Atty. Gen., of Sacramento, for respondent.

PEEK, Justice.

By an information containing two counts, appellant Trawick and his co-defendant Copeland were charged with the crimes of rape and kidnapping. From the judgment of conviction and the order denying their motion for a new trial Trawick alone has appealed.

Summarizing the pertinent facts as disclosed by the evidence it appears that on the evening of February 11, 1946, at a point between three and four miles from the city of Fairfield, Solano county, the complaining witness was seated in the parked car of an army captain with whom she had been riding that evening. Becoming frightened at the conduct of the captain she jumped from his car and ran across the highway to a car containing the appellant,

Copeland, and a third man. In response to her request the three men stated they would drive her to her home in Fairfield and she took her place on the rear seat in the car next to appellant. Copeland drove and the third man rode in the front seat with him. However, instead of taking her to Fairfield the car was turned off the highway in a direction away from that city. When she remonstrated and attempted to get out she was pulled back and forcibly restrained from leaving. During the ride occasional stops were made in the course of which both appellant and Copeland forcibly had sexual intercourse with the girl. She finally escaped and found refuge in a farm house.

Following their arrests each of the defendants made a voluntary statement to police officers. That of Copeland admitted the acts of intercourse but denied the use of force either in connection therewith or in the asportation. Trawick admitted having effected a slight penetration, and likewise denied the use of force. At the trial appellant repudiated his statement as having been induced by improper means.

[1, 2] Trawick now contends that the evidence is insufficient to sustain a conviction under section 207, of the Penal Code, which defines the crime with which he was charged. That section provides: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into * * * another part of the same county, * * * is guilty of kidnapping." It is his contention that there is no showing of a forcible carrying away, inasmuch as the complaining witness entered the car voluntarily, and that at no time was he driving the car. Appellant's conclusion is not supported by the premises on which it is based. It is not necessary that the original accompaniment of the abductor be involuntary, if subsequently there is an enforced restraint of liberty. People v. Flores, 62 Cal.App.2d 700, 702, 703, 145 P.2d 318; People v. Ogden, 41 Cal.App.2d 447, 456, 107 P.2d 50. Nor is it essential that the joint participant in such a kidnapping be the one who drove the vehicle used therein. See People v. Nieto, 14 Cal. App.2d 707, 710, 58 P.2d 945; People v. Duran, 57 Cal.App.2d 363, 134 P.2d 305. His further argument that the purpose of driving the girl out of the direct way to her destination was the procuring of a car with good tires, is answered by the observation, that the jury was entitled to infer because of the relative identity of the distances to said destination and to the place where such car was procured, that such explanation was highly improbable. Furthermore appellant's intent was not a material element of the offense. People v. Hunter, 49 Cal.App.2d 243, 245, 250, 121 P.2d 529; People v. Fernandes, 127 Cal.App. 45, 47, 48, 15 P.2d 172.

He next contends that the evidence fails to show forcible rape, as charged in the information and defined in Penal Code section 261, subdivision 3, which provides: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: * * * 3. Where she resists, but her resistence is overcome by force or violence."

[3] However the record discloses (1) definite testimony by the prosecuting witness to forcible ravishment by appellant on two occasions that night; (2) his confession or admission, which he later retracted; (3) her torn clothing; (4) the bruised condition of her body, and (5) the testimony of several witnesses who testified as to hearing screams at a time and place corresponding with the ones indicated in prosecutrix's story.

[4] Since there was substantial evidence to support the verdict of the jury and the determination of the trial court on motion for new trial as to both counts, the legal sufficiency of the evidence is conclusively established. People v. Wade, 71 Cal.App.2d 646, 650, 163 P.2d 59; People v. Ogden, supra, 41 Cal.App.2d at page 455, 107 P.2d 50.

Defendant further assigns as error the admission of portions of the statements made by himself and his co-defendant the day following the alleged crime on the ground that said statements were not voluntary but were induced by threats and promises of reward. In support of his position he cites People v. Gonzales, 136 Cal

666, 69 P. 487, and People v. Thompson, 84 Cal. 598, 24 P. 384. An examination of those cases discloses that in each instance the police officers, when testifying, in effect admitted that improper tactics had been used in procuring the statements there in question. Such is not the case in the present instance. Here the defendant's charge was categorically denied by the officers.

[5] The question thus presented was one of conflicting evidence to be resolved by the trial judge in the first instance. People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas.1912B, 1193. Since his discretion must be controlled by all of the attendant circumstances this court may not interfere with the conclusion therein unless the same is without substantial support in the evidence. People v. Castello, 194 Cal. 595, 229 P. 855; People v. Tugwell, 28 Cal.App. 348, 152 P. 740.

[6] Moreover, as the trial court observed in making its rulings, the statements in question were not confessions of guilt but merely partial admissions against interest, therefore they were admissible in evidence irrespective of their voluntary character. People v. Cronevitch, 86 Cal. App. 646, 650, 261 P. 309.

[7, 8] Appellant further complains of the failure of the trial court to give instructions proposed by him including a particular cautionary instruction. Instructions must be taken and read as a whole and if, when so considered, the entire charge may be said to fully and fairly present the law applicable to the case (People v. Owsley, 76 Cal.App.2d 166, 172 P.2d 561), the judgment will not be reversed for unimportant defects or, as in this case, because the court has refused to give repetitious instructions. However, whether or not the failure to give an appropriate cautionary instruction is reversible error is a question which must be determined by the facts and circumstances of the particular case. People v. Owsley, supra, 76 Cal.App.2d at page 166, 172 P.2d 561. The prosecutrix herein is not a child of young and tender years but an adult whose testimony was corroborated by her physical condition, the state of her clothing, the testimony of several witnesses who heard her screams at a time and place corresponding with the statements of the prosecutrix, and lastly the statements of the two defendants.

[9] While the court did not give the exact instruction requested by appellant it did give what properly may be termed a modified version thereof. Additionally, full instructions pertaining to the rights of the defendants and the presumptions which the law raised for their protection were given. It necessarily follows that no prejudicial error was committed in refusing to give the particular instructions proposed by appellant.

[10] Appellant's further contention, that the court erred in admitting evidence relating to acts and conversations occurring outside of his presence, also is without merit. Time and again the court instructed the jury that evidence against the co-defendant Copeland was not to be considered in any way against defendant Trawick. This is all that the law requires where defendants are tried jointly for participation in the same crime or crimes. People v. Wade, supra, 71 Cal.App.2d at page 653, 163 P.2d 59, and authorities there cited.

[11] Likewise without merit is the charge of prejudice on the part of the trial judge, because he refused to allow counsel for appellant to refer to the defendants as "boys". It appears that appellant was thirty years of age, and Copeland thirty-three. While the fact that defendants were in the armed service may be thought to make the mode of designation used by counsel and several of the witnesses—including the prosecutrix on occasion—appropriate, and the court's admonition unnecessarily strict, it hardly could be deemed prejudicial.

For the foregoing reasons the judgment and order are affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem.

**BROWN et al. v. BOEHM et al.**

**Civ. 7308.**

District Court of Appeal, Third District, California.

March 18, 1947.

Hearing Denied May 15, 1947.

**1. Appeal and error ⇐1004(1)**
**New trial ⇐76(1)**

The remedy for excessive verdicts is practically committed entirely to the trial judge, whose duty it is to weigh the evidence carefully himself and not allow an excessive verdict to stand for its full amount, and power of appellate courts over damages exist only when facts are such that the excess appears as a matter of law, or is such as to suggest, at first blush, passion, prejudice, or corruption on part of jury.

**2. Appeal and error ⇐932(1)**

In considering an attack on a verdict as excessive, the appellate court must treat every conflict in the evidence as resolved in favor of respondents and must give them the benefit of every inference that can reasonably be drawn in support of their claim.

**3. Death ⇐99(4)**

$25,000 to widow and five adult children for death of 61-year-old painter with a life expectancy of 13.47 years, who had a yearly income of about $2,500, was not so excessive that it would be reduced on appeal. Code Civ.Proc. § 377.

**4. Damages ⇐127**

In view of substantial decrease in purchasing power of the dollar, awards in earlier cases are unsubstantial as yardsticks in measuring awards in postwar times.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Death action by Addie Brown and others against George B. Boehm and Hearst Publications, Incorporated. From a judgment for plaintiffs for $25,000, the defendants appeal, claiming that the award was excessive.

Judgment affirmed.

Peters and Peters, of Chico, for appellants.

Jack M. McPherson and Charles H. Andrews, both of Chico, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment for $25,000 awarded to the widow and five adult children of Ernest Brown, deceased, who lost his life in an automobile accident which, it is admitted, was due to the negligence of defendants. The only contention made by appellants is that the award is excessive; and their plea is not that a new trial be ordered as to the amount of damages, but that this court reduce the amount thereof. The record shows that in the lower court a motion for a new trial was made by defendants, one of the grounds therefor being excessive damages appearing to have been given under the influence of passion and prejudice, and that said motion was denied.

[1] Under such circumstances what is the duty of an appellate court? In Bond v. United Railroads, 159 Cal. 270, 285, 286, 113 P. 366, 372, 48 L.R.A., N.S., 687, Ann. Cas.1912C, 50, the Supreme Court said that the remedy for excessive verdicts "is practically committed entirely to the judge who presides at the trial in the court below"; that if he does his duty he will carefully weigh the evidence himself, and will not allow a verdict to stand for its full amount if he believes it gives more damages than the pecuniary loss that it may be reasonably supposed the plaintiff will actually suffer by being deprived of the services, earnings, society, comfort, and protection of the deceased; and that the power of appellate courts over damages "exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. See Hale v. San Bernardino, etc., Co., 156 Cal. [713,] 716, 106 P. 83; Wheaton v. North Beach, etc., Co., 36 Cal. [590,] 591. Practically, the trial court must bear the whole responsibility in every case."

The rule of that case has been applied in numerous subsequent decisions. In Morris v. Standard Oil Co., 188 Cal. 468, 205

P. 1073, 1075, it was cited. There the trial court, in passing upon a motion for a new trial, said, regarding the contention that the damages were excessive, that it considered the award excessive, but that the appellate court was better able to reduce it to a proper amount. The Supreme Court said that while it agreed with the trial court on the subject, it was not the duty of the appellate court to fix the amount of the verdict; that "This duty we do not feel should be imposed upon us. This is not the province of appellate courts. The duty is one that is imposed on the trial court." The judgment was reversed and the cause remanded to the trial court to retry the issue of the amount of the damages.

In Griffey v. Pacific Electric Railway Co., 58 Cal.App. 509, 209 P. 45, 47, an action under section 377, Code of Civil Procedure, the trial court granted a new trial on the ground of excessive damages. Its order was sustained on appeal, the court citing the Bond case to the effect that it was the duty of the trial court on such a motion to weigh the evidence, that the remedy was practically committed to the judge who presided at the trial, and that its order should not be reversed unless it plainly appeared that it had abused its discretion; that "Every intendment is to be indulged here in support of his action, and it will not be disturbed if the question of its propriety is open to debate"; that "even though there be no conflict in the evidence as to the nature and extent of the pecuniary losses suffered by the plaintiffs, nevertheless, the probative force and effect of the evidence upon that phase of the case is ultimately for the determination of the judge of the trial court upon the hearing of the motion for a new trial."

In Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 177 P.2d 32, 36, the court said: "The powers and duties of a trial judge in ruling on a motion for new trial and of an appellate court on an appeal from a judgment are very different when the question of an excessive award of damages arises. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented, it becomes his duty to reduce them. Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors. Generally speaking, in cases of this kind, when damages are recovered for the destruction of property, if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive."

In this state there is no set rule for fixing the damages that may be recovered in an action such as this. Section 377 of the Code of Civil Procedure provides that in actions thereunder, such damages may be given as, under all the circumstances of the case, may be just. In Gilmore v. Los Angeles Railway Corporation, 211 Cal. 192, 198, 200, 295 P. 41, the court said that the measure of damages as to the surviving wife was the pecuniary loss suffered by her by the deprivation of her legally enforceable rights of support; and that in addition thereto loss of comfort, protection and society was a proper element of injury and that it was by no means to be classed as compensable by merely nominal damages. In that case an award of $7500 to the widow and three adult daughters of decedent was held not to be excessive, though none of the daughters was dependent upon decedent, he did not contribute to their support, and he was 79 years old at the time of his death. In Schulman v. Los Angeles Ry. Corporation, 1941, 44 Cal.App.2d 122, 130, 111 P.2d 924, a judgment for $2500 awarded to the adult children of a deceased mother who was 65 years of age, and was not supporting said children, was held not

excessive as the pecuniary value of the loss of society, comfort, and protection which the death of their mother had occasioned. In Corvin v. Hyatt, 1935, 10 Cal.App.2d 107, 51 P.2d 176, a verdict for $5000 for the death of plaintiffs' mother who was 77 years old was held not excessive, though the four surviving children were adults and decedent was not earning over $100 per year. In Coughman v. Harman, 1933, 135 Cal.App. 49, 58, 26 P.2d 851, 854, the widow of decedent was awarded a judgment for $5000 for his death attributed to the negligence of defendant. A motion for a new trial was denied. Deceased was 83 years and nine months old at the time of his death, had a life expectancy of but 3.20 years, and was earning $50 per month, was in good health and mentally sound. It was urged that the award was excessive, because, in 3.20 years he would have earned $1920, one-half of which would probably have been used for his own support, leaving but $960 for the support of plaintiff. But this court said: "There is nothing in the record indicating that the jury was actuated by malice or a desire to award the plaintiff an undue sum of money as damages for the losses sustained by her. While the mortality tables allowed the deceased only 3.20 years in which to live, those tables are only an approximation of how long anyone may be said to survive, and by no means constitute an absolute limit as to how many years a person of sound mind and body may remain alive. Common experience teaches us that many individuals live beyond the period of life which the tables would have allotted to the deceased in this case. We do not very well perceive how this court can say as a matter of law that the sum of $5,000 is an excessive sum to award a widow for the loss of the comfort, protection, and society of her husband, even though mortality tables limit his supposed span of life to a very few years. There being nothing to indicate passion or prejudice on the part of the jury, we find no reason for disturbing the verdict on the grounds of excessive damages. A human life if worth anything to another is certainly worth at least the sum of $5,000." In Bach v. C. Swanston & Son, 1930, 105 Cal.App. 72, 286 P. 1097, a verdict for $30,000 for the death of a wife aged forty years, in favor of her husband and four minor children, was upheld. In Kerrison v. Unger, 1933, 135 Cal.App. 607, 27 P.2d 927, five adult children of decedent brought the action for damages for the death of their mother, aged 68 years, and an award of $5000 was held not excessive. In Redfield v. Oakland Consol. St. Ry. Co., 1895, 110 Cal. 277, 42 P. 822, 1063, a verdict for $14,000 for death of a wife and mother aged 35 years, who left a surviving husband and two minor children, was held not excessive. It was said that the court could not interfere unless the amount of the award was so excessive that it appeared to have been given under the influence of passion or prejudice. In Froeming v. Stockton Electric R. Co., 1915, 171 Cal. 401, 414, 153 P. 712, Ann.Cas.1918B, 408, a verdict for $18,000 for the death of a mother who left a husband and several minor children was held not excessive. In Valente v. Sierra Ry. Co., 1910, 158 Cal. 412, 419, 111 P. 95, a $14,000 verdict for the death of a mother in favor of the husband and four minor children was held not excessive. The award was, in effect, for loss of society, comfort and care. In Nitta v. Haslam, 1934, 138 Cal.App. 736, 745, 33 P.2d 678, a verdict for $20,320 for death of a mother aged 32, who left as survivors her husband and three minor children, was affirmed. The court said while the judgment was large it could not be said to be excessive unless it appeared that it was the result of passion, prejudice or corruption on the part of the jury. In McLaughlin v. United Railroads, 1915, 169 Cal. 494, 147 P. 149, L.R.A.1915E, 1205, Ann.Cas.1916D, 337, a verdict for $7500 in favor of one minor and two adult daughters of a widowed mother was sustained, where a motion for a new trial had been denied by the trial court. In Weaver v. Shell Co., 1939, 34 Cal.App.2d 713, 722, 723, 94 P.2d 364, a verdict in favor of the widow and two minor children of a decedent for $40,000 was sustained, the trial court having denied a motion for a new trial. Decedent was 37 years of age and

was earning $150 to $200 per month, or $1800 to $2400 per year; the two children were approaching their majority.

[2] In considering an attack upon a verdict as excessive, the appellate court must treat every conflict in the evidence as resolved in favor of respondents and must give them the benefit of every inference that can reasonably be drawn in support of their claim. Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234; Wallace v. Pacific Elec. Ry. Co., 105 Cal.App. 664, 672, 288 P. 834.

In Ware v. McPherson, 213 Cal. 120, 121, 1 P.2d 433, the court said that on appeal a verdict must be "so plainly and outrageously excessive as to suggest, at the first blush, passion, or prejudice or corruption on the part of the jury," before it can be held excessive. Also see Corvin v. Hyatt, supra, and Bach v. C. Swanston & Son, supra, to the same effect. And in Lasater v. Oakland Scavenger Co., 71 Cal. App.2d 217, 220, 162 P.2d 486, 487, in which the Supreme Court denied a hearing, it was said that: "There is no fixed and absolute yardstick by which a court on appeal can measure the value of these elements of damage, it being sufficient if the amount awarded appears to bear a reasonable relation to the elements of loss entitled to be considered by the jury, and the fixing of the amount is committed first to the sound discretion of the jury and second to the like discretion of the trial judge in passing on a motion for new trial. 8 Cal. Jur. 1023, 1024."

In Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, it was said that the only method of determining whether a verdict is excessive is by comparing the amount of damages awarded with the evidence. Considering the evidence adduced in this case in the light most favorable to respondents, and giving them the benefit of every inference that reasonably can be drawn therefrom, it shows the following:

At the time of his death Ernest Brown was 61 years of age and, according to mortality tables, had a life expectancy of 13.47 years. His wife was 54. They were married in Osborn, Nebraska, on August 17, 1923. Of that marriage one child was born, namely, Virginia Chandler, one of the plaintiffs. At the time of the marriage, Mrs. Brown had four small children by a prior marriage, and Mr. Brown had four minor children by a prior marriage. On the same date, decedent's eldest daughter was married and became Velma Harmon, and upon her marriage she left her father's home where she had been residing. The other children of both parties were brought to the four-room home of Mrs. Brown and were there reared together. The girls remained in that home until they married, and Vernon Brown remained there until he was 22 years old. On November 2, 1936, he moved to California. For a year while her husband was in overseas service, Virginia lived with Mr. and Mrs. Brown and in the family home and contributed toward the household expenses. Decedent was a painter and interior decorator; he kept no books, had no business place, and operated out of the family home, taking jobs and doing them himself; before the accident his health was good; he never had had a doctor and was steadily employed; his widow stated that his earnings were "around about two or three thousand a year"; he also was a violinist, and Mrs. Brown played the piano, and they sometimes furnished the music for dances, and for such service "once in a great while they would take up a collection and give him money and sometimes he did it just for the fun of it"; aside from money received for his work, sometimes "they gave him commodities like chickens or eggs, milk"; the town where they lived and he worked was a small country town; if he wasn't working at his trade he would take any kind of work. Mrs. Brown stated that decedent always helped his children if any of them needed any help. Some years before his death he gave an unknown amount of financial assistance to his then married daughters, Velma Harmon and Vaveta Morse; Vaveta became ill in Texas and was brought to the Brown's home in Shubert, Nebraska, where Mrs. Brown took care of her until she was able to go to work; she stayed at the home for a year and the Browns kept her children for about two years while Vaveta worked. Mr. and Mrs. Brown visited his two children in Boise, Idaho, and Vernon Brown and her

son Delbert M. Townsend in California on three different occasions in the four years preceding his death; after they married and left home some of the children visited their parents at Shubert, Nebraska. One of the sons testified that his father and mother had visited him in California on three different occasions; that his father had not helped him with money since he left home because he did not need it, but that while still at the home in Nebraska he had pneumonia after he was 21 years of age, and was in bed from February 24th to May 11th; that his father brought in a doctor and "cared for me, stayed up day and night for me; he bought everything that was to be had because I never had it. He paid the doctor's bills. I never had any money at the time"; that his parents were sociable and friendly and were very happy together; that they fished together and they liked to dance; that they arrived in California on the last visit two or three days prior to the accident; they stayed part of the time with Delbert Townsend, her son by a prior marriage; on each of their visits to California they stayed on an average of two months or more, except the last visit when the accident occurred. The relations between decedent and his children and their families were apparently very friendly. The Browns always sent them Christmas presents, sometimes sent clothes for the children, and while visiting with them Mr. Brown bought groceries and took them to shows.

[3] In view of the foregoing evidence it cannot be said that the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion, or prejudice or corruption on the part of the jury." Ware v. McPherson, supra. The widow's testimony shows that decedent had a yearly income of $2000 to $3000, and if we take the figure of $2500 per annum and assume that decedent would have lived out his expectancy of 13.47 years, his earnings would have been $33,675; and assuming—though it does not necessarily follow—that one-half of that amount would have been required for his own support, $16,837.50 would have been left for the support of his wife. Funeral expenses, etc., amounted to $739.73, and the award of $25,000 would thus leave $7,423.77 as compensation to the six plaintiffs for the loss of comfort, society and protection. If, as was held proper in Corvin v. Hyatt, supra, $5000 was not excessive as compensation for the four adult surviving children of a mother, aged 77 years, such an amount should not be held excessive for the five surviving children of decedent Brown; and we cannot say that $2423.77 would be excessive as compensation for the loss to Mrs. Brown of the comfort, society and protection of her husband.

It is true, of course, as argued by appellants, that Brown's earning capacity might have decreased with advancing years; but it is also within the range of possibility, in view of the housing situation and the per diem which is now being paid for painters and paper-hangers, that his earnings might have increased; also, as was said in Coughman v. Harmon, supra, mortality tables by no means constitute an absolute limit of the span of life; and decedent might have lived much longer than the 13.47 years allotted to him, and without an appreciable decrease in his earnings. There is also the further consideration that the value of the dollar has decreased substantially, thus making awards in earlier cases unsubstantial as yardsticks for measuring verdicts during the postwar times. In O'Meara v. Haiden, 204 Cal. 354, 367, 268 P. 334, 60 A.L.R. 1381, this was recognized, and the court said, quoting from a decision in a Minnesota case, Quinn v. Chicago, M. & St. P. Ry. Co., 162 Minn. 87, 202 N.W. 275, 46 A.L.R. 1228, that in recent years there had been a noticeable increase in the size of verdicts in personal injury cases, and the courts had approved verdicts which they would, some years before, have set aside as excessive; that measured in money the earning capacity of most men had increased and the value of the dollar decreased; and that it is proper to take these well-known facts into consideration. Similar views were expressed in Lasater v. Oakland Scavenger Co., supra, 7 Cal.App.2d at page 220, 162 P.2d 486; Sim v. Weeks, 7 Cal. App.2d 28, 43, 45 P.2d 350; House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 341, 95 P.2d 465; Bach v. C. Swanston & Co., supra.

[4] The foregoing satisfies us that the award cannot be said to be without support in the evidence, or to be so outrageously excessive as to justify a conclusion that it was impelled by passion, prejudice or corruption. And in view of the fact that the trial court who heard and saw the witnesses, and presumably weighed the evidence on the motion for a new trial, was satisfied with the amount of the verdict, and every intendment is to be indulged here in support of its action, the judgment is affirmed.

PEEK and THOMPSON, JJ., concur.




**O'BANION et al. v. BORBA et ux. ***
**Civ. 3544.**

District Court of Appeal, Fourth District, California.

March 28, 1947.

Rehearing Denied April 18, 1947.

Hearing Granted May 26, 1947.

**1. Easements ⇐21**

Grantees in deeds excepting from the conveyance all existing rights of way did not acquire any rights in roads and ditches the use of which had ripened into easements at time of conveyance.

**2. Easements ⇐22**

The plaintiffs acquired a prescriptive right to road across defendants' property prior to defendants' purchase of property in 1945 under deed which expressly reserved from the conveyance all existing rights of way, where road had been continuously used since 1924, and was only means of ingress to and egress from plaintiffs' property, and plaintiffs improved road every year commencing in 1938, notwithstanding that third persons also used road.

**3. Waters and water courses ⇐242, 244**

Evidence was sufficient to show that plaintiffs' lands were the dominant tenements to which attached, easements in ditch which conveyed water to plaintiffs' lands and in parallel road used to keep ditch clean and in repair, both of which plaintiffs constructed in 1938 and used continuously without objection or interruption until defendants built fences in 1945.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action to quiet title by Emory O'Banion and others against A. A. Borba and Mary L. Borba, his wife. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

C. Ray Robinson, Samuel V. Cornell and Margaret A. Flynn, all of Merced, for appellants.

Linneman & Burgess, of Dos Palos, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to a right of way forty feet wide for road purposes, and to another forty-five feet for ditch and road purposes.

Plaintiffs owned three parcels of land containing approximately 413.10 acres, in Fresno and Merced Counties. The first parcel was acquired in 1933, the second in 1938, and the third at a later date.

Defendants owned two parcels of land in the same general neighborhood, one containing 162.10 acres which we will refer to as parcel "A," and the other, 610.93 acres, which we will refer to as parcel "B." The two parcels are separated by a sizeable tract owned by a Mr. Colson.

All the land in the district was owned at one time by Miller & Lux, Incorporated. It is quite alkali and has been used for pasturage and duck clubs.

There is a gentle slope of the country to the north. Immediately north of plaintiffs' properties and Parcel A is what we will call the San Joaquin Main Canal. Immediately south of Parcel B is the Outside Canal from which plaintiffs obtained their water through the ditch in question. The only public road in the entire district is Russell Avenue which runs north and south along the east side of Parcel A. It is distant about two miles from the parcels acquired by plaintiffs in 1933 and 1938.

* Subsequent opinion 195 P.2d 10.

When plaintiffs first acquired their property in 1933 there was an unimproved dirt road leading westerly from Russell Avenue to their tract of land. It was their only means of ingress and egress. It was just south of the San Joaquin Main Canal and crossed the northerly portion of Parcel A.

The evidence shows that this road was in use as early as 1924 and has been used continuously ever since in practically the same location where it is now found. The plaintiffs first did work on this road in 1938. They graded it with a tractor, bulldozer and grader. They did not build a crown or dig gutters, but made what they call a smooth grade by levelling it and filling in mud holes and ruts. They repeated this work every year up to 1945, and sometimes several times a year. There is no evidence that any permission was given to use the road and it affirmatively appears that no one objected to its use until after defendants had purchased their properties in 1945 and had built fences across it.

Before defendants purchased their properties, Mr. Borba went over them. He saw the road we have been discussing which ran from Russell Avenue westerly across the northerly portion of Parcel A, and the ditch with a road alongside it running from the Outside Canal northerly across the westerly portion of Parcel B to plaintiffs' properties.

[1] In the two deeds conveying Parcels A and B to defendants the grantor, Miller & Lux, Incorporated, expressly reserved and excepted from the conveyances "all now existing rights of way for roads, * * * ditches, canals * * * and irrigation works * * * " so if plaintiffs' use of the ditch and roads in question had ripened into a right when defendants purchased their two properties they did not acquire any rights in the easements under those conveyances. Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal.App. 451, 181 P. 98.

[2] Under the evidence before us we cannot see how it may be questioned that plaintiffs had acquired the right to use the road leading from Russell Avenue across the northerly portion of Parcel A and on to their property long before defendants purchased the property in 1945. It was the only means of ingress to and egress from their property and they used it continuously since 1933. They improved the road and did work upon it every year commencing in 1938. It is true that others, principally cattle and sheep men, also used the road but this use by others could not prevent the use by plaintiffs from ripening into a right. Therefore plaintiffs had acquired a prescriptive right to use the road. Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Leverone v. Weakley, 155 Cal. 395, 101 P. 304; Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370; Lemos v. Farmin, 128 Cal. App. 195, 17 P.2d 148; Wallace v. Whitmore, 47 Cal.App.2d 369, 117 P.2d 926; McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944.

Defendants argue that the so-called road across Parcel A was only one of several trails or tracks appearing at numerous places in that locality. The weight of the evidence is against this contention and effectively disposes of it.

[3] The conclusion that plaintiffs have gained a prescriptive right in and to the ditch and road along side of it leading from the Outside Canal northerly across Parcel B to plaintiffs' properties must be drawn from the evidence. This ditch and road were constructed by plaintiffs in 1938 and were continuously used by them without objection or interruption until defendants built their fences in 1945. The ditch was about fifteen feet wide and from three to six feet deep. The road paralleled the ditch and was used to keep the ditch clean and in repair. Water was conveyed through the ditch to plaintiffs' lands. These lands became the dominant tenements to which the easements attached. Wells v. Dias, 57 Cal.App. 670, 207 P. 913. Thus the use had ripened into a right prior to the time defendants purchased Parcel B.

Defendants point to certain portions of the record where it appears that plaintiff O'Banion admitted that permission had been given by Miller & Lux, Incorporated, for the construction of this ditch. An examination of the record shows that these state-

ments were contained in a deposition of O'Banion and were used to impeach his testimony during the trial at which time he testified that no permission for the construction of the ditch and road had been given by any one. The testimony of plaintiff Henderson is to the same effect.

The only effect of O'Banion's testimony in the deposition was to impeach his testimony and to create a conflict in the evidence which was resolved against defendants by the trial court. This is conclusive here as the weight to be given evidence, and conflicts in the evidence, are settled in the trial court and not in an appellate court.

The judgment is affirmed.

BARNARD, J. P., and GRIFFIN, J. concur.




**AVOSET, Inc., v. BROCK et al.**
**Civ. 7311.**
**Sac. 5794.**

District Court of Appeal, Third District, California.

March 10, 1947.

Rehearing Denied April 8, 1947.

See 179 P. 44.

**1. Injunction ⇐85(2), 114(2)**

Where a statute is clearly unconstitutional an injunction may issue at the instance of an aggrieved party. Civ.Code, § 3423; Code Civ.Proc. § 526, subd. 4.

**2. Constitutional law ⇐48**

Every presumption is in favor of the constitutionality of an act of the legislature.

**3. Constitutional law ⇐48**

The courts must uphold a statute enacted under the police power for the welfare of the public unless it clearly appears to be repugnant to the constitution.

**4. Constitutional law ⇐48**

The burden is on one who challenges the constitutionality of an act to show that it is irreconcilable with the fundamental law.

**5. Constitutional law ⇐70(3)**

It is the sole province of the legislature to determine the policy or necessity for enacting a statute.

**6. Constitutional law ⇐278(4), 298(1) Food ⇐1**

The section of the Agricultural Code providing that sterilized milk or cream shall not be used in the state nor sold for use in the state unless it is made from grade A milk or grade A cream and that in any area in which a price stabilization and marketing plan is in effect unless the milk or cream used in such sterilized milk or sterilized cream is purchased and such sterilized milk or sterilized cream is sold at the prices established for fluid milk and fluid cream in that area does not violate due process clause or any other constitutional provision. Agricultural Code, § 553.5; U.S.C.A.Const.Amend. 14; Const. art. 1, § 13.

**7. Constitutional law ⇐208(1)**

The legislature has a wide discretion in adopting classifications to which the statute is made applicable and such classifications should be upheld as valid in the absence of a clear affirmative showing that they are palpably arbitrary and devoid of reason.

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Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Avoset, Inc., against A. A. Brock, as Director of Agriculture of the State of California, and others to enjoin interference with manufacture and sale by plaintiff of a food product called "Avoset" within the state of California. From a judgment for plaintiff, the named defendant appeals.

Reversed with directions to render judgment for appellant.

Fred N. Howser, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., and Claude H. Adams, Dist. Atty., and William R. Elam, Asst. Dist. Atty., both of Merced, for appellants A. A. Brock and O. A. Ghiggoile.

H. K. Landram, of Merced, for appellant N. L. Cornell, Sheriff.

C. Ray Robinson, Samuel V. Cornell and Margaret A. Flynn, all of Merced, for respondent.

Ray L. Chesebro, City Atty., John L. Bland, Deputy City Atty., Christopher J. Harrison, and Willis I. Morrison, all of Los Angeles, amici curiae.

BY THE COURT.

The Director of Agriculture of California has appealed from a decree enjoining him and his agents from interfering with the manufacture and sale by plaintiff of a food product called "Avoset" within the State of California. The product is produced for human consumption and sale in violation of Section 553.5 of the Agricultural Code, from manufacturing milk or cream which is not Grade "A". It has not previously been sold within the State of California. The trial court found that Avoset was a pure, wholesome, healthful, harmless food product, free from bacteria and deleterious matter. The decree therefore determined that Section 553.5 is unreasonable, arbitrary, discriminatory and unconstitutional.

The plaintiff is a Delaware corporation maintaining its factory and principal place of business, since 1940, in Merced County, California, where it manufactures a milk or cream product called Avoset for sale as a supplement or substitute for fresh milk or cream. That product is made from sterilized *manufacturing* milk or cream as distinguished from *market* Grade A milk or cream, and is sold in hermetically sealed containers, in fluid form. It is composed of 99.8 per cent milk or cream to which two-tenths of one per cent of sodium alginate, a commercial vegetable stabilizer, is added. The product is not patented. It has been heretofore sold in large quantities outside of California, only. The label on the containers advertises that it is made of "real dairy cream" with the addition of the vegetable stabilizer which gives it "extraordinary keeping quality and maintains its Meadow-Sweet flavor"; that "Avoset makes delicious dessert toppings," and "excellent homemade ice cream, and if thinned is perfect for coffee, cereals, deserts and fruits," and that it should be whipped and flavored "just the same as *fresh* whipping cream." The Vice-President testified that "The most obvious uses are in places that are not ordinarily daily served with fresh milk products."

The only question on this appeal is the constitutionality of Section 553.5 of the Agricultural Code. It is conceded that Avoset conforms to the requirements of said section in its ingredients and method of manufacturing, except that it is not made from sterilized Grade A milk or cream; that it is composed of inferior grades of milk or cream, mingled with pure, treated vegetable extracts, sterilized, vacuum packed and processed so as to destroy bacteria and deleterious ingredients. It is made of manufacturing milk or cream, as distinguished from Grade A milk or cream, as defined by the Agricultural Code, to which two-tenths of one per cent of sodium alginate, a commercial vegetable stabilizer, is added.

After defining the terms "sterilized milk and sterilized cream", Section 553.5 of the Agricultural Code provides that: "* * * Such product may contain harmless edible stabilizer not to exceed five-tenths of 1 per cent but shall otherwise conform to the standards and requirements established for milk or cream, as the case may be. *Such milk or cream shall not be used in this State, nor sold for use in this State unless such sterilized milk or sterilized cream is made from Grade 'A' milk or Grade 'A' cream,* and, in any area in which a price stabilization and marketing plan is in effect, unless the milk or cream used in such sterilized milk or sterilized cream is purchased and such sterilized milk or sterilized cream is sold at the prices established for fluid milk and fluid cream in that area." (Italics added.)

Legislative regulation of the milk industry in California, extending over a period of more that 35 years, has wisely become increasingly strict with the apparent object of securing higher standards of purity and food property of milk and cream in their fluid state, for human consumption. Scientific methods have been adopted and caution has been taken to protect the pub-

lic against impure, contaminated and unsanitary milk and cream in their fluid form. There appears to be good reason for distinguishing between milk and cream in their fluid state and the products therefrom in their solid forms. Such classifications do not appear to be unreasonable. Grade A milk is "market milk" which conforms to the requirements specified in Section 484 of the Code. It must contain not less than 3.3 per cent of milk fat. (Sec. 476, Ag.Code.) Section 469 of that code prohibits the purchase or sale of milk or cream, as unlawful, "which does not meet the requirements and standards of *market* milk and *market* cream." "Milk which does not conform to the requirements of *market* milk is manufacturing milk." (Sec. 466(c), Ag.Code.) It is standardized on a basis of not less than 3 per cent of milk fat. (Sec. 466, Ag.Code.) "Cream which does not conform to the requirements of market cream is manufacturing cream." (Sec. 471(b), Ag.Code.) It is conceded that Avoset is made from *manufacturing* milk or cream, and not from Grade A milk or cream. It appears that the cost of producing Avoset from manufacturing milk or cream is considerably less than from market Grade A milk or cream. Many products of milk and cream, including butter and its substitutes, cheese, evaporated milk and cream, dried milk and buttermilk are separately classified and regulated by specific provisions of the code, and sometimes by reference to the standards adopted by the United States Agricultural Department. The Director of Agriculture is also authorized to adopt reasonable rules for regulating the milk industry and to enforce the statutes. (Sec. 735.2, Ag.Code.)

[1-5] An injunction may not ordinarily issue to prevent the execution of a public statute, by officers of the law, for the public benefit. (Civil Code, sec. 3423, subd. 4; C.C.P., sec. 526, subd. 4.) When the statute is clearly unconstitutional, an injunction may issue at the instance of an aggrieved party. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895. Every presumption is in favor of the constitutionality of an act of the legislature. It is the duty of courts to uphold a statute enacted under the police powers for the welfare of the public unless it clearly appears to be repugnant to the constitution. The burden is on one who challenges the constitutionality of an act to show that it is irreconcilable with the fundamental law. 5 Cal.Jur. 628, secs. 56-60; Rainey v. Michel, 6 Cal.2d 259, 272, 57 P.2d 932, 105 A.L.R. 148. It is the sole province of the legislature to determine the policy or necessity for enacting a statute. 5 Cal.Jur. 638, sec. 65; Butterworth v. Boyd, 12 Cal.2d 140, 146, 82 P.2d 434, 126 A.L.R. 838. The legislative purpose of regulating the production and distribution of fluid milk and cream and the products therefrom, is declared to be exercised under the police powers for the benefit of public health and welfare, to secure an adequate supply of milk and cream of proper chemical and physical content and to encourage efficient marketing of those important food commodities. [Secs. 735, 735.1, Ag.Code) In the section last cited it is said:

"The purposes of this chapter are to:

* * * * *

"(c) To authorize and enable the director to formulate stabilization and marketing plans * * *

"(d) Enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of *fluid milk and fluid cream* * * *." (Italics added.)

[6] We are of the opinion the trial court erred in holding that the last sentence of Section 553.5 of the Agricultural Code is unconstitutional and void because it is unreasonable, arbitrary, discriminatory or in violation of the due process provisions of the Federal or State constitution, U.S. Const.Amend. 14; Const. art. 1, § 13, or for any other reason. We are of the opinion it is a valid exercise of the police powers of the legislature in classifying and regulating the sale of milk or cream or the products therefrom. It requires all products in fluid form made from sterilized milk or sterilized cream "[to be] sold for use in this State," to be made "from Grade 'A' milk or Grade 'A' cream." That clas-

sification of the products of sterilized milk or cream is not arbitrary or unreasonable. There appears to be good reason for such classification, even though it may be conceded that such products made from an inferior quality of *manufacturing* milk or cream *may* also be wholesome and free from deleterious or contaminated elements. Manufacturing milk and cream are inferior grades or classes because they are not subject to the statutory requirements with respect to inspection, sanitation or contents which assure the purchasers and consumers of Grade A milk or cream of higher food properties and standards. It is an accepted fact that tuberculosis and other diseases may be incurred from drinking impure milk. It is evident that the higher the standard of production, the greater is the assurance of freedom from contamination and disease. It may be conceded that Avoset may be wholesome and free from deleterious matter. But the legislature had authority to classify fluid products made of sterilized milk or cream, out of precaution for the health and welfare of the public, so as to require them to be made only from the highest standard of Grade A milk or cream.

It is apparent that manufacturing milk or cream from which Avoset is made is not as safe to drink or use as Grade A milk or cream. Manufacturing milk is required by statute to contain a minimum of 3 per cent milk fat, while market milk must contain at least 3.3 per cent of milk fat. The former may contain 2,000,000 bacteria per cubic centimeter (Sec. 466(c), Ag.Code), while the latter may contain not more than 100,000 bacteria in the same quantity. And Grade A milk may contain not more than 75,000 bacteria per similar quantity, and it must be produced from inspected milk from dairies scoring at least 70% upon official inspection of the herds of cattle conducted every six months. Market cream shall conform to all of the standards set for market milk of the same grade except those relating to milk fat and solids not fat, and except that the maximum bacterial count for market cream shall not be more than three times as great as that for the corresponding grade of milk. (Sec. 489, Ag. Code.)

[7] It is true that ice cream, sherbet and other similar products made from milk or cream are not required to be produced from market milk or cream. (Sec. 506, Ag. Code.) But such products are not sold in liquid form, as is Avoset, and they are specifically separately classified. Because ice cream may be manufactured from milk other than Grade A furnishes no reason for holding that Section 553.5 of the code is therefore an arbitrary and unreasonable classification. We may not hold that the general application of Section 553.5 of the code is arbitrary and unreasonable merely because certain other specifically classified products are exempt therefrom. The legislature has a wide discretion in adopting classifications to which the statute is made applicable, and such classifications should be upheld as valid in the absence of a clear affirmative showing that they are palpably arbitrary and devoid of reason. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 702, 151 P. 398; 5 Cal. Jur. 832, sec. 193. Every intendment is in favor of the validity of the classification adopted. In State ex rel. Van Winkle v. Farmers Union Cooperative Creamery, 160 Or. 205, 84 P.2d 471, at page 478, quoting with approval from Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167, it is said: "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

Conceding that neither the product of Avoset nor the label which its containers have attached thereto are intended to deceive the public, notwithstanding the fact that the label states that Avoset is made of "*real* dairy cream", and that it may be whipped and flavored "just the same as *fresh* whipping cream," which fails to notify the public that it is really made of *manuturing* milk or cream and may infer that it is made only from market Grade A milk or cream, those conceded facts do not necessarily mean that the challenged provisions of Section 553.5 of the code are arbitrary,

unreasonable or in violation of the constitutional guaranty of due process.

In the statutory provisions regulating the production, handling and marketing of milk it is divided into two distinct classes, namely, market milk and manufacturing milk. (Secs. 466–495, Ag. Code.) The code also distinguishes between "fluid milk" and the products thereof which are not in that form. (Sect. 735.3, Ag. Code.) It also recognizes the fact that market milk means fluid milk, which is not necessarily true with respect to manufacturing milk. Jersey Maid Milk Products Co., Inc. v. Brock, 13 Cal.2d 620, 639, 91 P.2d 577, 588. In the case last cited it is said: "By these provisions of the Agricultural Code, 'fluid milk' means the same as 'market milk' and includes *fluid cream* as well as fluid milk."

The provisions of the Agricultural Code regulating the industry of milk and cream seek to enforce high standards of quality, excellence and food property, as well as purity and wholesomeness. In construing the section in question with respect to its alleged arbitrary or unreasonable provisions, that purpose of the legislature should be borne in mind. In 22 American Jurisprudence, at page 855, section 63, it is said in regard to the construction of milk statutes under such circumstances: "The regulations most frequently tested in the courts are those establishing an arbitrary standard of quality without regard to the question of adulteration or extraction, and prohibiting, under penalty, the sale of milk falling below the required standard. They have been sustained with practical unanimity, irrespective of whether the failure to come up to the standard is due to the fault of the cow, the dairy owner, or the dealer, and of the fact that the milk may be used without detriment by one who knows all about it and may be nutritious and, under certain circumstances, beneficial as an article of food."

The fact that Section 553.5 of the code fixes the standard for the sale of sterilized milk or cream, or the products therefrom, in this State and requires them to conform to Grade A milk or cream is not unreasonable merely because the product therefrom is pure and wholesome. In supporting a Los Angeles milk ordinance which required a standard including the necessity of the presence of 3.5 per cent butter fat in the milk authorized to be sold, in spite of the fact that the State Milk Act (Stats. 1907, p. 265) required only 3 per cent of milk fat, the Supreme Court held in In re Hoffman, 155 Cal. 114, at page 119, 99 P. 517, 519, 132 Am.St.Rep. 75, that the Los Angeles act was not unreasonable or arbitrary even though the milk was in its natural state and pure. The court said: "Petitioner charges that this particular ordinance is unreasonable and in restraint of trade in exacting too high a standard for the milk permitted to be sold. * * * Nor is it any objection to the validity of the ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law."

Many cases in various jurisdictions have held that the legislature has the right under its police powers to fix standards to which milk for sale must conform, and that such statutes are not an arbitrary exercise of authority or unreasonable merely because they require a higher per cent of milk fat or other properties or conditions, or for the reason that the products of lower standards may be pure, wholesome and free from deleterious matter. Anderson v. City of Tampa, 121 Fla. 670, 164 So. 546, 547; State v. Smyth, 14 R.I. 100, 51 Am.Rep. 344; People v. Cipperly, 37 Hun, N.Y., 319, 324; Id., 101 N.Y. 634, 4 N.E. 107; State v. Campbell, 64 N.H. 402, 13 A. 585, 10 Am.St.Rep. 419; City of St. Louis v. Liessing, 190 Mo. 464, 89 S.W. 611, 613, 1 L.R.A.,N.S., 918, 109 Am.St.Rep. 774, 4 Ann.Cas. 112; State v. Schlenker, 112 Iowa 642, 84 N.W. 698, 51 L.R.A. 347, 84 Am.St.Rep. 360; Commonwealth v. Wheeler, 205 Mass. 384, 91 N.E. 415, 137 Am.St.Rep. 456, 18 Ann.Cas. 319; Hebe Co. v. Calvert, D.C., 246 F. 711, 717; Hebe Co. v. Shaw, 248 U.S. 297, 39 S.Ct. 125, 126, 63 L.Ed. 255. In the case last cited the Supreme Court of the United States sustained the judgment of the United States District Court of Ohio dismissing a complaint in equity brought to restrain prosecutions of manufacturers of a milk product called "Hebe", which was

sold contrary to the Milk Act of the State of Ohio. Hebe was made from skimmed milk condensed by evaporation to which 6 per cent of cocoanut oil was added. The label on the containers correctly stated the ingredients from which the product was made. It was conceded that Hebe was a wholesome, harmless product, but it did not conform to the provisions of the statute. The Ohio statute prohibited and penalized the manufacture or sale of "condensed milk unless it has been made from * * * unadulterated * * * milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of 12 per cent of milk solids in crude milk, 25 per cent of such solids being fat, * * *." In upholding that statute, the late Mr. Justice Holmes said the statute declares that:

"* * * You are not to make a certain article, whatever you call it except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. * * * We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort.

"We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature 'is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. * * *' * * * If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' [Citing authorities.] The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends."

The foregoing case from which we have quoted appears to be determinative of the very issues of the present suit. The principles involved in both cases are exactly the same. In each case it was conceded the manufactured product was wholesome, harmless and suitable for human consumption. In the Hebe case the statute prohibited the sale of such products unless they were made from unadulterated milk from which the cream had not been removed. It required the milk to contain 12% of milk solids, 25% of which solids should consist of milk fat. In the present Avoset case, the California statute prohibits the sale unless the products are made from sterilized Grade A milk or cream. The plaintiff in this case violated that statute by making Avoset from manufacturing milk or cream, which is inferior to Grade A milk or cream, for the reason that it contains less milk fat, and because it otherwise fails to conform to the high standards required for the production and sale of fluid Grade A milk or cream.

For the foregoing reasons we conclude that the challenged portion of Section 553.5 of the Agricultural Code is not arbitrary, unreasonable, discriminatory or in violation of the due process provisions guaranteed by the constitutions.

The judgment is reversed, and the trial court is directed to render judgment for the appellant, upholding the constitutionality of that portion of the statute in question.

78 Cal.App.2d 714

**PAGANUCCI et al. v. KALPOUZOS et al.**
**Civ. 3524.**

District Court of Appeal, Fourth District, California.

March 24, 1947.

1. Appeal and error ⇐1010(1)

The trial court's finding, on ample evidence, that the agreement between plaintiffs and defendant respecting farming operations constituted a joint enterprise, and that it was not an undertaking of defendant alone which plaintiffs agreed to finance, was conclusive on appeal.

2. Appeal and error ⇐1008(3)

Where the interpretation put on the contract in suit by the trial court was reasonable, District Court of Appeal could not substitute another interpretation for the contract.

3. Joint adventures ⇐5(1)

The rules permitting suit by one joint adventurer against another did not authorize suit by one joint adventurer against another for the possession of personal property purchased with money advanced by one adventurer for use in the business of the joint undertaking.

4. Joint adventures ⇐4(1)

Property purchased with the funds of the joint adventure or with profits derived therefrom belongs to all the coadventurers in equal proportion, and one joint adventurer may not appropriate the joint property to his own benefit, or deprive his coadventurers of the benefit thereof.

5. Replevin ⇐8(5)

An action to recover possession of a tractor owned by plaintiffs and defendant as joint adventurers was an action for claim and delivery, to sustain which plaintiffs were required to establish their rights to immediate and exclusive possession of the tractor at the time of the commencement of the action.

6. Joint adventures ⇐5(2)

Where plaintiffs and defendant were joint adventurers in farming operations, plaintiffs furnishing a tractor and other equipment for use of defendant in carrying on the operations, no accounting had been had between the parties, and there was no agreement requiring defendant to return the tractor to plaintiffs for liquidation, plaintiffs had failed to establish their right to recover possession of the tractor.

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Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by A. H. Paganucci, E. J. Giovanetti, and H. J. Guintini, doing business as Half Moon Fruit and Produce Company, against Peter Kalpouzos and others to recover possession of a tractor for the purpose of sale in the liquidation of affairs of a joint enterprise conducted by plaintiffs and defendants. From the judgment, the defendant Peter Kalpouzos appeals, and also attempts to appeal from an order denying motion for new trial.

Judgment reversed, and attempted appeal from order denying motion for new trial dismissed.

N. Lindsay South and James C. Janjigian, both of Fresno, for appellant.

Ralph Robinson, of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment giving plaintiffs possession of a tractor for the purpose of sale in the liquidation of the affairs of a joint enterprise conducted by plaintiffs, co-partners, operating under the name of Half Moon Fruit and Produce Company, on the one hand, and Peter Kalpouzos on the other, and from the order denying a motion for new trial, which is not appealable. The complaint is in the usual form found in claim and delivery actions, alleging in plaintiffs the ownership and right of possession of the tractor.

Plaintiffs, as co-partners, were engaged in the business of shipping and selling farm and orchard produce as commission merchants. Kalpouzos was a farmer. During the cropping year of 1943, plaintiffs financed the farming operations of Kalpouzos and shipped and sold his crops. The

result was a net loss. These parties also engaged in a similar operation during the cropping season of 1944, which, they contend also resulted in a net loss.

The agreement between plaintiffs and Kalpouzos was oral, and besides requiring plaintiffs to advance the money to pay operating costs of the farming operations, included the purchase of the tractor in question and other farming equipment, the purchase price of which was to be advanced by plaintiffs.

The tractor was purchased from Budd and Quinn. It was stipulated that their sales manager, if present, would have testified as follows: "Memoranda: 11th month, 17th day, '43. Customer's order for tractor. Signed by Pete Kalpouzos. Released by government to Peter Kalpouzos 11-17-43. Granted, 12-30-43; Billed by girl here to Peter Kalpouzos and Half Moon Fruit Company, Box—looks like 2725. Anyway that is February 18, 1944. The receipt showed, Paid, and (by) Half Moon, February 21, 1944. I think that item there is the check that Half Moon sent in payment of it. February 21, 1944." This evidence was not contradicted.

The agreement for the joint operation was made late in the year 1943 between Paul G. Smith, the authorized agent of plaintiffs, and Kalpouzos. According to the evidence plaintiffs were to secure 160 acres of farming land, advance the money for the purchase of the tractor and other implements, for seed, and for farming the land and maturing the crops. Kalpouzos would prepare the land for planting, plant and mature the crops and deliver them to plaintiffs for sale. Plaintiffs would sell the crops, pay the owner of the land 50% of the selling price as rent, repay themselves the money advanced and divide the net proceeds equally between plaintiffs and Kalpouzos. A statement of account of some kind was introduced in evidence but it is not before us. While the evidence indicates that this account showed a net loss of $4430.00, probably including the cost of the tractor and other farming equipment, there is not one word of evidence indicating that the figures it contained correctly reflected the transactions or the correct balance between the parties.

Late in 1944 a tractor cultivator, purchased for these farming operations, was in the possession of plaintiffs and the tractor was in the possession of Kalpouzos, who, with Jim Nicholas, was farming other land near Fresno. Andrew Kufis had a chattel mortgage on the tractor. Neither Nicholas nor Kufis have appealed so they need no further attention here as the portion of the judgment against them has become final.

The trial court found that plaintiffs and Kalpouzos were joint adventurers in a joint enterprise; that in accordance with the joint enterprise agreement plaintiffs "were * * * entitled to possession of said tractor for the purpose of liquidating the same for and on behalf of said joint enterprise." Conclusions of law were drawn in part as follows: "That the plaintiffs are entitled to the possession of that certain D-2 Caterpillar Tracter, * * * for the purpose of the joint enterprise consisting of the plaintiffs and Peter Kalpouzos, and that the said tractor is a part of the assets of said Joint enterprise, and as such the plaintiffs are entitled to the possession thereof for the purpose of liquidating the same and applying the funds obtained therefor to the assets of said joint enterprise."

It is the theory of Kalpouzos that there was no joint enterprise; that his farming operations constituted an undertaking of his own which plaintiffs agreed to finance; that his sole duty was to farm the land, raise the crops and deliver them to plaintiffs for sale; that if the operations resulted in a loss his only obligation was to pay plaintiffs any balance due them as an unsecured debt.

[1, 2] The trial judge, on ample evidence, found against these contentions and concluded that the parties to the agreement were joint adventurers. This finding is final on that question here. As said in Nelson v. Abraham, Cal.Sup., 177 P.2d 931, 933: "Whether the agreement to share profits is merely to provide a measure of compensation for services or for the use of money, or whether it extends beyond and bestows own-

ership and interest in the profits themselves so as to constitute the undertaking a partnership or a joint venture, presents primarily questions of fact. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138. It has been said to be a 'mingled problem of law and fact.' Swanson v. Siem, supra, 124 Cal.App. 519, 523, 12 P.2d 1053, 1055, citing 20 R.C.L. 849, § 55." Further, as the interpretation put on the contract by the trial judge is reasonable we may not substitute another for it. Universal Sales Corporation v. California, etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665.

Kalpouzos now argues that, assuming there was a joint enterprise, no accounting had been had and no definite amount of the loss, if any, had been determined, which seems to be true; that therefore the sole remedy available to plaintiffs was in an action for accounting in which the remaining assets of the joint adventure might have been sold and the proceeds applied to the debts, if any, or divided between the joint adventurers if the accounting should disclose a profit.

In reply plaintiffs argue that a joint adventure differs in many respects from a partnership so that an accounting is not the sole remedy available to plaintiffs; that one joint adventurer may sue another, under some circumstances, other than by an action for accounting. This is a correct but very general statement of the law. Nelson v. Abraham, supra; Elsbach v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651; Keyes v. Nims, 43 Cal.App. 1, 184 P. 695; 30 Am. Jur. p. 707, § 57. The rule is thus stated in 14 Cal.Juris. 765: "One party to a joint adventure may sue another at law for a breach of the contract or for a share of the profits or losses or for a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share," to which should be added that one adventurer may sue another for damages resulting from fraud committed in connection with the venture as was held in Elsbach v. Mulligan, supra.

[3, 4] It is very apparent that the facts of the instant case do not bring it within any of the foregoing rules permitting suit by one joint adventurer against another. This is not a suit for money but one for the possession of personal property purchased with money advanced by one adventurer for use in the business of the joint undertaking. The transaction amounts to an advance of money by one adventurer for the joint adventure, and invested in property beneficial to and to be used by the joint undertaking. As said in 30 Am.Jur. 692:

"Property purchased with the funds of the joint adventure or with profits derived therefrom belongs, unless otherwise agreed, to all the coadventurers in equal proportion. * * * Even though title is permitted to be taken in the name of one of the coadventurers, the right of the others is not impaired thereby, for under such circumstances the one holding title becomes a trustee for all. * * *

"The principle which requires joint adventurers to be loyal to the joint concern and to exercise the utmost good faith in relation to each other applies to the acquisition of property related to the enterprise or the renewal of rights connected with such property. Clearly, one joint adventurer may not appropriate the joint property to his own benefit, or deprive his coadventurers of the benefit thereof."

[5] This is an action for claim and delivery and to sustain such an action the plaintiffs must establish their right to immediate and exclusive possession of the property at the time of the commencement of the action. Fredericks v. Tracy, 98 Cal. 658, 33 P. 750; McCormick v. Gross, 135 Cal. 302, 67 P. 766; 5 Cal.Juris. 160.

Independent of this rule in claim and delivery actions, to prevail here, plaintiffs must establish their right to the exclusive possession of the tractor. Counsel for plaintiffs virtually admitted this in oral argument and in his brief where he argued that the contract of joint adventure required Kalpouzos to deliver the tractor to plaintiffs for sale as an asset of the enterprise at its termination.

[6] Had plaintiffs proved that such a provision was in the contract initiating the joint adventure, and that Kalpouzos had then agreed to return the tractor to them

for liquidation for the benefit of the joint adventure, this argument might have required serious consideration. However, we have searched the record and find an entire absence of any evidence on that subject. The only evidence in the record concerning the return of the tractor is found in conversations between Smith and E.J. Giovanetti, one of the plaintiffs, and Kalpouzos, after the farming operations had been completed and plaintiffs were demanding return of the tractor or its value. We can find in these conversations nothing that can be construed as a valid and enforceable contract supported by any consideration to the effect that Kalpouzos would return the tractor to plaintiffs. Thus plaintiffs failed to establish in themselves any right to the immediate and exclusive possession of the tractor at the time of the commencement of the action, or at any other time.

The portion of the judgment against Kalpouzos is reversed. The attempted appeal from the order denying the motion for new trial is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.




78 Cal.App.2d 522

**TRANCHINA et al. v. ARCINAS et al.**

**Civ. 13146.**

District Court of Appeal, First District, Division 2, California.

March 12, 1947.

**1. Process ⇐171**

In action for damages for abuse of process, evidence sustained finding that proceedings taken to evict plaintiffs by defendants and subsequent eviction were not taken and done by defendants in good faith or with intention of occupying premises by defendants but for purpose of circumventing rules of Office of Price Administration.

**2. Appeal and error ⇐996**

The inferences to be drawn from evidence as a whole lies in sound discretion of trial judge.

**3. Evidence ⇐108**

The intention with which a party did an act may be inferred from evidence of his subsequent conduct.

**4. Judgment ⇐584**
**Process ⇐168**

Where defendants acting in bad faith procured certificate from OPA permitting eviction of plaintiffs and obtained judgment in unlawful detainer action for an ulterior purpose in circumvention of war time regulations of Congress and not for purpose of occupying premises themselves, the perversion of writ of possession to purpose forbidden by law amounted to an actionable abuse of process of court and fact that defendants had obtained OPA certificate and unlawful detainer judgment did not bar plaintiffs from relief under res judicata doctrine. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

**5. Process ⇐168**

One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it was not designated is liable to the other for the pecuniary loss caused thereby.

**6. Process ⇐171**

Even if malice is a necessary element of actionable abuse of process, malice may be inferred from the willful abuse of process.

**7. Appeal and error ⇐882(3)**

A party may not ordinarily change his theory on appeal.

**8. Appeal and error ⇐1167**

Where plaintiffs suing for damages for wrongful eviction in circumvention of war time regulations of Congress, pleaded in their complaint an abuse of process and issue as to defendants' intention in good faith to occupy premises was fully litigated and plaintiffs' theory of fraudulent conduct in securing OPA certificate and judgment in unlawful detainer action did not mislead defendants in presentation of their

evidence on controlling issues, judgment would not be reversed for new trial on issue of abuse of process which would develop no issue not already fully litigated and decided. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921; Const. art. 6, § 4½.

**9. Appeal and error ⇐1167**

Courts will not reverse a judgment for a mere error in remedy or procedure where a new trial on proper theory would only result in the same judgment. Const. art. 6, § 4½.

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Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by Peter Tranchina and wife against Cesar E. Arcinas and another for damages for abuse of process. Judgment for plaintiffs and defendants appeal.

Affirmed.

Albert J. McGuire, of San Francisco, for appellants.

W. L. A. Calder and Charles M. Frey, both of San Francisco, for respondents.

DOOLING, Justice.

Defendants appeal from a judgment for damages in favor of plaintiffs. Plaintiffs, husband and wife, on or about August 1, 1942, entered into occupancy of a dwelling house in San Francisco under a month to month tenancy and continued in such occupancy until they were evicted in the manner hereinafter described on or about September 15, 1944. On April 1, 1944 the defendants by purchase acquired title to the property so occupied by plaintiffs. Upon acquiring said property defendants petitioned the Office of Price Administration (popularly known as OPA) for a certificate authorizing them to pursue the local remedies for the eviction of plaintiffs, representing to the OPA that they desired said housing accommodations for the immediate use of themselves and their family. Pursuant to this petition the OPA issued such certificate. The certificate so issued contained the following restriction: "An action to remove or evict the tenant is hereby authorized solely for the purpose of occupancy by Antonia Arcinas, Purchaser."

Pursuant to this certificate the necessary notice was served on the plaintiff, Mary Tranchina, and thereafter an unlawful detainer action was commenced against Mary Tranchina which resulted in a judgment for the possession of the premises. Defendants then obtained a writ of possession in that action and placed it in the sheriff's hands for execution, and pursuant to the demand of the sheriff acting under said writ the plaintiffs surrendered possession of the premises on September 15, 1944.

Following the departure of plaintiffs from the premises defendants did not move into or occupy them, but rented portions of them to tenants and placed the property in the hands of a realtor for sale. Plaintiffs filed the present action for damages on January 2, 1945 and on or about March 20, 1945, the defendants finally moved into and occupied the premises as their home.

[1-3] The trial court found that the proceedings taken to evict the plaintiffs by defendants and their subsequent eviction were not taken and done by the defendants in good faith or with the intention of occupying the premises themselves but "for the purpose of circumventing the rules and regulations of the Office of Price Administration." Defendant, Antonia Arcinas, testified that defendants at all times intended in good faith to occupy the premises as their home, but that they had to repair the premises, which were badly run down; that they also had difficulty in evicting certain subtenants; and that due to these difficulties, and only because of them, they decided to put the house up for sale. Appellants argue that in view of this testimony the finding above summarized is not supported by the evidence. Opposed to the defendants' evidence, however, are the undisputed facts that defendants did not actually occupy the premises until over six months after the eviction (and then only after the commencement of this litigation) and that in the meantime they rented a portion of the premises to new tenants and made an unsuccessful effort to sell the property. The inferences to be drawn from the evidence as a whole

lie in the sound discretion of the trial judge and it is well settled that the intention with which a party did an act may be inferred from evidence of his subsequent conduct. Longway v. Newbery, 13 Cal.2d 603, 611, 612, 91 P.2d 110; Holiday v. Tolosano, 39 Cal.App. 151, 153, 154, 178 P. 170; Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 748, 749, 289 P. 859; Jarkieh v. Badagliacco, 75 Cal.App.2d 505, 170 P.2d 994.

We may take it as settled, then, that defendants in bad faith caused the eviction of plaintiffs in circumvention of the war-time regulations of the Congress of the United States as implemented by the regulations of the OPA. In the face of these facts appellants argue that plaintiffs must be without remedy for the wrong done them because the fraud practiced upon them, the OPA and the municipal court in the unlawful detainer action was intrinsic fraud and the certificate obtained by them from the OPA is now res judicata of their good faith intention to occupy the premises as their home. Pico v. Cohn, 91 Cal. 129, 134, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; Hosner v. Skelly, 72 Cal. App.2d 457, 164 P.2d 573; 15 Cal. Jur. 18.

[4] Granting full weight to the doctrine of res judicata in cases of perjured testimony amounting to intrinsic fraud we do not feel bound by that doctrine in the case here presented. The wrong was not done to plaintiffs in this case by the procuring of the certificate from the OPA nor by the entry of the judgment in the unlawful detainer action. The wrong was only done when by the use of the writ of possession defendants evicted plaintiffs from their home, not for the purpose of occupying it themselves as contemplated by the war-time emergency regulations but for an ulterior purpose in circumvention of those regulations. In our view this perversion of the writ of possession to a purpose forbidden by law amounted to an actionable abuse of the process of the court.

[5] This tort is thus defined in 3 Restatement of Torts, section 682, p. 464:

"One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby.

"Comment:

"a. The gravamen of the misconduct for which the liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section."

So in 1 Cooley on Torts, 4th Ed., sec. 131, pp. 434, 435, we read: "If process, either civil or criminal, is wilfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The action will lie although the process was lawfully issued upon a valid judgment for a just cause and is valid in form. The grievance for which redress is sought arises in consequence of subsequent acts—the illegal and malicious abuse of the power conferred by the judgment and writ."

The rule is similarly stated in Dean v. Kochendorfer, 237 N.Y. 384, 143 N.E. 229, 231, by Mr. Judge Pound of the Court of Appeals: "The gist of the action for abuse of process lies in the improper use of process after it is issued. To show that regularly issued process was perverted to the accomplishment of an improper purpose is enough."

To the same effect are 50 C.J. 612; 1 Am.Jur. 176; Prosser on Torts, sec. 98, p. 892 et seq.; Coplea v. Bybee, 290 Ill.App. 117, 8 N.E.2d 55; Ash v. Cohn, 119 N.J.L. 54, 194 A. 174; Saliem v. Glovsky, 132 Me. 402, 172 A. 4; Defnall v. Schoen, 73 Ga. App. 25, 35 S.E.2d 564; Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884; Nix v. Goodhill, 95 Iowa 282, 63 N.W. 701, 58 Am.St.

Rep. 434; Kool v. Lee, 43 Utah 394, 134 P. 906; and cases collected in the notes in 80 A.L.R. 580 and 86 Am.St.Rep. 397; and cf. the dictum in Crews v. Mayo, 165 Cal. 493, at page 495, 132 P. 1032.

Under the OPA regulation adopted pursuant to the Emergency Price Control Act of 1942, Pub.L. No. 421, 77th Cong., 2d Sess., c. 26, 56 Stat. 29, 50 U.S.C.A.Appendix, § 921, "no tenant shall be removed from any housing accommodations * * * unless: * * *

"(6) The landlord * * * seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself" (8 Federal Register 7322, sec. 6 (a); and under sec. 6 (b) of the same regulation a landlord acquiring title after October 20, 1942, must in addition procure a certificate permitting such removal under local law. These regulations modified the local law pro tanto so as to prohibit the eviction of a tenant for other than the purposes or reasons authorized therein. It follows that defendants were prohibited by law in this case from evicting plaintiffs for any other purpose than that authorized, i. e. "solely for the purpose of occupancy by Antonia Arcinas, purchaser." When, as found by the trial court, defendants wilfully used the writ of possession to effectuate another purpose than that authorized by law, such use constituted a perversion of the writ from its lawful purpose and amounted to an abuse of process.

[6] Defendants argue that malice is a necessary element of the actionable abuse of process. Malice was pleaded (paragraph XXI of the complaint) and found by the court (paragraph 5 of the findings). Whether malice is a necessary element of this tort has been questioned (50 C.J. 616, 617; 1 Am.Jur. 179, 180) but if malice is a necessary element it is settled that it may be inferred from the wilful abuse of the process. 50 C.J. 616; 1 Am.Jur. 192; Prosser on Torts, 893, 894; Coplea v. Bybee, supra, 290 Ill.App. 117, 8 N.E.2d 55, 59; and cases collected in 80 A.L.R. 582.

To summarize the court has found that defendants having procured a judgment in unlawful detainer for the purpose of evicting plaintiffs solely for the purpose of occupancy of the premises by them as authorized by law, they wilfully and maliciously perverted the process of the court issued pursuant to their judgment to evict plaintiffs for a purpose forbidden by law.

[7-9] Because the plaintiffs proceeded upon the theory of fraudulent conduct in securing the OPA certificate and the judgment in the unlawful detainer action defendants argue that this court should not affirm the judgment on another theory. The rule that a party may not change his theory on appeal is generally accepted and followed. 2 Cal.Jur. 237. It rests upon principles of estoppel, that a party having elected a theory in the trial court should not change his theory on appeal to the disadvantage of his adversary. "To permit a party who has tried his case wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt a different theory on appeal, would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." 2 Cal.Jur. 237. The rule has no proper application to this case. Plaintiffs pleaded in their complaint an abuse of process (paragraph XI); the issue was fully litigated as to defendants' intention in good faith to occupy the premises and the plaintiffs' theory of the law as advanced in the trial court in no respect misled defendants in the presentation of their evidence on that controlling question of fact. If the case were reversed, a new trial on the issue of abuse of process would develop no issue not already fully litigated and decided. The courts will not reverse for a mere error in remedy or procedure where a new trial on the proper theory would only result in the same judgment. Whitworth v. Fernandez, 202 Cal. 134, 138, 259 P. 727; Hoffman, Inc., v. Bernstein Film Prod., 42 Cal.App. 12, 15, 183 P. 293; Ackley v. Prime, 99 Cal.App. 534, 540, 541, 278 P. 932; 5 C.J.S., Appeal and Error, § 1680, p. 840; Cal.Const. art. VI, § 4½.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

78 Cal.App.2d 504

**COOKSEY v. ATCHISON, T. & S. F. RY. CO.**

**Civ. 15489.**

District Court of Appeal, Second District, Division 3, California.

March 11, 1947.

**1. Damages ⇐26**

In personal injury action, plaintiff is entitled to recover such damages as will compensate him for loss incurred up to time of trial and loss reasonably certain to occur in the future.

**2. Damages ⇐208(1)**

It is province of jury to determine and fix amount of damages for personal injury.

**3. New trial ⇐72**

Upon a motion for a new trial, it is duty of trial judge to review and weigh evidence and then approve or disapprove verdict.

**4. Appeal and error ⇐934(1)**

All intendments are in favor of correctness of judgment in trial court.

**5. Appeal and error ⇐933(1)**

The trial judge in denying motion for new trial on which it was contended that verdict was excessive thereby approved amount of damages, and his ruling was persuasive on appeal in determining whether verdict was based upon passion or prejudice.

**6. Damages ⇐132(3)**

$42,000 to 54-year-old conductor, who was earning $6,000 annually and had life expectancy of 17 years for serious permanent back injuries requiring the wearing of steel brace and which might develop into kyphosis, wrist fracture, and heel injury which would likely be permanent and would cause pain and physical discomfort, was not excessive. Federal Safety Appliance Act, 45 U.S.C.A. §§ 1–7.

**7. Damages ⇐127**

Consideration of amounts awarded as damages in previous cases is of value in determining whether award is excessive, but in so doing notice should be taken of differences in purchasing power of money at different times.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Henry J. Cooksey against the Atchison, Topeka & Santa Fe Railway Company to recover for personal injuries sustained by the plaintiff while he was an employee of the defendant. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Leo E. Sievert, H. K. Lockwood, and Meserve, Mumper & Hughes, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod, of Oakland, and Booth B. Goodman, of San Francisco, for respondent.

WOOD, Justice.

Defendant appeals from a judgment, based upon a verdict of a jury, awarding plaintiff $42,000, as damages for personal injuries sustained by him while he was an employee of the defendant.

The accident occurred March 10, 1945, when plaintiff, who was working as a conductor, fell from a freight car on which he was attempting to set the hand brake. Defendant admitted liability under the Federal Safety Appliance Act, 45 U.S.C.A. §§ 1–7, and the only issue before the trial court was the extent of damages.

Appellant contends that the award was excessive, and could have been given only under the influence of passion or prejudice.

At the time of the accident plaintiff was 54 years of age, was in good health, had been employed by defendant 35 years, and was receiving a salary of approximately $500 per month. It was stipulated at the trial that the American Experience Table showed plaintiff's life expectency to be 17.40 years. The evidence shows that, as a result of the fall, plaintiff sustained a comminuted (fragmented) fracture of the third lumbar vertebra and injuries to the surrounding area, a fractured pelvis, a fractured scaphoid bone of the right wrist, and injuries to his left heel; that he was

in the hospital 59 days; that he was placed in a "body cast" which was removed a few days later and boards placed under his mattress; that he was fitted with a steel brace to support his back; that at the time of trial he had not recovered, was still wearing the brace, and suffered constant pain. There was medical testimony that plaintiff's condition is permanent, that it will become worse, and that he may develop kyphosis (humpback).

Appellant argues that plaintiff's condition is not permanent, but will improve. Two physicians, who had examined and treated plaintiff after he left the hospital, testified that plaintiff had a severe comminuted fracture of the vertebra, which resulted in a forward displacement of his body; that there had been some bone absorption (degeneration), and only the lapse of time would determine whether kyphosis would develop; that a fracture of the scaphoid bone is a painful injury, which terminates with permanent disability and pain, stiffness of the wrist and loss of grasping power. One of those physicians testified that x-rays, in evidence as exhibits, revealed a tremendous amount of crushing of the body of the vertebra; that the bone had been more or less exploded, and the forward part of the vertebra had been pushed into the abdominal space; that the injury to the vertebra is permanent, and nothing can be done about it; that an attempt to get to it through the spinal canal would cause a total paralysis, and an abdominal approach is impossible; that a degeneration of the vertebra is going on due to a lack of blood supply which causes small pieces of bone to be absorbed; that as they are absorbed, plaintiff's condition will get worse; that an x-ray taken January 14, 1946, shows no improvement, but on the contrary shows a definite degeneration of parts of the bone; that an x-ray, in evidence as an exhibit, shows a fibrous healing but it is not bone healing; that there was no doubt in his mind that plaintiff's back injury is permanent and he will continue to suffer pain; that if he is "lucky enough," however, to develop a sufficient amount of arthritis above and below the third lumbar vertebra to form a bony ridge his back would not become deformed; and that plaintiff was then apparently free from arthritis. He also testified that the second and third intervertebral discs, above and below the fractured vertebra, were ruptured as a result of the compression caused when the fracture occurred; that eventually the second and fourth discs will have a tendency to angle together, and the second lumbar vertebra will have a tendency to approach the third vertebra which will result in kyphosis; that, even if an intervertebral disc operation were performed and if transplants were put in to take care of the discs, there would not be enough area of support between the front portions of the vertebra to prevent plaintiff developing a very marked kyphosis. He testified further that fracture of the radial scaphoid bone is a disabling type of injury, and he would consider it permanent to a man of plaintiff's age; that it is a foregone conclusion that he will always be in a state of discomfort; that there are two bones in the body, the scaphoid and the oscalcis (the heel bone) which, when broken, give discomfort continuously thereafter; that the scaphoid is so shaped and arranged that, in order to break it, 5 different bones are injured; that the fracture seems to be healing satisfactorily, but plaintiff will have a painful wrist particularly when he squeezes anything and when he attempts to put his palm down.

A physician, who was appointed by the court to examine plaintiff, testified that he had examined plaintiff 2 days previously; that nothing would correct the deformity of the vertebra; that the dislocation is forward toward the abdomen; that it will be necessary for plaintiff to wear the brace until the bone becomes solid; that plaintiff was unable to touch or feel with his finger tips; that he (witness) did not know how long plaintiff would have trouble with his heel; that plaintiff limps, and the pain is manifest when the foot is everted or bearing weight, and that the heel will require some study and possibly a shoe correction and physiotherapy.

A physician, called on behalf of defendant, testified that he had examined plaintiff January 15, 1946 (one week before the

trial); that he did not think there would be total disability to the back, but he thought plaintiff "might have some permanent disability in so far as pain was concerned"; that the weight bearing portion of the vertebra was smashed, but no one could say into how many pieces it was broken; that the displacement of the vertebra will be permanent; that in such an injury the intervertebral discs would be ruptured; that if plaintiff were to go without the brace or remove it too soon he would develop kyphosis; and that the only way it could be determined for a certainty whether there would be degeneration would be to follow the course of the injury for another 6 months or a year.

Plaintiff testified that after he returned home from the hospital he was confined to his bed most of the time for about 2 months; that from the time he left the hospital to the time of trial he had returned to the hospital once or twice a month for treatment; that the pain in his back is so great when he takes the brace off that he wears it all day—from the time he arises until he retires; that he can't stand the pain caused when he lies on a soft mattress, and he has slept on an army cot ever since he returned from the hospital; that when he sits in overstuffed chairs, his body sinks down, and he gets pains in his legs and hips, and can hardly get up; that his back and wrist pain him constantly, and if his hand does not remain straight while he sleeps, the pain awakens him; that his wrist has been swollen ever since the accident; that it bothers him when he eats, and he can hardly cut meat; and that if he does any walking his heel becomes painful.

There was some medical testimony to the effect that plaintiff could perform some kinds of work; that he could perform duties of a freight conductor, such as sitting at a desk in a caboose and writing train orders and getting on and off steps of a train if not moving; and that he may be able to be a passenger conductor. There was also medical testimony to the effect that it would be hazardous for plaintiff to be a freight conductor; and that if he were a passenger conductor he would experience pain each time he punched a ticket because the pressure of squeezing the punch would be directly over the site of the scaphoid bone. Plaintiff testified that he does not have enough strength in his hand to punch tickets; that he could not hold a pencil long enough, or press it hard enough, to do the writing and make the carbon copies required of a freight conductor; and that to be a freight conductor one has to get on and off moving trains.

There was substantial evidence, as shown above, that plaintiff suffered severe injuries, and that there was a reasonable certainty that the injuries would be permanent. There was also substantial evidence that plaintiff is unable to follow his usual occupation, or any occupation that requires physical strength or activity.

[1-5] In personal injury actions, the plaintiff is entitled to recover such damages as will compensate him for the loss incurred up to the time of trial and also the loss reasonably certain to occur in the future. To determine what is a just and reasonable compensation is a difficult task, and one not possible of exact ascertainment. It is the province of the jury to determine and fix the amount of damages. Upon a motion for a new trial, it is the duty of the trial judge to review and weigh the evidence, and then to approve or disapprove the verdict. All intendments are in favor of the correctness of the judgment. In the present case the trial judge denied appellant's motion for a new trial, and one of the grounds upon which the motion was made was that the award was excessive. The jury and the trial judge, having been present when the witnesses testified, were in a position to determine the weight of the evidence. In denying the motion for a new trial, the trial judge, who had the power to set aside the verdict if it was not in accord with the weight of evidence, approved the amount of damages. His ruling, in denying the motion, "is persuasive in determining whether the verdict was based upon passion or prejudice." Foster v. Pestana, 77 Cal.App.2d 885, 177 P.2d 54, 57. It was stated in the case of Eubanks v. Milton G. Cooper & Son, Inc., 68 Cal.App.2d 366, at page 375, 156 P.2d 775, at page 779: "The trial court, as

a thirteenth juror, considered all of these questions [credibility of witnesses and weight of testimony] on a motion for new trial, as well as the excessiveness of the verdict. That is the proper forum in which to first press that issue and the trial judge, guided by different rules, should there be governed by the facts, weight of the evidence, the justice of the case, and allow only such damages as are commensurate therewith, * * *. Appellate courts are prone to uphold the discretion thus reposed in trial judges in so doing." Appellant, in support of its contention that the amount of damages should be reduced, cites cases wherein awards were reduced by reviewing courts. One of the cases so cited is Roedder v. Rowley, Cal.App., 166 P.2d 292, wherein the District Court of Appeal reduced the amount of damages awarded. In that case a petition for a hearing was granted by the Supreme Court, and the verdict of the jury was upheld. In the Supreme Court that case was entitled Roedder v. Lindsley, and is reported in 28 Cal.2d 820, 172 P.2d 353. The court stated therein, 28 Cal.2d at page 822, 172 P.2d at page 354: "In assessing general damages, the jury should consider all relevant circumstances, including the age and sex of the injured person, his physical condition before and after the injury, the extent, severity and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom. Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as a reasonable person would estimate as fair compensation. Hence, necessarily, the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury, and a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment. Deevy v. Tassi, 21 Cal.2d 109, 120, 121, 130 P.2d 389; Loper v. Morrison, 23 Cal.2d 600, 610, 145 P.2d 1; Turnipseed v. Hoffman, 23 Cal.2d 532, 535, 144 P.2d 797."

[6, 7] The evidence shows that plaintiff sustained serious permanent injuries to his back, resulting in a deformity which may develop into kyphosis; that it is necessary for him to wear a steel brace; that surgery is impossible; that the grip of his right hand has been greatly weakened; that it is necessary to give further study to the condition of his heel in order to determine the proper treatment for it; that the pain, physical discomfort and impaired earning power will continue in the future, and it is reasonably certain that they will, to a great extent, be permanent. At the time of the injury his salary was about $6,000 annually, and he had a life expectancy of approximately 17 years. Damages must be determined according to the circumstances of each particular case. It is true, as appellant asserts, that a consideration of the amounts awarded as damages in previous cases is of value in determining whether an award is excessive, but it is also true that consideration should be given to differences in economic conditions prevailing when the awards were made. For a discussion of the rule that notice may be taken of the differences in the purchasing power of money at different times, and that such notice should be taken in making an award of damages, reference is made to Foster v. Pestana, supra, 77 Cal.App.2d 885, 177 P.2d 54, 59.

"The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion citing case, and we cannot say that the amount awarded by the jury in this case is so large as to indicate that it was the result of passion or prejudice." Roedder v. Lindsley, supra; Foster v. Pestana, supra.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

78 Cal.App.2d 515

## PETER et al. v. BOARD OF SUP'RS OF KERN COUNTY et al.

Civ. 3538.

District Court of Appeal, Fourth District, California.

March 11, 1947.

Hearing Denied May 8, 1947.

**1. Schools and school districts ⇐39**

In a proceeding in certiorari to annul an order of county board of supervisors changing the boundaries of a union elementary school district, order can only be vacated if board exceeded its jurisdiction in making it. Education Code, §§ 2401 et seq., 2801 et seq.

**2. Schools and school districts ⇐37(3)**

The jurisdiction of county board of supervisors with respect to a petition to change the boundaries of union elementary school district was initiated by and was dependent upon a proper and sufficient petition being presented and filed. Education Code, §§ 2401 et seq., 2801 et seq.

**3. Schools and school districts ⇐37(3)**

The procedure prescribed by statute for uniting two or more contiguous elementary school districts, including the provision for submission of a petition signed by a majority of the electors residing in each of the districts must be followed to accomplish the addition of a portion of a school district to a union school district. Education Code, §§ 2401 et seq., 2501–2503, 2561, 2896.

**4. Statutes ⇐179**

Provision in the political code respecting conflicting provisions requires that where provisions of one chapter relate to one subject and furnish procedure to accomplish the purposes of chapter, that procedure must be followed to exclusion of other procedure set forth in another chapter having to do with another although it may be a related subject. Pol.Code, § 4482.

**5. Statutes ⇐231**

Where it was sought to change the boundaries of a union elementary school district by annexing to it a portion of adjoining school district, and provisions of one chapter in the statute relating to union elementary school districts conflicted with provisions of another chapter relating to elementary school districts, provisions relating to union elementary school districts were controlling. Education Code, §§ 2502, 2561, 2896; Pol.Code, § 4482.

**6. Schools and school districts ⇐37(3)**

Where petition to change the boundaries of union elementary school district by annexing to it a portion of adjoining school district was not signed by a majority of the electors residing in each of the districts, the petition was insufficient to confer jurisdiction on county board of supervisors. Education Code, §§ 2401 et seq., 2501–2503, 2561, 2896.

**7. Action ⇐64**

An action is "commenced" when the complaint is filed, and is deemed "pending" from the time of its commencement until final determination. Code Civ.Proc. §§ 350, 1049.

See Words and Phrases, Permanent Edition, for all other definitions of "Commence" and "Pending".

**8. Schools and school districts ⇐22**

Where an action attacking proceedings to change the boundaries of union elementary school district by annexing to it a portion of adjoining school district, for insufficiency of petition, was pending when Validating Act of 1946 went into effect, defects in the proceedings under attack were not cured by the Validating Act, particularly in view of fact that Act did not purport to cure jurisdictional defects in proceedings. St.1946, 1st Ex.Sess., c. 17.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in certiorari by Clyde H. Peter and others against the Board of Supervisors of Kern County and another to annul an order of the board changing the boundaries of a school district. Judgment in favor of respondents and petitioners appeal.

Reversed.

Wellborn, Mitchell, Barrett & Rodi, of Los Angeles, and Harvey, Johnston, Baker & Palmer, of Bakersfield, for appellants.

Norbert Baumgarten, county counsel, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of respondents in a proceeding in certiorari in which the petitioners sought to annul an order of the Board of Supervisors of Kern County changing the boundaries of the Buttonwillow Union School District by annexing to it a portion of the Belridge School District.

The Buttonwillow Union School District is a union elementary school district organized and existing under what are now the provisions of Chapter 9, Division 2 of the Education Code, with all the territory of its component elementary districts lying within Kern County. The Belridge School District is an elementary school district organized and existing under what is now Chapter 7, Division 2 of the Education Code. It is stated in the briefs that the Buttonwillow Union School District had a surplus of children and a deficiency in assessed valuation of property when compared with the Belridge School District, the difference in assessed valuation being caused by the existence of valuable oil properties in the latter district.

Counsel have filed exhaustive briefs in which many questions are argued. Because of the view we will take of the case it will be unnecessary to consider many of them.

On December 20, 1945, a petition containing 10 signatures was presented to the Superintendent of Schools of Kern County to change the boundaries of the Buttonwillow Union School District. He set the petition for hearing and on January 14, 1946, transmitted it to the Board of Supervisors with a letter stating that he had examined the petition and had found it sufficient and properly signed. Nine of the signers of the petition resided in the Buttonwillow Union School District and one in the Belridge School District. On January 7, 1946, the sole signer residing in the Belridge School District filed a letter with the Superintendent of Schools requesting that her name be withdrawn from the petition, because, as she claimed, she had signed it while relying on misrepresentations made to her. She also wrote a similar letter to the Board of Supervisors making the same request for like reasons.

Various protests were filed against granting the petition and the Superintendent of Schools through his administrative consultant recommended that it be denied.

The original petition requested the addition of 42 sections and two fractional sections to the Buttonwillow Union School District. After a hearing the Board of Supervisors eliminated 12 sections and granted the petition as to the balance of the territory.

The petition for a writ of review of the order was filed on February 6, 1946, and an amended petition on February 19, 1946. No writ was issued on the original petition and there is no evidence of service of that petition on respondents. A writ requiring respondents to certify all the annexation papers and proceedings to the Superior Court for review was issued on February 19, 1946.

On February 26, 1946, respondents filed a notice of motion to strike from the files the original petition on the ground that it had not been served before filing, and also the amended petition. On March 4, 1946, for trial court struck the original petition, filed February 6, from the files and denied the motion to strike the amended petition with the provision that it "be considered as the original petition".

On May 10, 1946, the trial court affirmed the order of the Board of Supervisors and discharged the writ of review. This appeal followed.

[1, 2] It is elemental that in proceedings of this kind the order under attack can only be vacated if the Board of Supervisors exceeded its jurisdiction in making it. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Nider v. City Commission of City of Fresno, 36 Cal.App.2d 14, 97 P.2d 293. It is equally true that the jurisdiction of the Board of Supervisors in this case was initiated by and was dependent upon a proper and sufficient petition being presented and

filed; that if there was no such proper and sufficient petition before it the Board of Supervisors had no jurisdiction to act.

The Education Code is divided into various Divisions, Chapters and Articles dealing with various classes of public schools. Chapter 7 of Division 2 has to do with elementary school districts. Chapter 8 has to do with joint elementary school districts. Chapter 9 has to do with union and joint union elementary school districts. The differences between these various classes of school districts are not important here so they need no consideration. It is sufficient to point out that there are differences and that the legislature has seen fit to provide certain variations in the rules concerning each class.

Article 5, Chapter 7, Division 2, (Secs. 2501, 2502, 2503) of the Education Code has to do with the change of boundaries of school districts, without specifying the class or kind of district to which its provisions apply. However the article is a part of Chapter 7, Division 2 of the Education Code, the provisions of which apply to elementary school districts. It is clear from the record that the proceedings before us were initiated under the provisions of section 2502 which requires the petition to change the boundaries of school districts to be signed by "at least 10 electors, reading in the districts affected by the proposed change of boundaries."

[3] Section 2896 of the Education Code is found in Chapter 9, Division 2 of that code, the provisions of which relate to union or joint union school districts. That section provides as follows: "A portion of a school district may be added to a district which is a part of a union or joint union school district pursuant to Article 7 of Chapter 7 of this division."

Section 2561 of the Education Code is a part of Article 7, Chapter 7 of Division 2 and provides as follows: "Two or more contiguous elementary school districts may at any time be united to constitute but one district, whenever a petition, signed by a majority of the electors residing in each of the districts is presented to the superintendent of schools. The petition shall be acted upon in the same manner as in the cases of the formation of new school districts."

In this connection it should be observed that section 2561 provides for the joining of two or more contiguous elementary school districts while we have here the addition of a portion of an elementary school district to a union school district by changing the boundaries of the latter which is expressly authorized by section 2896. That section refers to Article 7, Chapter 7 of Division 2, and it is rather clear that its intention is to incorporate into section 2896 the procedure set forth in section 2561 to accomplish the addition of a portion of a school district to a union school district as no other procedure to accomplish this end is found in any of the provisions relating to union school districts. Thus we have in the chapter relating to union school districts an express power to add to such a school district, or perhaps to one of its elementary school districts, a portion of another school district upon a petition "signed by a majority of the electors residing in each of the districts". No such petition was signed, presented to the county superintendent of schools or filed with the board of supervisors in this case.

Counsel for respondents argues that as the provisions of section 2502 are not by their terms limited to elementary school districts we should not reject its provisions as applying to the facts of this case or at least we should regard them as an alternative method of changing the boundaries of an elementary school district which forms a part of a union school district.

[4, 5] The answer to the argument is found in section 4482 of the Political Code which provides as follows: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject matter of such chapter."

This section has been construed to mean that where the provisions of one chapter relate to one subject and furnish the procedure to accomplish the purposes of the chapter, that procedure must be followed to the exclusion of other procedure set forth

in another chapter having to do with another although it may be a related subject. Odd Fellows' Savings Bank v. Banton, 46 Cal. 603; Southern Pacific R. Co. v. Painter, 113 Cal. 247, 45 P. 320; In re Dolbeer's Estate, 153 Cal. 652, 96 P. 266; In re Kennerly, 190 Cal. 774, 214 P. 857; Hubbard v. Superior Court of Santa Clara, 9 Cal.App. 166, 98 P. 394; People v. Fink, 121 Cal. App. 14, 8 P.2d 493; Heard v. Board of Administration, 39 Cal.App.2d 685, 104 P.2d 47. We are confronted with a situation where the provisions of one chapter relating to union elementary school districts conflict with the provisions of another chapter relating to elementary school districts and where, under the foregoing authorities, we must hold that the provisions relating to union elementary school districts must control.

[6] Thus the conclusion follows that as the petition involved in this case did not purport to be "signed by a majority of the electors residing in each of the districts", as required by section 2561 of the Education Code, and as it was admittedly prepared and signed and all proceedings were had under section 2501 et seq., it was insufficient to confer any jurisdiction on the board of supervisors to act on it. The cases of Washburn v. Mann, 73 Cal.App. 302, 238 P. 721; Multer v. Keppel, 76 Cal. App. 517, 245 P. 218, and Slater v. Kesey, 102 Cal.App. 266, 282 P. 1021, support this result.

Respondents seek to escape this conclusion on two grounds. First: That the reference in section 2896 to Article 7 of Chapter 7 of Division 2 of the Education Code was a typographical error, the legislators meaning to refer to Article 5 of Chapter 7; and, second: That any defects in the proceedings were cured by the Validating Act of 1946. (Chap. 17, First Extra Session, 1946.)

The argument that there is a typographical error in section 2896 of the Education Code is based on the history of the legislation on the subject covered by it. Section 1591 of the Political Code contained legislation on the same subject, the last paragraph of which covered the same ground as section 2896 of the Education Code. That paragraph adopted the procedure set forth in section 1577 of the Political Code which was substantially the same as sections 2502 and 2503 of the Education Code, which procedure was followed in the instant case. These sections of the Political Code were superseded by sections 2.264 and 2.160 of the School Code in 1929. Section 2.264 was substantially the same as section 2896 of the Education Code and adopted the procedure established by section 2.160 of the School Code which was substantially the same as section 2561 of the Education Code except that the School Code required the petition to be "signed by a majority of the heads of families residing in each of said districts" while the Education Code requires the petition to be "signed by a majority of the electors residing in each of the districts". If there was any typographical error in the Education Code the same error occurred in 1929 in adopting the procedure of section 2.160 of the School Code to accomplish the ends of section 2.-264, and was perpetuated in 1943 in adopting section 2896 of the Education Code. This indicates that the change in the procedure was made intentionally for if there had been a typographical error in the 1929 enactment certainly it should have been discovered by 1943 and should have been corrected then.

[7] Respondents can draw no support from the Validating Act of 1946. Subdivision "d" of section 7 of that act provides as follows: "This act shall not operate to confirm, validate, or legalize any act, proceeding, or other matter the legality of which is being contested or inquired into in any legal proceeding now pending and undetermined."

The Validating Act was passed as an emergency measure and was signed by the Governor and filed with the Secretary of State on February 12, 1946. The complaint in this action was filed on February 6, 1946, the amended complaint on February 19, 1946, and the original complaint was not stricken from the files by order of court until March 7, 1946. Any assumption that this order could be supported would be a violent one on the ground specified. The requirements as to service when the pe-

tition is filed, in section 1107 of the Code of Civil Procedure, would seem to be more directory than mandatory as the court may act on the petition without any service if it decides to do so. Under these circumstances it would seem that service might be made after the petition is filed if the court should decline to proceed in the matter without service. The provisions as to service and points and authorities in opposition to the issuance of a writ under the prayer of a petition would seem to be more for the benefit of the court than for the advantage of the parties. However, we do not need to decide that question at this time. The complaint sought to inquire into and contest the legality of the proceedings resulting in the change of boundaries and the proceeding was pending and undetermined when the Validating Act of 1946 went into effect. An action is commenced when the complaint is filed. (Sec. 350, Code Civil Procedure.) It is deemed pending from the time of its commencement until its final determination. (Sec. 1049 Code Civil Procedure; Collins v. Ramish, 182 Cal. 360, 188 P. 550.)

[8] It follows that under its express terms the Validating Act of 1946 did not purport to cure the defects in the proceedings under attack here as there was an action pending attacking the proceedings when the Validating Act went into effect. Further, the act did not purport to cure jurisdictional defects in proceedings. (See, Subd. a, Sec. 7.) Nor should it do so. People ex rel. Amestoy Estate Co. v. Van Nuys Lighting District, 173 Cal. 792, 162 P. 97, Ann.Cas.1918D, 255; Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531.

As the Board of Supervisors did not have before it a sufficient petition to give it jurisdiction over the matter, its order cannot be sustained.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

29 Cal.2d 766

## KROUSER et al. v. SAN BERNARDINO COUNTY et al.

L. A. 19875.

Supreme Court of California, in Bank.

March 7, 1947.

**1. Property ⇐4**

Under statutes relating to the nature of property, land is something distinct from the buildings, fences, and other improvements placed thereon by man's work, whereas real property is all-inclusive and contemplates both land and improvements. Civ.Code, §§ 657–659.

**2. Property ⇐4**

The use of the word "land" as synonymous with real property has become its historical, ordinary and accepted meaning in connection with title, ownership, conveyance or transfer by deed or inheritance, with the exercise of the right of eminent domain, with execution sales and redemption, with dower, and similar evidences of ownership or modes of transfer. Civ.Code, §§ 654 et seq., 657–659, 829; Revenue and Taxation Code, §§ 103–105; Const. art. 13, § 2.

**See Words and Phrases, Permanent Edition, for all other definitions of "Land".**

**3. Municipal corporations ⇐33(5)**

"Land" within statute requiring petition signed by at least 25 per cent. of the holders of title to lands situated within limits of proposed municipal corporation was to be interpreted in accordance with legislative definition as the solid material of the earth unless it was clear that the Legislature intended the broader and all inclusive meaning of land and improvements. Gen.Laws, Act 5233, § 2; Civ. Code, § 659.

**4. Municipal corporations ⇐33(5)**

"Land" within statute requiring petition signed by at least 25 per cent. of the holders of title to lands situated within limits of proposed municipal corporation and providing that only owners of land in fee and purchasers of land under written agreement should be qualified to sign such petition, had reference to solid material of the earth, excluding improvements. Gen. Laws, Act 5233, § 2; Civ.Code, § 659.

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Mandamus proceeding by Caryl Krouser and others against the County of San Bernardino and others to compel the respondents to accept for filing a petition for the formation of a municipal corporation.

Peremptory writ granted.

Burke, Hickson, Burke & Marshall and Daniel G. Marshall, all of Los Angeles, for petitioners.

Albert E. Weller, of San Bernardino, County Counsel, for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondents, board of supervisors of the county of San Bernardino and its clerk, to accept for filing a petition for the formation of a municipal corporation signed by certain property owners in the area known as Barstow. The respondents filed an answer as a return to the alternative writ. There is no dispute as to the facts.

The petition for incorporation was presented to the board of supervisors on March 18, 1946, pursuant to the Municipal Corporations Act, Stats. 1883, p. 93, as amended, 2 Deering's Gen.Laws, Act 5233. Section 2 of that act reads in part: "A petition signed by at least twenty-five per cent of the holders of title * * * to the lands situate within the limits of a proposed corporation which includes both subdivided and/or densely populated areas and farming and/or industrial areas representing twenty-five per cent of the value of the land included in said limits, as the value thereof is shown on the last equalized assessment roll of such county, shall first be presented to the board of supervisors of such county. For the purposes of this act only owners of land in fee and purchasers of land under written agreement shall be qualified to sign such petition. The petition shall set forth and particularly and accurately describe the proposed boundaries of such corporation * * *." Other provisions of the section require that after the presentation of the petition at a regular meeting of the board of supervisors, the board shall require its clerk to ascertain

whether the petition is subscribed by the requisite number of qualified signers, whether it correctly describes the boundaries of the proposed corporate area, and to make a report to the board within thirty days. If the report shows that the petition does not contain the signatures of a sufficient number of qualified signers, or that the boundaries are inaccurately described, the board is without jurisdiction to proceed. If the requirements as to the petition are complied with the board must direct the clerk to accept the petition for filing upon the payment of certain fees, and at its next regular meeting fix a time for a hearing on the petition, and direct the clerk to cause the petition and a notice of the time of hearing to be published for at least two weeks before the time fixed. At the hearing on the petition the board is authorized to establish the boundaries of the proposed municipality. The board must then give notice of an election to be held within the limits of the proposed corporation for the purpose of determining the question of incorporation and for the election of its officers.

After the presentation of the petition for incorporation here involved the board of supervisors directed its clerk to make his report in accordance with the provisions of section 2 of the act. The report of the clerk was presented to the board on April 15, 1946. It shows that the boundaries of the proposed municipality are accurately described in the petition; and that the number of qualified signers exceeds 25 per cent of the total number of landowners within the area on March 5, 1945. The report contains the following data concerning property values within the area as of March 5, 1945:

| | |
|---|---|
| Aggregate value of property within the area (exclusive of public utility property, exempt property and personal property) | $ 688,585.00 |
| Aggregate value of public utility property | $ 986,780.00 |
| Aggregate value of assessed property exempt from tax | $ 119,200.00 |
| Total | $1,794,565.00 |
| Total value of property of signers | $ 199,730.00 |

The clerk reported his conclusions (a) that the total value of the land of qualified signers was in excess of 25 per cent of the aggregate value of the land in the proposed corporate area, if public utility property, exempt property, and personal property were excluded; and (b) that the total value of the land of qualified signers was less than 25 per cent of the aggregate value of the land proposed to be included in the corporate area, if public utility property and exempt property were included.

On the basis of the foregoing report, the board of supervisors found that the petition was not signed by the requisite number of qualified signers and that it had no jurisdiction to proceed further in the matter.

In the report of the clerk the words "property" (in connection with the detail of property values) and "land" (in stating conclusions (a) and (b) ), were used synonymously, that is, as inclusive of both land and improvements. Thereby both the clerk and the board adopted the view that, in calculating the values within the meaning of the act, the word "land" meant land and improvements and not land alone, and that it was necessary that the signers own 25 per cent in value of all land and improvements in the area before the board could proceed.

It is not disputed that in calculating values all land in the area which has been assessed must be included in determining the sufficiency of the petition. But the petitioners contend that the word "land" as used in section 2 of the act means land only, and not land and improvements. If that be the proper meaning of the word it is conceded by the respondents that the petition is sufficient. That is, had the clerk reported the value of the land separately from the value of the improvements, the figures would show that the qualified signers on the petition own more than 25 per cent in value of all the land in the area, inclusive of exempt land and land devoted to public utility use.

Section 2 of article XIII of the Constitution of California provides that land, and the improvements thereon, shall be separately assessed. Title I, part 1, division second of the Civil Code treats of the Na-

ture of Property. Section 657 included therein provides that property is either real (immovable), or personal (movable). Section 658 defines real property as "1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law * * *." Section 659 reads: "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance."

[1] In accordance with the foregoing sections land is deemed to be something distinct from the buildings, fences, and other improvements placed thereon by man's work. Real property on the other hand, within the code definitions, is all-inclusive and contemplates both land and improvements; and the Constitution requires that the distinction be carried into the tax rolls for the purpose of equalizing separately the assessments on land and on improvements. See, also, Rev. & Tax Code, §§ 103–105.

The respondents rely on section 829 of the Civil Code as furnishing the key to the meaning of the word "land" in section 2 of the Municipal Corporation Act. The code section states that the owner of land in fee has the right to the surface and to everything permanently situated beneath or above it. The respondents argue that since the words "owner of land in fee" in section 2 plainly refer to those having title to real property, considered as land and improvements, the same meaning of land, as land and improvements, should be carried throughout the section. This meaning may be attributed to the word "land" in ascertaining the numerical percentage of owners of land in the area; but it does not follow that the word "land" was intended to include improvements in ascertaining the requisite land value percentage.

[2] It is true that the word "land," both in legal and popular parlance, more frequently than not includes both land and improvements. The use of the word "land" as synonymous with real property has become its historical, ordinary and accepted meaning in connection with title, ownership, conveyance or transfer by deed or inheritance, with the exercise of the right of eminent domain, with execution sales and redemption, with dower, and similar evidences of ownership or modes of transfer. See Vol. 24 Words and Phrases, Perm.Ed., p. 134 et seq., and numerous cases cited; Gibson v. Brockway, 8 N.H. 465, 470, 31 Am.Dec. 200; Chicago, I. & K. R. Co. v. Knuffke, 36 Kan. 367, 13 P. 582; Stauffer v. Cincinnati R. & M. R. Co., 33 Ind.App. 356, 70 N.E. 543; Lincoln Nat. Bank & Trust Co. v. Nathan, 215 Ind. 178, 19 N.E.2d 243, 247; Lenfers v. Henke, 73 Ill. 405, 408, 24 Am.Rep. 263; Swann v. Washington Southern Ry. Co., 108 Va. 282, 61 S.E. 750; Munson v. Wade, 174 Ark. 880, 298 S.W. 25; Castle v. Castle, 9 Cir., 267 F. 521, 523; Saulsberry v. Maddix, 6 Cir., 125 F.2d 430, 433; Sims v. Trinity Farm Const. Co., Tex.Civ. App., 28 S.W.2d 856; Lorino v. Crawford Packing Co., Tex.Civ.App., 169 S.W.2d 235; Whelan v. Johnston, 192 Miss. 673, 6 So.2d 300.

In assessing benefits under conservation district and similar statutes, it has been held that land is synonymous with real property and includes improvements. State v. Board of Directors of Miami Conservancy Dist., Ohio App., 39 N.E.2d 537. In that case, however, the statutory definition of land included buildings and other improvements. The word "land" was held to include dwellings and other structures in assessing the cost of a street improvement (Ex parte Hill, 194 Ala. 559, 69 So. 598), and for purposes of assessment in the organization of a drainage district. Atchison T. & S. F. R. v. Drainage Dist. No. 1, 133 Kan. 586, 1 P.2d 253, 82 A.L.R. 552.

In Delaney v. Lowery, 25 Cal.2d 561, 571, 154 P.2d 674, this court referred to both meanings of the word "land," and quoted extensively from 42 American Jurisprudence, Property, section 14, in holding that oil lease interests were real property within the broader and all-inclusive meaning of the word "land."

Southern Pacific Co. v. County of Riverside, 35 Cal.App.2d 380, 95 P.2d 688, involved the assessment provisions of the Storm Water District Act of 1909, Stats.

1909, p. 339, as amended, and the question whether the terms "land," "real property," and "land or any improvements thereon" were interchangeable. In arriving at an affirmative answer, the District Court of Appeal relied in part on In re Haines, 195 Cal. 605, 613, 234 P. 883. In the latter case it was stated that words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions; that general language may be restrained where to construe it in a broad sense would lead to absurdity; and that the particular inquiry is not as to the abstract force of the words or what they may comprehend, but the sense in which they were intended to be used as found in the act. See, also, In re Washer, 200 Cal. 598, 604, 254 P. 951.

In City of Pasadena v. County of Los Angeles, 182 Cal. 171, 175, 187 P. 418, it was said that the words "lands" or "improvements," in the absence of anything in the context of the statute to the contrary, were used as defined by the statutes in force at the time. To the same effect is State Mutual Building & Loan Ass'n v. Los Angeles County, 30 Cal.App.2d 383, 385, 86 P.2d 372. In Kauke v. Lindsay Unified School Dist., 46 Cal.App.2d 176, 185, 115 P.2d 576, it was said with citation of authorities that there is no dearth of recent cases all enunciating the principle that where the statutory language is subject to two interpretations, it is the intention of the legislature that must be given effect.

In the case of Lightfoot v. Grove, 5 Heisk. 473, 52 Tenn. 473, the all-inclusive meaning of the word "lands" as real property was rejected as being not in accordance with the intention of the Legislature.

In Sinclair Refining Co. v. Burroughs, 10 Cir., 133 F.2d 536, it was held that the word "lands" as used in an Oklahoma statute was not synonymous with "real property." In that case the court had before it statutory definitions of "Real Property" and "Land" identical with those in our Civil Code. It was said, 133 F.2d at page 539, that having defined the terms "land" and "real property" it must follow in the absence of some controlling state decision that when the law-making body of the state used one or the other of those terms, it used them in the sense in which it had defined them.

[3] The word "land" used in section 2 of the Municipal Corporations Act should be interpreted in accordance with the legislative definition of section 659 of the Civil Code, as "the solid material of the earth," unless it is clear that the Legislature intended the broader and all-inclusive meaning of land and improvements.

[4] The requirements of section 2 that both numerical and geographic representation in land ownership be disclosed by the petition for incorporation gives the clue to the legislative intent. The requirement of geographic representation of ownership, as well as numerical representation, indicates the intent that numbers of owners alone should not control at least in the first instance. The language that all areas, urban, agricultural, and industrial, should be included, indicates an intent that the property in the district should speak on an equal basis. The only equal basis for control geographically is to require the land as such to be a deciding element. Therefore, unless the word "land" be given the legislative definition of section 659 of the Civil Code, that intent would be defeated. For, to ascribe to the word "land" the meaning invoked by the respondents, would in practical effect place the initial control of the question of incorporation in more densely populated sections where both numbers and real property wealth are usually concentrated. If it were not the intention to give a voice to the rural sections of the proposed corporate area by permitting the land to speak for or against the incorporation in the first instance, it would not have been necessary to include any land value quotient in the petition. The interpretation of the word "land" as defined by section 659 of the Civil Code carries into effect the legislative intent, while to give to it the interpretation invoked by the respondents would leave the requirement for land value representation without its intended meaning. It is clear therefore that the Legislature, in formulating section 2 of the Municipal Corporations Act, was

mindful of and intended the statutory definition of the word "land."

Since the report of its clerk to the board of supervisors is incomplete because of a failure to show separately the value of the land as so defined, there is no proper basis in that report upon which the board may make its determination that the petition is sufficient; and it is the duty of the clerk to correct his report accordingly.

Let the peremptory writ issue directing the respondent clerk to correct his report to show the value of the land separately from the value of the improvements, and directing the respondent board of supervisors and its clerk thereupon to proceed in accordance with the provisions of the Municipal Corporations Act and the views herein expressed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




29 Cal.2d 782

**BRIGNOLI et al. v. SEABOARD TRANSP. CO. et al.**

Sac. 5805.

Supreme Court of California, in Bank.

March 14, 1947.

Rehearing Denied April 10, 1947.

**1. New trial ⇐41(3)**

A new trial may be granted on ground of errors in law, occurring at the trial, where an instruction is given which includes an incorrect or incomplete statement of the law applicable to a material issue, and the error is not cured by a charge as a whole or otherwise rendered harmless. Code Civ.Proc. § 657, subd. 7.

**2. New trial ⇐41(3)**

Where it appears that an erroneous instruction confused or misled the jury, a new trial is justified.

**3. New trial ⇐39**

Where characteristics of relationship of common carrier and of contract or private carrier were of vital importance in action by carriers to recover for trucking services, wherein one of the defendants filed a counterclaim for loss of goods by fire during carriage, and case was tried on both theories of liability, and there was no basis for an estoppel against the defendant filing the counterclaim, and instruction concerning contract carriers was incomplete, court properly granted plaintiffs a new trial.

**4. Carriers ⇐4**
**Trial ⇐243**

Statement in instruction relating to a private carrier, that a common carrier is one who undertakes generally and for all persons indifferently to carry goods, and if he refuses, without some just ground, to carry goods for every one, he is liable in damages, was too broad and was inconsistent with prior instruction that a common carrier is one who holds his transportation services out to a substantial portion of the public for some variety of freight.

**5. New trial ⇐71**

Trial court in considering motion for a new trial, is not bound by a conflict in the evidence, and does not abuse its discretion in granting the motion, where there is any evidence which will support a judgment in favor of the moving party.

**6. Appeal and error ⇐933(4)**
**New trial ⇐163(2)**

When an order for a new trial is made on a ground other than that of insufficiency of the evidence, the court impliedly holds that there is sufficient evidence to support the verdict, and on appeal from such order, it will conclusively be presumed that the order was not based on that ground. Code Civ.Proc. § 657.

**7. New trial ⇐163(2)**

The granting of a new trial to plaintiffs after judgment for one of the defendants on its counterclaim, on ground that certain instruction was erroneous, did not include an implied determination that there was insufficient evidence to support a con-

trary verdict on the counterclaim. Code Civ.Proc. § 657.

**8. Carriers ⇐136**

In action by carriers to recover for trucking services rendered to another carrier, wherein the other carrier filed a counterclaim to recover for loss of goods by fire during carriage, question whether plaintiffs were acting as common carriers or contract carriers was for jury.

**9. Carriers ⇐108, 132**

The liability of a carrier for damages to property by fire in transit under a contract to transport is practically absolute, and burden is on the carrier, if it would escape liability, to show that the loss resulted from one of the cases stated as an exception to the general rule. Civ.Code, § 2194.

**10. Carriers ⇐115, 118**

Failure of carrier to equip rear trailer on truck with more than one spare tire and driver's conduct in leaving the equipment loaded with valuable supplies unattended while he went for help, would have justified a finding of negligence that would render carriers liable for destruction of supplies by fire, if they were common carriers. Civ. Code, § 2194.

**11. Appeal and error ⇐978(1)**

Whether the rights of party moving for new trial were prejudiced by an error of law occurring at the trial is a matter resting so completely within the trial judge's discretion that an appellate court will not interfere with his action in granting a new trial on that ground except for manifest abuse of discretion.

TRAYNOR, J., dissenting.

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Appeals from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Charles Brignoli and Charles Trombetta, doing business as Rampone Brothers, against the Seaboard Transportation Company, a corporation, and others to recover for trucking services rendered by the plaintiffs, wherein the named defendant filed a counterclaim to recover for loss of goods by fire while intrusted to plaintiffs for carriage. From an order granting a new trial after judgment on a verdict in favor of plaintiffs, the plaintiffs appeal, and from the judgment, the defendants appeal.

Order granting new trial affirmed, and appeal from judgment dismissed.

Prior opinion, 171 P.2d 518.

Hauerken, Ames & St. Clair, of San Francisco, Gumpert & Mazzera, of Stockton, George H. Hauerken, of San Francisco, J. Calvert Snyder, of Stockton, and Alden Ames, of San Francisco, for plaintiffs-appellants.

Neumiller, Ditz, Beardslee & Sheppard and R. L. Beardslee, all of Stockton, for defendants-appellants.

EDMONDS, Justice.

Charles Brignoli and Charles Trombetta, doing business as Rampone Brothers, sued Seaboard Transportation Company, a corporation, to recover for trucking services rendered to it. Seaboard admitted liability to the amount of approximately $7,100, but by counterclaim demanded over $14,000 on account of the loss of goods by fire while entrusted to Rampone Brothers for carriage. Rampone Brothers have appealed from an order granting a new trial after judgment upon a verdict in their favor, and there is also an appeal from the judgment. The principal questions for decision concern the instructions to the jury.

Before the trial, Seaboard was dissolved, and Walter A. Junge, its principal stockholder, took over its assets, assumed its liabilities, and continued the business under the same name. Counsel then stipulated that any judgment rendered in the action shall inure to the benefit of and shall bind Walter A. Junge, doing business as Seaboard Transportation Company, and that the name Seaboard Transportation Company, when referred to or mentioned in the pleadings or elsewhere, shall include Junge, doing business as Seaboard Transportation Company, as well as the dissolved corporation. The word "Seaboard" will, therefore, now be used with the meaning stated in the stipulation.

The complaint alleged a common count for services rendered in the amount of

$8,348.24 during the preceding two years. By answer, Seaboard admitted indebtedness of $7,166.48. The answer included a counterclaim, pleaded in two counts, which was treated by the parties and the court as constituting a cross-complaint. In the first count, Seaboard charged that it had delivered to Rampone Brothers, as a common carrier, goods belonging to the United States of America. In the course of transit, and while in their exclusive possession and control, Seaboard alleged, the goods were damaged or destroyed in the amount of $14,486.98. The second count alternatively pleaded that the goods received by Rampone Brothers in the capacity of a contract carrier were destroyed or damaged in transit by their negligence.

In answering the cross-complaint, Rampone Brothers admitted that they received the goods from the corporation for carriage. The destruction of, or damage to, the goods was also admitted, but they denied that they were then acting as a common carrier. Affirmatively, it was alleged that the goods, received in the capacity of a private or contract carrier, were destroyed or damaged by fire while in their possession and under their control but without any fault on their part.

Upon these issues, evidence was presented showing the following facts: Rampone Brothers, engaged in the trucking business, were duly licensed by the Railroad Commission of the State of California as a radial highway common carrier and a highway contract carrier. (See Highway Carriers' Act, Stats.1935, p. 878 as amended, Deering's Gen.Laws, Act 5129a.) Their application to act as a radial highway common carrier specified the area to be served as that within a radius of 150 miles from Oakland. They also held a certificate of public convenience and necessity issued under the provisions of the Public Utilities Act for the transportation of fresh fruits, vegetables and canned goods. (See Deering's Gen. Laws, Act 6386, § 50¾.) Seaboard was licensed as a radial highway common carrier.

The principal business of Rampone Brothers was the transportation by motor truck, of such freight from the delta region of the San Joaquin and Sacramento Rivers to Oakland and San Francisco. Most of this hauling was done under the common carrier franchise. During the winter months, they also hauled other commodities for various shippers, including Seaboard, to divergent parts of the state. In 1943, some of at least 56 accounts on Rampone Brothers' books showing charges for services as a common carrier included entries for carrying freight other than fresh fruits, vegetables and canned goods for distances in excess of 150 miles from Oakland. On occasion, they refused to carry particular freight.

The United States Army had a contract with Seaboard to haul goods from certain points near Stockton. Upon verbal notification from the Army that it had freight to move, Seaboard would accept delivery of the goods and assume full common carrier liability. When the corporation did not have sufficient equipment of its own to handle all of the shipments offered, Seaboard sublet portions of these movements to Rampone Brothers and other truckmen, paying for such services an amount less than the charge to the government.

Commencing in 1941, Rampone Brothers carried Army freight for Seaboard but they had no written or oral agreement with Seaboard except as to rate of pay, and there was no agreement as to the basis or extent of their liability. The usual procedure was that Seaboard would ask Rampone Brothers to send specified equipment to the corporation's dispatcher at an Army base. The goods were loaded and checked by Army personnel, and Seaboard issued its bill of lading to the Army. The driver received a "dray tag" from the corporation's dispatcher and after obtaining a clearance from the Stockton office of the corporation, proceeded to the designated destination.

The present controversy concerns Army freight which Seaboard requested Rampone Brothers to haul from Stockton. The corporation had issued to the Army a bill of lading covering the goods. The driver, employed by Rampone Brothers and driving a diesel tractor, semi-trailer and rear trail-

er, proceeded to the depot where the crates, boxes, and bundles were loaded on the truck by Army personnel.

About 175 miles from Stockton, the driver felt the truck "pulling heavy." Upon examining his equipment he found that the two right front tires of the rear trailer had blown out. The blown-out tires were warm but not hot. According to the driver's testimony, he knew that blown-out tires sometimes become hot and cause fire. There was only one spare for the rear trailer. After about 30 to 45 minutes, with three flares placed near the edge of the pavement, the driver left the vehicle unattended and hailed a passing motorist. He was taken to Pixley, a town about a mile and one-half away, where he telephoned to Rampone Brothers for additional tires. Upon the driver's return, some 45 minutes later, he found the semi-trailer in flames and the front one-fourth of the rear trailer burning. The evidence does not show with any certainty the cause of the fire. According to the driver, the wind was then blowing from the rear trailer toward the semi-trailer. With the help of the fire and police departments, the rear trailer and much of its load were saved, but the semi-trailer and the freight it was carrying were completely destroyed. The Army claimed $14,486.98 as the amount of its loss and Seaboard paid that sum in settlement.

In instructing the jury, considerable emphasis was placed by the trial judge upon the liability of a radial highway common carrier, a highway common carrier, and a highway contract or private carrier, but the only instructions given defining these carriers were as follows: "There are two classes of common carriers operating upon the highways of this State in intra-state commerce. The first class is called a 'highway common carrier' and the second class is called a 'radial highway common carrier.' A 'highway common carrier' is one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, at rates filed with the Railroad Commission of the State of California and who usually or ordinarily operates between fixed termini or over a regular route. Before commencing his operations as such, a 'highway common carrier' is required to make a showing before the Railroad Commission sufficient to justify and culminating in the issuance by the Commission of a certificate that declares that public convenience and necessity requires such operation. A 'radial highway common carrier' is one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, and who does not usually or ordinarily operate between fixed termini or over a regular route, and who offers to serve anyone within the scope of his dedication, which scope must be a clearly defined area." The court also instructed the jury: "Everyone who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry. To impress upon one the character of a common carrier, it must be shown that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for every one, in the course of his employment, and for a reasonable and customary price, he will be liable to an action. * * *" As a part of this instruction, proposed by Rampone Brothers, which was the only one defining a private or contract carrier, the court stated: "A private or contract carrier, on the other hand, is not bound to carry for every person and can refuse to do so without incurring any liability." In another instruction the jury was told: "If you find from the evidence that * * * at the times here in this case involved, the plaintiffs, by virtue of their calling, and as a regular business, undertook to transport goods from place to place, offering their services to such as chose to employ them and pay their charges, then I instruct you that plaintiffs were a common carrier."

About two hours after the jurors commenced their deliberations, they requested further instruction as to the distinction between a common carrier, a contract carrier, and a radial carrier. The first of the

quoted instructions was again read to the jury, and upon being asked by the court, "Does that answer your question in reference to that point?", the foreman replied, "Yes, sir." To the foreman's question as to the meaning of "the radial area," the trial judge replied that the answer would have to be found in the evidence. He then asked the jurors if they understood the meaning of "private carrier" and they collectively replied, "Yes." But upon inquiring whether the jurors wished to have any other instruction read, one of them asked, "The contract carrier now."

In response to this request the judge reread the instruction regarding the difference in liability between a common and contract carrier and stated: "A carrier may be a common carrier as to certain types of merchandise, and be a contract carrier as to other types of merchandise, and this will depend upon the conduct of the carrier or the agreement of the carrier with the shipper, or both. The true test as to whether or not a carrier is a common carrier or a private carrier is not what the company is empowered to do, but what it is actually engaged in doing." After a further question from one of the jurors, counsel stipulated that the liability of a radial common carrier is exactly the same as that of a common carrier.

The instruction requested to be given by Seaboard but refused by the court reads as follows: "A contract or private carrier is distinguished as one who does not dedicate and hold out his transportation service generally to the public or a substantial portion thereof, but who is employed by a select and limited group of shippers as a private carrier for an agreed compensation to the exclusion of all others by a mutually binding contract entered into and performed in good faith for an agreed term, and which contract mutually binds the carrier to transport and the shipper to supply a specific category of freight and which contract is definite as to the following: 1. The time involved in the performance of the contract; 2. The route and/or termini and/or area involved in the performance of the contract; 3. The kind of commodity or commodities involved in the contract; 4. The tonnage to be hauled; 5. The compensation to be paid and received."

In accordance with a stipulation of the parties, a directed verdict was returned in favor of Rampone Brothers for $8,197.02 as the amount due to them for services rendered. Upon the cross-complaint, the jury found in favor of Rampone Brothers, and the only controversy now at issue concerns the question of liability for the goods damaged or destroyed by the fire.

In a memorandum opinion stating the grounds upon which the motion for a new trial was granted, the trial judge declared: "* * * Failure of the Court, through inadvertence, to give the defendant's instruction defining a private carrier constituted the error of law which I believe, under the peculiar circumstances of this case, confused the jury and seriously affected the outcome of the trial. * * * I consider it quite significant that the jury, after retiring, returned to the courtroom and requested that the court point out the 'distinction between a common carrier, a contract carrier and a radial carrier.' This indicates that the jurors were confused: and I am convinced now that the Court did not clarify the matter by giving them the definitions requested. At first blush it would appear that the error was rather trivial; that the jurors, armed with the correct definition of what constituted a common carrier could, by a sort of process of elimination, solve the problem for themselves, since a carrier which is not a common carrier necessarily has to be a private carrier. But a jury is not required to undertake any such task. * * * It has been held that when instructions are confusing and questions by the jurors indicate such confusion and the same is not cleared up by the Court, a new trial should be granted. * * *"

In appealing from the order granting the motion for a new trial and as cross-respondents in the appeal from the judgment, Rampone Brothers contend that, because recovery by Seaboard rested upon the theory that they were doing business as a common carrier, an instruction defining the characteristics of a contract carrier

was not relevant. And since Seaboard adopted exclusively the theory that they were a common carrier, it is now estopped from asserting liability upon another basis. Furthermore, it is argued, the verdict of the jury supports the implied findings that they were a contract carrier and were not negligent. Also, say Rampone Brothers, because the motion for a new trial was not granted for insufficiency of the evidence, the ruling constitutes an implied finding by the court that they were not a common carrier. A further contention is that the evidence would not support a verdict in favor of the corporation. Moreover, the jurors were correctly, fully, and clearly instructed on the distinction between a common and a contract carrier. Their inquiries show that they were not confused in this regard and the instruction proposed by Seaboard defining a contract carrier was not a correct statement of the law. Under these circumstances, Rampone Brothers conclude, the record shows neither error nor a "miscarriage of justice," and the granting of a new trial was an abuse of discretion. In any event, it is urged, they should not be required to retry the cause of action for services because Seaboard has admitted liability for the amount of the judgment.

As justifying the order, it is evident from the pleadings, Seaboard contends, that the case was tried upon the alternative theories of liability either as a common carrier or as a contract carrier; therefore, an instruction defining the characteristics of a contract carrier was relevant and essential because, to fully understand the obligations of a common carrier, necessarily one must know the definition of a contract carrier, and vice versa. In granting a motion for a new trial upon a ground other than insufficiency of the evidence, says Seaboard, although the ruling, in effect, is that there is sufficient evidence to support the verdict, it does not import that there is insufficient evidence to support a contrary verdict. Seaboard also contends that the instructions stating the distinction between a common and contract carrier were inadequate, and that, as was clear from the jurors' inquiries, they were confused and could easily have been misled. The requested instruction, defining a contract carrier, refused by the trial court, was a correct statement of the law, says Seaboard, and there was substantial evidence to support a finding that Rampone Brothers are liable, either as a common carrier or a contract carrier. In conclusion, Seaboard argues, the granting of the new trial rested in the wide discretion of the trial court, and the refusal to fully instruct the jury on the characteristics of a common and contract carrier by more explicitly defining a contract carrier resulted in a "miscarriage of justice" requiring a new trial.

[1, 2] A new trial may be granted upon the ground of "error in law, occurring at the trial" when an instruction has been given which includes an incorrect or incomplete statement of the law applicable to a material issue, and the error was not cured by the charge as a whole or otherwise rendered harmless. Code Civ.Proc., § 657, subd. 7; Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680; see 20 Cal.Jur. 139, 140. And where it appears that an erroneous instruction confused or misled the jury, a new trial is justified. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929.

[3] In the present case the characteristics of the relationship of a common carrier and that of a contract or private carrier were of vital importance. The pleadings, evidence, instructions, and memorandum of opinion on motion for the new trial, show that the case was tried upon both theories of liability and there is no basis for an estoppel against Seaboard. The instruction concerning a contract carrier was incomplete (see Rampone v. Leonardini, 39 C.R.C. 562 [Dec. No. 28526]; Matter of Fred Belli, 41 C.R.C. 1 [Dec. No. 30382]) and therefore erroneous.

[4] Furthermore, the statement in the instruction relating to a private carrier, that a common carrier is one who undertakes generally and for all persons indifferently, to carry goods and if he refuses, without some just ground, to carry goods

for every one he is liable in damages, is too broad. Also it is inconsistent with the first instruction to the effect that a common carrier is one who holds his transportation services out to a substantial portion of the public for some variety or varieties of freight. In view of the questions posed by the jurors during their deliberations, it is evident that they were endeavoring to obtain a clear understanding in regard to the characteristics of the relationship of each type of carrier.

[5-7] The trial court in considering a motion for a new trial is not bound by a conflict in the evidence, and does not abuse its discretion in granting the motion where there is any evidence which would support a judgment in favor of the moving party. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465. When the order is made upon a ground other than that of insufficiency of the evidence, the court impliedly holds that there is sufficient evidence to support the verdict, and "on appeal from such order it will be conclusively presumed that the order was not based upon that ground." Code Civ.Proc., § 657; Fennessey v. Pacific Gas & Elec. Co., supra, 10 Cal.2d at page 544, 76 P.2d 104. But such a ruling does not include an implied determination, as Rampone Brothers contend, that there is insufficient evidence to support a contrary verdict.

[8] The capacity in which Rampone Brothers was acting at the time of the fire was a question of fact primarily for the jury (George v. Railroad Comm. 219 Cal. 451, 456, 27 P.2d 375; People v. Duntley, 217 Cal. 150, 165, 17 P.2d 715; Haynes v. MacFarlane, 207 Cal. 529, 532, 279 P. 436), and there is evidence in the present record tending to prove a common carrier relationship. The number and varied types of accounts in the books of Rampone Brothers for charges as a common carrier, the lack of definiteness of the agreement between the parties in certain particulars, and the fact that they were licensed and operating as a radial highway common carrier, would support a determination that there was such a relationship as to the particular shipment in controversy.

[9, 10] The liability of a carrier of that kind for damage to property in transit under the contract to transport is practically absolute (Anheuser-Busch, Inc., v. Starley, 28 Cal.2d 347, 349, 170 P.2d 448), and the burden is upon the carrier, if it would escape liability, to show that the loss resulted from one of the cases stated as an exception to the general rule. Civ.Code, § 2194; see 4 Cal.Jur. 870. The question of negligence also was for the jury. Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 176, 93 P.2d 135. The failure to equip the rear trailer with more than one spare tire, and the driver's conduct in leaving the equipment loaded with valuable supplies unattended, would have justified a finding of negligence.

[11] Whether or not the rights of the moving party were prejudiced by an error of law occurring at the trial is a matter which rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action in granting a motion for a new trial upon that ground except for a manifest abuse of discretion. Mazzotta v. Los Angeles Ry. Corp., supra, 25 Cal.2d at page 169, 153 P.2d 338; Mathers v. County of Riverside, 22 Cal.2d 781, 786, 141 P.2d 419; Fennessey v. Pacific Gas & Elec. Co., supra, 10 Cal.2d at page 544, 76 P.2d 104. In the present case, the instructions were carefully considered by the trial judge and he concluded that the failure to fully define for the jury the relationship of a contract highway carrier prejudiced Seaboard's rights. The record shows no abuse of discretion in this regard.

The order granting a new trial is affirmed, and the appeal from the judgment is dismissed. However, in view of Seaboard's admitted liability for services rendered by Rampone Brothers, the issues upon the new trial should be limited to the liability, if any, of Rampone Brothers, for the loss and damage by fire.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion upon the sole ground

that the trial court erred in failing to give Seaboard's proposed instruction No. 13 defining a contract carrier. The definition of a contract carrier contained in the instruction which the court gave was incomplete and may have operated to confuse the jury. This was the view taken by the trial court in ruling on the motion for a new trial, and it is impossible for us to say that such was not the case. If the instruction proposed by Seaboard had been given, the jury would then have had before it a correct definition of a contract carrier and would have been in a better position to determine the liability of Rampone Brothers for the loss sustained by Seaboard.

I do not agree with what is said in the majority opinion relative to the instructions given by the trial court defining a common carrier. I see no inconsistency in these instructions and they are both correct. The instruction criticized in the majority opinion as being too broad is as follows: "Everyone who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry. To impress upon one the character of a common carrier, it must be shown that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for every one, in the course of his employment, and for a reasonable and customary price, he will be liable to an action. * * *" While the foregoing instruction defines a common carrier in general terms, I do not believe it can be said to contain an incorrect statement relative to the requirements of the law necessary to create the status of a common carrier or responsibility which one assumes in acquiring such status. It is true that as stated in another instruction given by the court to the jury: "A 'highway common carrier' is one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, at rates filed with the Railroad Commission of the State of California and who usually or ordinarily operates between fixed termini or over a regular route." The definition contained in the instruction last quoted is more limited and specific than that contained in the portion of the instruction first quoted, but it is clear that the instruction first quoted deals with common carriers generally and the instruction last quoted deals specifically with "highway common carriers" which operate upon the highways in this state. While the court would have been justified in this case in submitting to the jury a definition of a "highway common carrier" only, I do not think it can be said that the court committed prejudicial error in giving a definition in general terms as to what constitutes a common carrier.

Furthermore, it was the contention of Seaboard that in the hauling of the particular load of army supplies involved in this action Rampone Brothers was not operating under a certificate of public convenience and necessity as a "highway common carrier" but was acting as a "radial highway common carrier" and it was the contention of Rampone Brothers that they were acting as a "highway contract carrier." Such being the contention of the respective parties, there is little likelihood that the jury could have been confused by anything said in the instructions relative to common carriers generally.

TRAYNOR, Justice.

I dissent. The problem whether a carrier is a common carrier involves questions of fact and of law. It is for the jury to determine what the facts are; whether the facts establish that a carrier is a common carrier is a question of law for the court. If there is conflicting evidence as to the relationship between the parties, the court must instruct the jury as to the operative facts that legally fix the status of common carrier and private carrier and instruct them that if they find the existence of certain facts they must find that the carrier is a common carrier, but if they find the existence of certain other facts they must find that the carrier is a private carrier. After finding the facts, the jury must follow the instructions of the court, and if there is evidence that reasonably warrants the conclusion reached, their verdict is controlling. If the

facts are undisputed and not reasonably susceptible of conflicting inferences, it is the sole responsibility of the court to determine whether the status of common carrier exists, and it is not only unnecessary but improper to instruct the jury as to the distinction between a common carrier and a private carrier. The evidence in the present case as to the relationship between Seaboard and Rampone Brothers is without conflict and not reasonably susceptible of conflicting inferences. It was therefore a question of law for the court whether or not Rampone Brothers were acting as a common carrier. In my opinion they were not. Since Rampone Brothers did not perform the services in question as a common carrier, their liability can be predicated only upon their negligence or the negligence of their driver, and the question whether they acted as a common carrier or private carrier should not have been presented to the jury. No harm was done, however, by doing so, since the jury, as demonstrated by its verdict, did not find that Rampone Brothers acted as a common carrier. The jury was properly instructed as to the negligence issue, and since it determined that issue in favor of Rampone Brothers, there was no ground for granting a new trial.

It is settled that a common carrier may contract to render special services as a private carrier. Gornstein v. Priver, 64 Cal. App. 249, 254, 221 P. 396; Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U.S. 177, 185, 33 S.Ct. 474, 57 L.Ed. 787; Baltimore & Ohio S. W. R. Co. v. Voigt, 176 U.S. 498, 20 S.Ct. 385, 44 L.Ed. 560; Northern P. R. Co. v. Adams, 192 U.S. 440, 24 S.Ct. 408, 48 L.Ed. 513; Long v. Lehigh Valley R. Co., 2 Cir., 130 F. 870, 65 C.C.A. 354; Bank of Kentucky v. Adams Express Co., 93 U.S. 174, 186, 23 L.Ed. 872; New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 377, 84 U.S. 357, 377, 21 L.Ed. 627; Wilson v. Atlantic Coast Line R. Co., C.C., 129 F. 774, affirmed, 5 Cir., 133 F. 1022, 66 C.C.A. 486; Cushing v. White, 101 Wash. 172, 181, 172 P. 229, L.R.A. 1918F, 463; Claypool v. Lightning Delivery Co., 38 Ariz. 262, 269, 299 P. 126; Bernardi Greater Shows, Inc., v. Boston & Maine R. R., 86 N.H. 146, 154, 165 A. 124; Jackson Arch. Iron Works v. Hurlbut, 158 N.Y. 34, 37, 52 N.E. 665, 70 Am.St.Rep. 432; Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 255, 62 Am.Dec. 567; State v. Boyd Transfer & Storage Co., 168 Minn. 190, 192, 209 N.W. 872; Mengel Co. v. Inland Waterways Corp., D.C., 34 F.Supp. 685, 692; see 13 C.J.S., Carriers, § 5, p. 32; 9 Am.Jur. 436; Atchison, T. & S. F. R. Co. v. Homewood, 39 Okl. 179, 134 P. 856, 48 L.R.A.,N.S., 990. In all these cases it was determined as a matter of law whether or not the engagement in question was so different from the services offered to the public that the carrier was not a common carrier. As the United States Supreme Court declared in Bank of Kentucky v. Adams Express Co., 93 U.S. 174, 186, 23 L.Ed. 872: "We do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by his acts or omissions of others. * * * But what we have to decide in these cases is, whether the contract proved has that operation." See Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 255, 62 Am.Dec. 567; Jackson Arch. Iron Works v. Hurlbut, 158 N.Y. 34, 37, 52 N.E. 665, 70 Am.St.Rep. 432. The rule is stated in 13 C.J.S., Carriers, § 5, p. 32, as follows: "The question whether a contract of carriage changes the relation of the carrier from that of a common carrier to that of a private carrier is one of law."

The cases decided by this court cited in the majority opinion do not hold to the contrary. In Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436, 437, a common carrier sought to escape liability as such by designating himself a private carrier in his contracts and by reserving "all of the privileges and rights of a contract carrier." Since public policy prevents a common carrier's repudiating his liability as such with respect to transactions in which he is "in substance and reality a common carrier," this court held that such a contract did not protect the carrier against claims based on his obligations as a common carrier. "The fact that the defendant in his contract called himself a 'private carrier' could not make him such in the light of the undisputed facts to the contrary." 207 Cal. 529, 534, 279 P. 436, 438. In that case the question whether the carrier acted as a common carrier was de-

termined as a question of law by this court. The statement in the decision: "Whether the status of a freight auto truck operator is public or private in character is primarily a question of fact in each case," means that the legal conclusion whether a carrier has acted in the capacity of a common carrier depends on what he actually did rather than on the language of the contract that he made with the shipper. In People v. Duntley, 217 Cal. 150, 17 P.2d 715, the court was concerned with the question whether a tax imposed upon common carriers was properly imposed upon the defendant. It was held that the findings of the trial court as to the transactions undertaken in the conduct of defendant's business were supported by the evidence and that from these findings the legal conclusion could reasonably be drawn that defendant was not a common carrier. In George v. Railroad Comm., 219 Cal. 451, 27 P.2d 375, the conclusion of the commission that petitioners were common carriers was sustained by the same reasoning.

In the present case the unconflicting evidence shows that Rampone Brothers undertook to furnish Seaboard with trucking equipment and a driver for the transportation of goods entrusted to Seaboard by the United States Army whenever Seaboard lacked sufficient equipment to transport such goods. Rampone Brothers reserved the right, however, to refuse compliance with Seaboard's request if they needed the equipment for their regular business. The driver furnished by Rampone Brothers was concerned with neither the loading nor the delivery of the goods. He reported to Seaboard's dispatcher at an army camp and was not present while the merchandise was loaded. When the truck and other equipment were loaded, Seaboard delivered to the driver the original and a copy of a "dray tag" and requested him to sign another copy as a receipt. The dray tag was issued on a form furnished by Seaboard. Under the agreement between Seaboard and Rampone Brothers the latter received compensation that was about 20 per cent less than the compensation the army paid Seaboard. Rampone Brothers' driver was subject to Seaboard's instructions as to the handling and transportation of the goods. He was not even to take part in the loading or delivery of the goods, although such services formed an important part of the duties of Rampone Brothers with regard to their other business. Seaboard determined what part of the goods entrusted to it was to be carried by its own equipment, by that furnished by Rampone Brothers or by other subhaulers. These undisputed facts demonstrate that the services that Rampone Brothers rendered to Seaboard were substantially different from the services for which they held themselves out to the public as a common carrier. If the services in question were those of a common carrier, it would follow that Rampone Brothers were under obligation to furnish their equipment and drivers to any one upon the same conditions they were furnished to Seaboard. It is not the duty of a common carrier, however, to place his equipment and personnel under the control of another carrier.

An inference that Rampone Brothers acted as a common carrier in rendering the services in question cannot be drawn from the mere fact that they were licensed, and upon other occasions operated, as a radial highway common carrier. It was shown by the uncontradicted evidence that the special services rendered Seaboard were entirely different from the services rendered the public generally as a common carrier. To hold that such an inference could be drawn despite the uncontradicted evidence as to the special nature of the services is equivalent to holding that the jury could disregard the rule that a common carrier may contract to render services as a private carrier. It is also immaterial that as a common carrier Rampone Brothers sometimes carried commodities other than fruit, vegetables, and canned goods, for the determination of their status in this case depends, not on the kind of goods carried, but upon the circumstances under which the services were rendered.

It is unnecessary to determine whether Rampone Brothers merely leased their equipment to Seaboard or whether they acted as a contract carrier. In neither event would they be liable as a common carrier.

The order granting a new trial should be reversed, and the judgment should be affirmed.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.




78 Cal.App.2d 808

**SHEPPARD v. BANNER FOOD PRODUCTS, Inc., et al.**

**Civ. 15356.**

District Court of Appeal, Second District, Division 3, California.

March 28, 1947.

**1. Vendor and purchaser ⇐46**

In action for specific performance of contract for sale of realty, the court cannot make a new contract for vendor and purchaser.

**2. Specific performance ⇐17, 119**

Plaintiff lending money to purchaser who executed trust deed on realty which purchaser had contracted to purchase from vendor was not entitled to specific performance of contract between purchaser and vendor, where plaintiff was not party to contract, and contract was not made specifically for plaintiff's benefit, and plaintiff did not show that purchaser offered to comply with contract and that purchaser would be entitled to specific performance of contract. Civ.Code, § 1559.

**3. Specific performance ⇐17**

A person not party to contract which is not expressly made for such person's benefit cannot specifically enforce contract even though such person would be indirectly benefited by performance. Civ.Code, § 1559.

**4. Mortgages ⇐97**

A purchaser borrowing money from lender to be used in purchase of realty and executing to lender a trust deed on realty which purchaser had contracted to purchase from vendor had implied obligation to lender to go through with purchase and thus to place lender in rightful position with respect to trust deed.

**5. Vendor and purchaser ⇐145**

A vendor contracting to sell realty to purchaser was under no obligation to convey realty to purchaser without performance of contract by purchaser.

**6. Specific performance ⇐5**

Generally, specific performance of contract will not be decreed at instance of one who may be adequately compensated in money.

**7. Specific performance ⇐64**

A plaintiff lending money to purchaser who executed trust deed on realty which purchaser had contracted to purchase from vendor had adequate legal remedy which precluded plaintiff from maintaining suit for specific performance of purchase contract, where plaintiff could be compensated by money judgment against purchaser.

**8. Liens ⇐22**

A plaintiff lending money to purchaser who executed a trust deed on realty which purchaser had contracted to purchase from vendor could not maintain action in equity to impress a lien on realty which the vendor had not yet conveyed to purchaser, in absence of allegation that purchaser was unable to meet obligation to plaintiff according to terms of note which trust deed secured, or that plaintiff was likely to suffer loss.

**9. Pleading ⇐193(5), 225(1)**

A demurrer to complaint for equitable relief was properly sustained without leave to amend, where complaint stated no ground for equitable or legal relief and plaintiff elected to stand on complaint.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action to impress a trust deed as a lien on realty and for other relief by Barney Sheppard against the Banner Food Products, Inc., a corporation, and Max Bortz and Blanche Bortz. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Leo M. Zinner, of Los Angeles, for appellant.

Lyons & Lyons, Harry Lyons and David Lyons, all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiff brought this action against Max Bortz and Blanche Bortz, husband and wife, and Banner Food Products, Inc., seeking a decree declaring a trust deed held by plaintiff to be a lien upon certain real property owned by defendants Bortz, and directing a foreclosure of the deed of trust and a sale of the property thereunder. A demurrer to the amended complaint was sustained without leave to amend and judgment of dismissal was thereupon entered. Plaintiff appeals.

Defendants Bortz owned premises on East Sixth Street in Los Angeles, where they conducted a wholesale smoked fish business. On October 3, 1944, they agreed to sell the land and the business to Banner Food Products, Inc., a corporation, for the sum of $22,500, payable $5,000 down, $5,000 March 1, 1945, and $12,500 at the rate of $200 per month, with 6% interest, to be evidenced by a note and a mortgage upon the real property. On October 9, 1944, defendants Bortz transferred to Banner the fixtures, equipment and trucks belonging to the business for a price of $1,500. At that time the transaction was placed in escrow under instructions by which defendants Bortz agreed to sell and Banner agreed to buy the real property for the balance of the total price, namely, $21,000, to be paid as follows: $3,500 in cash, $4,300 by the assumption of an existing trust deed indebtedness, and the balance of $13,200 at the rate of $125 per month and a $5,000 payment on March 1, 1945, said sum of $13,200 to be secured by trust deed on the property. The complaint alleged that plaintiff, relying upon the terms of the agreement and the escrow instructions "and upon the express or implied assurance of defendants Banner and Bortz that said transaction between themselves would be consummated and carried out to completion," loaned Banner $6,500 and received Banner's note in that amount, payable in monthly installments of $541.67, and a trust deed on the real property securing the same "subject to the aforesaid encumbrances," and also secured by Banner's chattel mortgage in favor of plaintiff covering said fixtures, equipment and trucks. The complaint alleged: "That the aforesaid loan so made by plaintiff to defendant Banner was made with the full knowledge, consent and approval thereof by defendants Bortz, and with the latter's full knowledge that said trust deed so executed by defendant Banner in favor of plaintiff would constitute a charge or lien upon said property, and that said deed of trust constituted plaintiff's principal security for the repayment of said loan." There remains $5,308.33 unpaid upon the $6,500 note. It was alleged that $8,302.50 has been paid by Banner to Bortz upon account of the purchase, a substantial part thereof being money loaned by Banner to plaintiff. It was then alleged that defendants Bortz failed, neglected and refused to carry out their agreed sale to Banner, "in that said defendants Bortz notified defendants Banner and Union Bank that they would not execute a deed to defendant Banner covering the title to said real property and would not consummate said escrow transaction unless other and further terms imposing increased obligation upon defendant Banner would be agreed to and complied with by the latter." It was also alleged, "That by reason and as a result of said acts and conduct of defendants Bortz in so failing and refusing to comply with and carry out the terms and provisions of said contracts of October 3, 1944 and October 10, 1944, the deed of trust so executed by defendant Banner to this plaintiff is ineffectual and insufficient to impose a lien upon the real property described therein, in that by reason of the failure of defendants Bortz to execute and deliver the deed to said property, defendant Banner lacked and now lacks the title and ownership thereof necessary to impose and impress a valid and subsisting encumbrance thereon by deed of trust." It was alleged that plaintiff has requested defendants Bortz to carry out their agreement and convey the property to Banner, "which defendants Bortz have failed and refused to do," and if they continue in their refusal they "will

be unjustly enriched at the expense of this plaintiff and plaintiff will be without security for the enforcement of the greater part of the sum due him." The second cause of action repeats numerous of the allegations of the first cause of action, alleges default by Banner in payments upon plaintiff's note, declaration of default, and Banner's liability for the payment of attorney's fees for the foreclosure. The prayer of the complaint was for a decree impressing plaintiff's trust deed as a lien upon the property or directing defendants Bortz to convey the land to Banner and for a sale of the property under plaintiff's trust deed. It is asserted in respondents' brief that Banner Food Products, Inc. has not been served with process. The record contains no evidence of service or appearance by Banner.

It was not alleged in the complaint that Banner was or is ready, able and willing or has offered to consummate its agreed purchase of the property or that it has demanded of defendants Bortz performance upon their part, nor was it alleged that defendants Bortz have acted with a fraudulent purpose.

If the transaction between Bortz and Banner had been or should be consummated, plaintiff would be the holder of a trust deed for $6,500, executed by the owner of the legal title and subject to the outstanding trust deed of $4,300 and the trust deed of Banner to Bortz in the amount of $13,200. He can gain that position only through a transfer of the title to Banner and the execution by the latter of the $13,200 purchase money trust deed. If the transaction is completed by the defendants voluntarily, plaintiff's position will thereby be established. The relief which he seeks is in reality a decree of specific performance. In no other way can he be placed in the position he would have occupied if the sale had been carried out as agreed.

[1] Plaintiff's contentions are stated as follows: "That the amended complaint states a cause of action, whether this be upon the theory of the existence of a constructive trust upon the property in favor of appellant, or that the instrument be regarded as an equitable mortgage, or of the application of the principle of an equitable estoppel, or upon the proposition that Banner had a mortgageable interest in the property which it had the right to mortgage, or upon the theory that appellant, as mortgagee, is a bona fide purchaser for value, or that the instrument constitutes a purchase-money mortgage, or that to deny appellant the relief sought would result in unjust enrichment by Bortz." What appellant fails to do is to point out wherein the application of all or any of these doctrines would justify a decree of specific performance as between Bortz and Banner. Plaintiff's rights are measured by the Bortz-Banner contract. The court cannot make a new contract for them, nor can the court decree a lien in favor of plaintiff upon the property of Bortz in disregard of the right of Bortz to receive from Banner a $13,200 trust deed which would be superior to that of plaintiff.

[2, 3] Plaintiff has no right to enforce performance of the Bortz-Banner contract. He was not a party to it and it was not made specifically for his benefit. Section 1559 of the Civil Code provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." If a contract is not made expressly for his benefit, it may not be enforced by him even though he would be incidentally benefited by performance. Steinberg v. Buchman, 73 Cal.App.2d 605, 609, 167 P.2d 207.

[4, 5] We may examine the allegations of the complaint from another point of view. Plaintiff relied upon Banner as well as upon Bortz to consummate the purchase of the property. Banner's obligation in fact was the greater, for the reason that in borrowing money from plaintiff to be used in the purchase, an implied obligation arose to go through with the purchase and to thus place plaintiff in his rightful position. Bortz was under no obligation to convey the property without performance upon the part of Banner. While the complaint alleged that Bortz failed, refused and neglected to consummate and carry out their agreement "unless other and further terms imposing increased obligation upon defendant Banner would be agreed to and com-

plied with by the latter," it did not allege that Banner was ready, able and willing to perform or ever offered to perform upon its part. It was alleged that plaintiff had requested Bortz to convey the property to Banner as agreed, but it was not alleged that Banner had made any such demand or had tendered performance. So far as disclosed by the complaint, Banner may have abandoned the purchase or it may have been rescinded by mutual consent. The complaint was insufficient to state a cause of action for specific performance, not only because the contract was not made expressly for the benefit of plaintiff, but also for the reason that it failed to allege facts sufficient to show that Banner has complied or offered to comply with its contract and would be entitled to specific performance.

[6, 7] In addition to all this is the general rule that specific performance will not be decreed at the instance of one who may be adequately compensated in money. Plaintiff sought to acquire no interest in the land, but only a lien upon it as security for his loan. He could be compensated by a money judgment against Banner and, if he could establish liability of defendants Bortz, against them also. No facts were alleged to show the inadequacy of his legal remedy. Flood v. Templeton, 148 Cal. 374, 83 P. 148.

It was alleged that plaintiff loaned the money "upon the express or implied assurance of defendants Banner and Bortz that said transaction between themselves would be consummated," etc. No representations or promises on the part of Bortz to plaintiff were alleged. The contract itself was the only inducement to plaintiff to loan the money to Banner. It was not alleged that Bortz and Banner acted in collusion or that either was actuated by bad faith or a fraudulent purpose.

[8] In yet another aspect the complaint was deficient as an appeal for relief upon equitable grounds, under which a lien would be impressed upon the property of Bortz. It was not alleged that Banner is unable to meet its obligation to plaintiff according to the terms of the note, or that plaintiff is likely to suffer any loss. So far as appears from the complaint he has a plain, speedy and adequate remedy at law. He has not brought himself within any exception to the rule stated in Pomeroy's Equity Jurisprudence, (5th Ed.) Vol. 1, sec. 178, that "Where the primary right of the plaintiff is purely legal, arising either from the nonperformance of a contract or from a tort, and the money is sought to be recovered as a debt or as damages, and the right of action is not dependent upon or connected with any equitable future or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like, full and certain remedies are afforded by actions at law, and equity has no jurisdiction; these are cases especially within the sole cognizance of the law."

Upon the facts alleged plaintiff is not entitled to a decree requiring defendants Bortz to convey the property to Banner, nor is he entitled to have a lien impressed upon the property for the amount of his trust deed while title to the property remains in defendants Bortz and the contract of sale remains unperformed.

[9] Inasmuch as the complaint states no ground for equitable relief and no cause of action in tort, the demurrer was properly sustained without leave to amend. It is stated in respondents' brief, and not denied by appellant, that appellant informed the trial court that he could not further amend his amended complaint and that he elected to stand upon it.

The judgment is affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.

78 Cal.App.2d 720

**GREENLEAF v. BRIGGS et al.**

**Civ. 3540.**

District Court of Appeal, Fourth District, California.

March 24, 1947.

Hearing Denied May 22, 1947.

**1. Carriers ⇐320(27, 28), 347(9)**

In passenger's action for injuries sustained when she fell on driveway when alighting from bus at night, whether defendants were negligent because of failure to stop at a more accessible place and to furnish a safe place to alight from bus, and whether plaintiff was contributorily negligent because of failing to exercise due care for her own safety, were questions for the jury. Civ.Code, § 2100.

**2. Carriers ⇐280(1)**

Common carriers are required to use utmost care and diligence for safe carriage of passengers. Civ.Code, § 2100.

**3. Carriers ⇐303(6)**

If passenger was not injured during her carriage, but only after she alighted from the bus because of unsafe condition of the place where she alighted, carrier would only be liable if it failed to use ordinary care, but not utmost care, in maintaining place for alighting in safe condition for passengers. Civ.Code, § 2100.

**4. Appeal and error ⇐882(12)**

Plaintiff could not attack verdict resulting from an erroneous instruction which she prompted in view of applicable invited error doctrine, notwithstanding plaintiff acted in good faith.

**5. Appeal and error ⇐1064(1)**

In passenger's action for injuries sustained when she fell on driveway when alighting from bus at a bus stop at night, instructions that carrier was required to exercise the highest degree of care while passenger was riding as a passenger and instructing as to the time when the highest degree of care terminated were not prejudicially erroneous.

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Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action of Georgia Greenleaf against William Briggs and another for personal injuries allegedly sustained when alighting from a bus. From an adverse judgment, plaintiff appeals.

Affirmed.

H. H. Bell and Walter H. Hewicker, both of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

GRIFFIN, Justice.

Defendant and respondent Bakersfield and Kern Electric Railway Company is a public utility operating buses on the public streets of Bakersfield. Defendant and respondent William Briggs was the operator of the bus here involved. A bus stop sign, near plaintiff's home, was located at a point between 227 and 229 South Chester Avenue, near the curb. The sidewalk at that point extended to the curb, which provided a flat level place to discharge passengers. Within a few feet from this sign a concrete driveway sloped to the street from the sidewalk at an angle of about 30 degrees.

On March 27, 1945, at about 11 o'clock p. m. the bus on which plaintiff was riding, according to her story, stopped just north of the sign in front of the driveway herein described. The night was dark and the driveway was wet. In alighting from the bus plaintiff, who was 79 years of age, stepped on the slope of the driveway with her right foot. She fell heavily on her left side, sustaining a fractured hip.

Defendants, in their answer to plaintiff's complaint, denied all allegations of negligence and pleaded contributory negligence on the part of the plaintiff.

The evidence shows that plaintiff was completely off of the bus when she fell. The driver testified that the bus stopped at its usual stopping place, 225 South Chester Avenue, with the stopsign post lined up with the front of the bus (which post had been in that same place for about 2 years and was located near the plaintiff's home; that the bus had both a center and front door exit; that plaintiff was standing at the front door of the bus waiting for it to stop; that it did not move until after plaintiff fell; that the bus was of a new type and

was lighted with 12 dome lights and a step light in each step, throwing a light 7 or 8 feet across the sidewalk; that he pulled the bus "right against the curb"; that plaintiff got out of the bus and started to step up the walk and lost her balance and fell down; and that the driveway was not wet although there was a puddle of water in the gutter. The jury returned a verdict in favor of defendants.

The claimed negligence of defendants is predicated upon the theory that, since defendants were at all times required to exercise the utmost care and diligence, their failure to stop at a more accessible place and to furnish their passenger with a safe place to alight from the bus, entitled plaintiff to a recovery as a matter of law, citing sec. 2100 of the Civil Code; and Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 741, 90 P. 125.

The evidence establishes as a fact that the sidewalk and curbing on which passengers were permitted to step when alighting from the bus was not a platform or walk furnished or maintained by the defendants. There is substantial evidence, if believed by the jury, that plaintiff failed to exercise due caution for her own safety.

[1] The question of defendants' negligence and the contributory negligence of plaintiff were factual questions for the jury to determine. Hall v. Kaufman, 37 Cal.App.2d 264, 99 P.2d 339.

Plaintiff claims certain errors were committed by the trial court in its rulings on the question of the admissibility of certain evidence in reference to the usual stopping place of the bus, concerning governmental regulations in relation thereto, and instructions in connection with defendants' responsibility for maintenance and upkeep of sidewalks and driveways in places where passengers were permitted to alight. We have carefully considered these claimed errors. Our examination of the transcript in reference thereto reveals no prejudicial error in these respects.

[2] At defendants' request the court instructed the jury (Instruction No. 14) on the doctrine of unavoidable accidents, and followed it with the instruction that if the jury believed that Briggs "was, at the time of, and when he arrived at, and near the scene of the accident, operating the bus in an ordinary, careful and prudent manner, * * * including the customary and ordinary method of operating and stopping along such route," and plaintiff was injured and the accident was inevitable or unavoidable, plaintiff could not recover. The instruction, standing alone, is inapplicable to a passenger riding on a bus of a common carrier and is contrary to the rule of conduct prescribed for common carriers under section 2100 of the Civil Code, in that said section requires such carrier to use "the utmost care and diligence" for the safe carriage of a passenger. See, also, Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 870, 113 P.2d 244. It also permits the consideration by the jury of the "customary and ordinary method of operating and stopping along such route" in determining whether the accident was unavoidable. These added words admit of the interpretation that if defendants were *customarily* violating the provisions of section 2100 of the Civil Code no liability attached to them. To this extent the instruction is erroneous. However, in another portion of the instruction it did recite that under such circumstances the driver must be using *"ordinary care* in the management and operation of his vehicle." The court did instruct the jury, at plaintiff's request, that "The carrier of passengers for hire is required to exercise the *highest degree of care* in their transportation, and is responsible for injuries received by them as passengers which might have been avoided by the exercise of such care."

At defendants' request it instructed the jury that the relationship of passenger and carrier continues during the ride and "while the passenger is in the act of alighting, and until she has reasonable opportunity, after leaving the bus, to get beyond danger from its operation." After that "she is no longer a passenger * * *." Then the court instructed the jury, at defendants' request, that while she was a passenger defendants were obligated to observe the *utmost degree of care and skill* and to provide her with reasonably safe means of alighting from the bus.

At plaintiff's request the court instructed the jury that "When a carrier knows, or in the exercise of its duty would know, that a passenger is aged and infirm, or otherwise handicapped, it is the carrier's duty to give special attention to the needs of such a passenger as they involve her safety and as that safety might be affected by the management of the bus; and the providing of a safe place to alight therefrom, and having the passenger's safety as an object to render such care and assistance as are commensurate with the reasonable needs of her condition."

The trial court then instructed the jury, at plaintiff's request, that "The responsibility imposed by law upon a carrier of passengers for hire includes the duty to provide a *reasonably safe place* where the passenger may board and alight from the bus."

It thus appears that plaintiff has also fixed a standard of care required of a carrier for the passenger of a bus for hire as the duty to provide a *reasonably safe* place where the passenger may *board and alight* from the bus.

The trial court gave plaintiff's instructions covering the theories under which she might recover. She invited instructions on *ordinary* and *reasonable care,* and a *reasonably safe* place to alight from the bus. She has used the words *ordinary* and *reasonable care* as a *standard of care* in at least three other instructions requested by her (Plaintiff's instructions 3, 4 and 5).

Plaintiff's complaint recites that her cause of action is based upon the theory "That it was the duty of the defendants to stop at a suitable place at said 225 South Chester Avenue for the use of passengers alighting from said bus" and that defendants, "in carrying said plaintiff as passenger negligently failed to stop said bus at the usual stopping place at 225 Chester Avenue indicated by a sign at said place" and stopped immediately in front of and on a sloping concrete driveway; and that said driveway was unsafe as an alighting place for passengers of said bus.

[3] Counsel for plaintiff, in his argument, stated to the jury: "The fact remains that the only question in this case, the only question you have to consider is, did the bus company furnish its passenger, Mrs. Greenleaf, with a safe place to alight from the bus?" If plaintiff does not maintain that she was injured during her carriage, but only after she alighted, and claims negligence with respect to the conditions where she alighted and that the defendant driver stopped at such a point, the standard of ordinary care might come into play with respect to the condition of the place where she did alight. The standard of *ordinary care* is upheld in Robson v. Union Pacific R. Co., 70 Cal.App.2d 759, 161 P.2d 821; Teale v. Southern Pacific Co., 20 Cal.App. 570, 576, 129 P. 949; Falls v. San Francisco & N. P. R. Co., 97 Cal. 114, 119, 31 P. 901; Sellars v. Southern Pacific Co., 33 Cal.App. 701, 707, 166 P. 599; Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 396, 2 P.2d 845; and 13 C.J.S.,Carriers, § 713, pp. 1326–1328.

[4] Since appellant has, through her request, invited the trial court to instruct the jury that the rule of ordinary care applies as to the duty of defendants to provide a reasonably safe place of alighting from or boarding a bus, and has used that same standard of care in at least three other instructions requested by her, she cannot be heard to complain because defendants offered and the trial court gave, instructions substantially the same in meaning. In other words, plaintiff cannot attack a verdict resulting from an erroneous instruction which she prompted. The doctrine of an invited error is applicable irrespective of the good faith of the plaintiff. Jentick v. Pacific Gas & Electric Co., 18 Cal.2d 117, 114 P.2d 343; Eubanks v. Milton G. Cooper & Son, Inc., 68 Cal. App.2d 366, 373, 156 P.2d 775.

[5] The other instructions of both plaintiff and defendants, given by the court, clearly instruct the jury that the carrier was required to exercise the highest degree of care while plaintiff was riding as a passenger. The jury were fully instructed as to the time when that highest degree of care terminated. We are not convinced that the instructions given, when considered as a whole, were pre-

judicially erroneous or that any error complained of entitled plaintiff to claim that a miscarriage of justice resulted only by the giving of defendants' claimed erroneous instructions.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.




78 Cal.App.2d 814

## DILLON v. HASKELL.

Civ. 15494.

District Court of Appeal, Second District, Division 3, California.

March 28, 1947.

Hearing Denied May 26, 1947.

**1. False Imprisonment ⇐20(1)**
**Pleading ⇐8(3)**

A complaint in action for false imprisonment which alleged that plaintiff was arrested "at the instigation and procurement of defendant" did not state a mere conclusion, but sufficiently charged defendant with having caused the arrest. Code Civ. Proc. § 426.

**2. Appeal and error ⇐1078(3)**

A judgment dismissing complaint should be affirmed if it appeared that complaint failed to state a cause of action, even though the defect was one not discussed in the briefs on appeal.

**3. False imprisonment ⇐2, 43**

"False imprisonment", whether treated as a tort or a crime, is the unlawful violation of the personal liberty of another. Pen. Code, § 236.

See Words and Phrases, Permanent Edition, for all other definitions of "False Imprisonment".

**4. Evidence ⇐83(1)**

The presumption of law is that officers acted in performance of duty.

**5. False imprisonment ⇐20(1)**

A complaint in action for false imprisonment which failed to negative all of the factual situations in which plaintiff's arrest would have been lawful was insufficient. Pen.Code, § 836.

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Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Wilbur T. Dillon against Grace M. Haskell for false imprisonment. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

Maurice Blumenthal, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Plaintiff brought this action for damages for false imprisonment. Following allegations in his first amended complaint that plaintiff has long been a tenant of defendant in a two-story building in which both resided, the complaint read as follows: "II. Defendant claims that on January 30, 1946, someone, without permission and with felonious intent, broke into her apartment aforesaid and stole considerable property, especially jewelry, belonging to defendant. About 9:15 P. M. or 9:30 P.M. on Saturday, the 9th day of February, 1946, as plaintiff returned to his home at 4316 Woodman Ave., Van Nuys, California, from his employment in Alhambra, California, plaintiff, at the instigation and procurement of defendant, was arrested by two police officers on the charge of having committed said burglary, and, at defendant's instigation and procurement, said police officers forcibly, and against plaintiff's will, took him to the police station in Van Nuys where he was grilled by them for two or three hours, and then locked up in a jail cell with drunks, criminals, and other disreputable characters, and confined therein, against his will, until noon the next day, upon said charge, and then released." It was then alleged that plaintiff had never entered defendant's premises with felonious intent nor taken any of her property nor committed against defendant the crime of burglary or larceny or any other criminal offense. This complaint was demurred to generally, and upon

the ground that it was uncertain, in that it failed to allege facts showing that plaintiff's arrest was "at the instigation and procurement of defendant." The demurrer was sustained, leave to amend was granted, which was not availed of, and judgment of dismissal was entered.

[1] Respondent's sole argument in support of the judgment is that the allegation that plaintiff was arrested "at the instigation and procurement of defendant" stated a mere conclusion, and was not the equivalent of a charge that defendant instigated and procured the arrest. The point is without merit. Defendant could not have failed to understand that she was charged with having caused the arrest. It is required by section 426 of the Code of Civil Procedure that the complaint state facts constituting the cause of action in ordinary and concise language. It is not to be tested for literary excellence.

[2-5] The judgment should be affirmed if it appears that the complaint failed to state a cause of action, even though the defect is one not discussed in the briefs on appeal. The complaint was defective, and subject to general demurrer. False imprisonment as a penal offense is the unlawful violation of the personal liberty of another. Penal Code, sec. 236. Whether the offense is treated as a tort or as a crime, the definition is the same. Donati v. Righetti, 9 Cal.App. 45, 97 P. 1128; Kroeger v. Passmore, 36 Mont. 504, 93 P. 805, 14 L.R.A.,N.S., 988. Imprisonment consisting merely of a lawful arrest is not false imprisonment. Authority of a peace officer to make an arrest is derived from section 836 of the Penal Code. The lawfulness of the arrest of plaintiff must be tested by the provisions of this section. Dowdell v. Owl Drug Co., 121 Cal.App. 316, 8 P.2d 890. The circumstances warranting an arrest, pertinent to the present inquiry, are (1) in obedience to a warrant delivered to him; if the arrest is made without a warrant; (2) when a felony has in fact been committed and he has reasonable cause to believe the person arrested to have committed it; or (3) on a charge made, upon a reasonable cause, of the commission of a felony by the party arrested. The presumption of law is that the officers acted in the performance of duty. Davis v. Pacific Telephone etc. Co., 127 Cal. 312, 57 P. 764, 59 P. 698. A complaint for unlawful imprisonment which fails to allege facts under which the arrest would be unlawful is insufficient. The present complaint did not negative all or any of the named factual situations in which plaintiff's arrest would have been lawful. It was not alleged that the arrest was made without a warrant, it was not alleged that a felony had not been committed or that a felony had been committed and that the officers did not have reasonable cause to believe that plaintiff committed it, and it was not alleged that the arrest was not on a charge made, upon reasonable cause, of the commission of a felony by plaintiff. So far as can be determined from the complaint, the arrest was lawful even though plaintiff was innocent of the claimed burglary. Since the arrest is presumed to have been lawfully made, and no facts were alleged to countervail the presumption, the fact that it was instigated and procured by defendant would place her under no liability if her actions were upon reasonable cause and without malice. No attack is made upon the sufficiency of defendant's knowledge, information or belief as to plaintiff's guilt nor upon her motives.

The complaint did not purport to state a cause of action for malicious prosecution. It was not strengthened in any way by the allegations, "Though plaintiff established his innocence, defendant has never expressed her regret over said arrest or imprisonment. Said acts of defendant were committed with a conscious indifference on her part to consequences."

Plaintiff had an opportunity to amend, but instead of doing so took an appeal from the judgment. Defendant has been put to the expense of resisting the appeal and is entitled to an affirmance of the judgment. We cannot assume that plaintiff might be able to state a case, where he has not even attempted to allege the essential elements of a cause of action for false imprisonment.

The judgment is affirmed.

WOOD, J., and KINCAID, Justice pro tem., concur.

78 Cal.App.2d 773

**PEOPLE v. BROWN.**

**Cr. 4077.**

District Court of Appeal, Second District, Division 3, California.

March 26, 1947.

Hearing Denied April 24, 1947.

**1. Infants ⇐20**

An information charging defendant with offering a girl of 16 years employment in a house of prostitution was sufficient to charge offense of contributing to the delinquency of a minor. Welfare and Institutions Code, § 700.

**2. Criminal law ⇐1023(10, 13)**

Where defendant was found guilty of contributing to the delinquency of a minor, and the court suspended proceedings and placed defendant on probation without rendering a judgment on the verdict, and defendant moved for a new trial, defendant could appeal only from the order denying the motion for new trial. Welfare and Institutions Code, § 700.

**3. Infants ⇐20**

Evidence sustained conviction for contributing to the delinquency of 16-year-old girl whom defendant allegedly offered employment in a house of prostitution. Welfare and Institutions Code, § 700.

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Frank Buddy Brown was convicted of contributing to the delinquency of a minor, and he appeals.

Appeal from conviction dismissed, and order denying motion for new trial affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Defendant was convicted in a court trial of contributing to the delinquency of one Janet Ryan, who was of the age of 16 years. He was charged by information with offering the girl employment in a house of prostitution. Upon finding defendant guilty, the court suspended proceedings and placed him on probation. Defendant gave notice of appeal from the "judgment" and from an order denying his motion for new trial.

[1] Proof of the allegations of the information would have established his guilt of the offense charged. People v. Cohen, 62 Cal.App. 521, 217 P. 78; People v. Perfetti, 88 Cal.App. 609, 264 P. 318; People v. Lamanuzzi, 77 Cal.App. 301, 246 P. 557. Under his specification of insufficiency of the evidence, appellant says: "There is nothing in the record tending to show that Appellant committed any act or acts which tended to cause or encourage the Complaining Witness to come within any of the provisions of any of the subdivisions of Section 700 of the Welfare and Institutions Code; nor is there any evidence that any of his acts contributed to the delinquency of said minor; there is no evidence at all to sustain this conviction."

The evidence disclosed that the girl made a trip to a place called "Fisher's" with another girl and three boys. Fisher's was described as a "colored place where they have a juke box there and you can dance." Upon her second visit she met defendant and saw him there upon four occasions. She called him on the telephone once or twice and upon one occasion he took her to dinner. She testified that she had had drinks at Fisher's but that none was served to her when she was there with defendant. Police officer Danforth testified that upon the occasion when she was arrested she was at Fisher's, seated at a table drinking liquor, which she testified she had poured for herself in the kitchen, and defendant was seated on a couch drinking milk. She testified at the preliminary examination as follows:

"Q. At any of those times you were up in Fisher's with Mr. Brown, did you ever have a conversation with him in which he stated that he wanted you to work for him in a house of prostitution? A. Not at Fisher's.

"Q. Did such conversation take place somewhere else? A. Yes.

"Q. Where was that? A. When he was taking me home.

"Q. Was that on an occasion when you had been to Fisher's and you were on your way home from Fisher's? A. Yes.

"Q. Were you to work for him in San Francisco or in Los Angeles?

Mr. Gordon: Just a moment now. I submit that calls for a conclusion. I would like to have the conversation.

"The Court: State the conversation.

"Q. By Mr. Tobey: What was the conversation that you had with Mr. Brown in that regard? A. I don't remember the exact words or anything, but it was the second time he had seen me up there. I went up there with a girl, her and myself.

"Q. Just the time of the conversation, now; what was the conversation? A. Well, he asked me if I had been in Fisher's much before, and I said no. I don't remember exactly, you know, the exact words or anything, but it just came around if I wanted to work there, that is all.

"Q. Was there anything said as to whether that was to be in Los Angeles or in San Francisco? A. No, sir.

"Q. Was the same subject mentioned on more than one occasion? A. No, sir.

"Q. Was anything mentioned as to the type of place that it was to be? A. Well, when he—I thought it was going to be—

"Q. Was anything said as to whether it was to be a place like Fisher's, or some thing different from Fisher's? A. No, it would not be anything like Fisher's.

"Q. What was said in that regard? A. At first I thought it was as a hostess, you know, that he was talking about before I thought any further about it, and I just got the idea that it was something like Fisher's place, and that is what I thought, and I said something about it, and he said it would not be anything like Fisher's.

"Q. Did he say whether it would be better or worse than Fisher's? A. No, I just—he said it would be better, because I said, 'Does it look like Fisher's place anything like that?' and he said, 'No, it is better,' something like that.

"Q. At any time that you were out with Mr. Brown did he ever put his arm around you? A. Once, yes.

"Q. Did he ever feel of your breasts? A. No, he—he kind of tried to, I guess, but he didn't.

"Q. Did he ever kiss you at any time that you were out with him? A. No, I kissed him.

"Q. On more than one occasion of your being out with him? A. No.

"Q. Just the one time? A. Yes.

"Q. Which time was that? A. I don't exactly remember.

"Q. You don't remember whether the first, second or third? A. I know it was not the first or second time; I think it was about the third time I was out.

"Q. This conversation that you had with Mr. Brown relative to your working for him in a house of prostitution—

"Mr. Gordon: Just a moment. That assumes a fact not in evidence, your Honor.

"The Court: What do you mean, a fact not in evidence?

"Mr. Gordon: 'A house of prostitution.'

"The Court: What else did she call it? The objection is overruled.

"Q. By Mr. Tobey: Did that conversation occur here in the City of Los Angeles? A. Yes, sir.

"Q. What reply did you make to the request to work for him? A. I said 'no.'

"Q. Did you make any other statement than that? A. Well, it took me a couple of minutes to get it through my head, you know, and I just said, 'No,' and he said, 'O.K.'

"Mr. Tobey: You may cross examine.

"Mr. Gordon: No cross examination."

Upon the trial it was stipulated that the case be tried on the transcript of the testimony at the preliminary. Defendant did not take the stand. The case was submitted without argument.

The testimony which we have quoted constitutes the evidence upon which the conviction rests. Defendant argues that the questions propounded by the District Attorney with respect to employment in a house of prostitution were leading and that

they called for conclusions of the witness. He also points out that the witness, in relating her conversation with defendant, attributed to him no statement which would indicate that he was proposing employment in a house of prostitution or anything other than respectable employment. The argument, as far as it goes, has merit, but we do not think it goes far enough to establish defendant's contention that the evidence was insufficient to support the conviction. A 16-year-old school girl was making midnight visits to a place where she could procure liquor and defendant was a frequenter of the place. He offered the girl employment, which she declined. This much is admitted by his failure to testify. The girl testified, in answer to leading questions by the District Attorney, that she was offered employment in a house of prostitution and that she at first did not comprehend the nature of the offer. Her testimony as to defendant's offer was vague, except in reply to the leading questions. Defendant's counsel waived cross examination. This is a circumstance deserving of consideration. It may be that it would have been developed by cross examination that there was no basis for the conclusions of the witness or her understanding that she was being offered employment in a house of prostitution, or it may be that it would have been developed that her understanding was justified. The reasonable assumption is that cross examination was waived for the latter reason. The setting in which the conversation was had scarcely suggests that defendant was looking for a child's governess or a house maid. He did not avail himself of the opportunity to advocate the purity of his motives. He did not explain what he was looking for at this place which was frequented by young colored girls. He did not enlighten the court as to what his occupation was or what he had given the girl to understand it to be, and there was nothing in the testimony from which it could reasonably be inferred that he was seeking candidates for honest or respectable employment. He was willing that the case be tried in a manner that would shed the least possible light upon his activities. He evidently believed that he would have a better chance of escaping in the darkness than he would have of vindication upon a full disclosure of the facts. The evidence in the case was meager, but the equivocal testimony given by the girl was to be weighed in the light of the circumstances. The situation was one which defendant brought upon himself if the girl's uncontradicted understanding of his offer was erroneous. The trial court was justified in drawing the inference that her understanding of defendant's offer was probably justified by what she knew of him and by the general conversations which she had had with him. Defendant offered no evidence as to his good character.

Upon defendants' application for probation, his counsel stated, in part, as follows:

"Mr. Gordon: I have known this defendant for years. He is a man who is not addicted to work.

"The Court: He has been working, but in the wrong department.

"Mr. Gordon: He isn't a vicious character by any means, but he is one of the type of men that you will find in every average sized city, who identify themselves with some progressive movement, and then are not inclined to get out and do any work themselves. I will be very frank with your Honor. I have known this fellow for sometime, and he has not been the type to get out and lend himself to any moral derelictions of any great moment."

Counsel then referred to an item of evidence found in the testimony of officer Danforth and which was mentioned in the report of the probation officer, and said: "In this case I think your Honor will particularly remember the probation officer's report, that this man was sitting up there drinking milk." This apparently was the only evidence in the case which was considered favorable to defendant and was doubtless given due consideration in the granting of probation upon condition that defendant spend 90 days in jail. Defendant's conviction was not a miscarriage of justice.

There are no other points in appellant's brief which merit particular attention.

[2] Since no judgment was rendered and defendant made a motion for new

trial, he could appeal only from the order denying the motion. People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755.

[3] The attempted appeal from the judgment is dismissed. The order denying the motion for new trial is affirmed.

WOOD, J., and KINCAID, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.




78 Cal.App.2d 896

**HESS et al. v. MERRELL et al.**

**Civ. 3555.**

District Court of Appeal, Fourth District, California.

**April 4, 1947.**

**1. Boundaries ⇐46(3)**

In the event of an agreed boundary between two lots in subdivision differing from descriptions of the lots on recorded map of subdivisions, assessment of lots would be presumed to include the land within the agreed boundary.

**2. Boundaries ⇐46(1)**

Adjoining landowners who are uncertain as to location of true boundary may agree on a line which shall be the boundary line dividing their properties.

**3. Adverse possession ⇐95**
**Boundaries ⇐37(5)**

Evidence was insufficient to show that owners of adjoining lots in subdivision agreed on boundary line differing from descriptions of lots on recorded map of subdivision, and hence owner paying taxes assessed according to description on map paid no taxes on disputed strip between actual boundary and claimed boundary and could not obtain title to disputed strip by adverse possession.

**4. Boundaries ⇐14**

The thread of a non-navigable stream was not boundary of lot which did not border on stream but which was separated from it by substantial strip of land, as shown by recorded map of subdivision in which lot was located and to which map the deed to lot referred. Civ.Code, § 830; Code Civ.Proc. § 2077.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action to quiet title by Irvin Hess and Ruby Hess against Raymond R. Merrell and Gertrude A. Merrell and others. The named defendants filed a cross-complaint. From the judgment, the named defendants appeal.

Affirmed.

H. A. Savage, of Fresno, for appellants.

Chester R. Andrews and Arthur C. Wahlberg, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to property in Fresno County. The case in fact settles a boundary line dispute, in so far as the parties before us are concerned, to the dividing line between Lot 16 of the Eppinger Tract owned by plaintiffs, and Lot 28 of the same tract owned by Raymond R. Merrell and Gertrude A. Merrell, whom we will refer to as the defendants.

The Eppinger Tract was subdivided into acreage lots in 1907, and the map of the subdivision was duly recorded. Lot 16 is north of an adjoining Lot 28. The division line is clearly shown on the map as a meander line running near the edge of the general level of the district before it breaks downward to reach the level of the bed of Wahtoke Creek, a non-navigable stream. During ordinary flow the stream is about twenty feet wide but during high water may reach a width of sixty feet. The ground levels are about twenty-five feet above the bottom of the creek and the flow does not approach the crest of the banks or the country-side level north and south of the depression in which the stream flows. The evidence indicates that the southerly line of the ordinary flow of the creek between Lots 16 and 28 varies between one and two hundred feet from the crest on which the boundary line between Lots 16

and 28 runs. At another point on property to the west this distance is about 370 feet. The land between this line and the stream slopes downwards towards the north and is the property in dispute here. It consists of four or five acres. Crops of hay have been grown on it though the evidence indicates that its principal use is for pasture.

Defendants purchased Lot 28 in March of 1932. There was a fence, or at least a part of a fence, along the north boundary line. Mr. Merrell saw the original map of the subdivision on which the boundary lines were clearly marked as well as the flow of the Wahtoke Creek with a clearly indicated space lying between. He found the remnants of a fence along the creek bottom and rebuilt it. It washed out during high water and he finally reconstructed it from near the northeast corner of Lot 28, running thence westerly across the flow of the stream and thence generally southwesterly northerly of the creek bed. He testified that he built the fence across the stream so cattle pastured on both Lots 16 and 28 could get to water. He only claims ownership of the land to the center of the stream so it is clear that this fence was not intended to and did not mark any actual or claimed boundary between the two lots. Rather it served as a barrier to stock ranging on them.

Both lots in question were assessed according to the descriptions on the recorded map of the Eppinger Tract and taxes were paid by the respective owners on the property thus assessed.

Defendants base their claims to the land lying between the actual north boundary line of Lot 28 and the thread of the stream of Wahtoke Creek on these grounds: (1) User and uninterrupted possession from March 1932, to April 1945, when plaintiffs acquired Lot 16. (2) An alleged agreed boundary line between Lots 28 and 16 running along the thread of Wahtoke Creek. (3) As Wahtoke Creek was a non-navigable stream and allegedly formed the north boundary of Lot 28 the property would extend to the center of the stream. (See Sec. 830, Civil Code; Sec. 2077, Code Civil Procedure; Martin v. Cooper, 87 Cal. 97, 25 P. 262; Foss v. Johnstone, 158 Cal. 119, 110 P. 294; Curtis v. Upton, 175 Cal. 322, 165 P. 935; Ford v. County of Butte, 62 Cal.App.2d 638, 145 P.2d 640.)

The trial court found against these contentions of defendants and quieted plaintiffs' title to the property in question here. Mr. and Mrs. Merrell have appealed from the judgment.

[1] It is evident that their claim of a title by prescription must rest on the validity of their claim of an agreed boundary, for if there was no agreed boundary line they paid no taxes on the property in dispute, while if there was an agreed boundary line it may be presumed that the assessment included the land within the agreed boundary and that they paid the taxes. (See: Price v. De Reyes, 161 Cal. 484, 119 P. 893.) It is necessary, therefore, first, to consider the evidence on the question of an agreed boundary line.

The only evidence in the record concerning an agreement as to the boundary line is found in a casual conversation between Mr. G. P. Cummings, now deceased, a prior owner of Lot 16, and Mr. Merrell, which the latter described as follows:

"A. I heard Mr. Cummings down in the creek; I heard some shooting in quail season. Q. What year? A. 1933. I tried to keep the hunters away from the fig orchard and also away from the creek to keep them away from the cattle and if I heard shooting I went down to see who it was. I never met Mr. Cummings. I said, 'Didn't you see the hunting sign there?' Q. Which side of the creek was he on? A. On the south side, on that side I think there. Q. What did he say? A. 'I wounded a couple of quail and they flew up in here and I was over here to pick them up.' There was another man with him. I don't recall his name. He said, 'My name is Mr. Cummings,' and introduced himself and said, 'I own the property across the creek.' I said, 'My name is Merrill and I am the owner on this side.' He said, 'What place did you get?' I said, 'I have the old Ship place.' He says, 'That is right—' * * * He says, 'That is right; we divide here at the creek,' and after that he went on about his hunting and I said, 'Go on and hunt if

you are a hunter, go on and hunt,' and I went back to the house and attended to my business."

Another witness added the following: "Q. What was said about the boundary line, if anything? A. He explained that it came just to the center of the creek at that time. Q. Who said that? A. Mr. Cummings said, 'That is right, it comes to the center of the creek.' "

[2, 3] In the recent case of Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881, many cases concerning agreed boundary lines are reviewed. The conditions necessary to bring the rule into play are stated. One of them is the necessity that both adjoining owners be uncertain as to the location of the true boundary line separating their properties. Where such uncertainty exists, they may then agree on a line which may become the actual boundary line dividing their properties. There was no such uncertainty as to the true boundary line proved in the instant case. At the time of the conversation with Mr. Cummings, Mr. Merrell knew or should have known the location of the true line. He testified that he had examined the recorded map of the subdivision of Eppinger Tract. This map clearly showed the true boundary line and that it did not run along the thread of Wahtoke Creek but was distant southerly from it. The trial judge evidently concluded that he should be charged with knowledge of what he saw so he correctly found against the contention of an agreed boundary line, assuming that such an agreement could have been predicated on the very casual conversation we have quoted. This also disposes of the claim of title by adverse possession for in the absence of an agreed boundary defendants paid no taxes on the property in dispute here.

[4] There is no merit in the contention that the northerly boundary line of defendants' property is the thread of the Wahtoke Creek under the provisions of Section 830 of the Civil Code, 2077 of the Code of Civil Procedure and the cases already cited.

Section 830 of the Civil Code provides in effect that where the land borders on a nonnavigable stream it takes to its center unless the grant indicates a different intent. As we have already observed, defendants' property did not border on the creek but was separated from it by a substantial strip of land. Further, the deed referred to the recorded map which showed this separation. Therefore the intent to make the marked boundary, and not the stream, the northerly boundary of Lot 28 is evident from the grant under which the land is held. Ownership of land north and south of the thread of the stream was vested in an owner other than defendants so the provisions of Section 2077 of the Code of Civil Procedure do not apply here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




78 Cal.App.2d 880

**Application of GALLOWAY.**

**Cr. 1997.**

District Court of Appeal, Third District, California.

**April 1, 1947.**

**Criminal law ⇐1202(1)**

A conviction of violating National Motor Vehicle Theft Act cannot be considered as conviction of "felony" requisite to adjudication that person convicted is habitual criminal on his subsequent conviction of felony. National Motor Vehicle Theft Act, 18 U.S.C.A. § 408.

**See Words and Phrases, Permanent Edition, for all other definitions of "Felony".**

In the matter of the application of Frederick D. Galloway for a writ of habeas corpus to Robert A. Heinze, warden of the California State Prison at Folsom.

Petitioner remanded to respondent's custody, with direction to the Adult Authority to fix petitioner's term of imprisonment on

his conviction of assault with a deadly weapon without regard to a determination that he is an habitual criminal.

Frederick D. Galloway, in pro. per.

Fred N. Howser, Atty. Gen., and Jas. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

This is a proceeding in habeas corpus. The petitioner is confined in the State Prison at Folsom under a judgment of conviction of the crime of assault with a deadly weapon and an adjudication that he is an habitual criminal by virtue of his admission of two prior convictions of a felony. The basis for his application is his claim that one of the prior convictions did not constitute a felony for which he could be adjudged an habitual criminal and that his sentence is therefore excessive.

The petitioner was accused by information of the crime of assault with a deadly weapon committed in Solano County on or about July 9, 1941. The information also alleged two prior convictions of felonies for which the petitioner had served terms. The first prior conviction alleged was for the violation of the National Motor Vehicle Theft Act, 18 U.S.C.A. § 408, in the United States District Court for the Southern District of Georgia on or about April 12, 1923, under the name of Fred Roland. This is the prior conviction that is put in issue by the petition. The petitioner pleaded not guilty by reason of insanity to the main charge and a jury returned a verdict against that plea. Petitioner admitted the two prior convictions as alleged. The court adjudged petitioner to be an habitual criminal.

The sole problem presented here is whether said prior conviction could be used as a basis for adjudging petitioner to be an habitual criminal. In his answer and return to the petition, respondent freely admits that said prior conviction was improperly considered as one of the felonies requisite to an adjudication of petitioner as an habitual criminal and that petitioner should not have been so adjudged.

The identical problem was presented in People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615, and in that case it was held that an admission of conviction of a violation of the National Motor Vehicle Theft Act, with nothing more, did not constitute a prior conviction such as could be considered in adjudging a defendant to be an habitual criminal.

The Lohr case was cited with approval in Re Connell, 68 Cal.App.2d 360, 156 P.2d 483, and both cases were cited with approval in Re Seeley, 29 Cal.2d 294, 176 P.2d 24.

It follows that the portion of the judgment in this case which determined that the petitioner is an habitual criminal is invalid. That portion of the judgment is therefore annulled. The balance of the judgment is valid. The Adult Authority is therefore directed to disregard the determination that petitioner is an habitual criminal, and to fix his term of imprisonment without regard thereto.

The prisoner is remanded.

SCHOTTKY, J. pro tem., and PEEK, J., concur.




78 Cal.App.2d 894

**PEOPLE v. TATE.**

**Cr. 704.**

District Court of Appeal, Fourth District, California.

April 3, 1947.

Hearing Denied May 1, 1947.

**1. Criminal law ⇐997**

Whether information was sufficient, or a corpus delicti or any crime had been proved, or the court had made erroneous rulings on the admission of evidence, or whether it had been established that defendant was an habitual criminal could have been raised on appeal from conviction and where practically all of such issues had been so raised, a second review could not be obtained by writ of error coram nobis.

**2. Criminal law ⇐997**

Slight variances in testimony at trial concerning immaterial matters from testi-

mony given at preliminary hearing would not justify interference on writ of error coram nobis with conviction that had been affirmed on appeal.

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Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Fred Tate was convicted of grand theft following prior convictions and was sentenced to state prison for the term prescribed by law and thereafter filed in the trial court a petition for a writ of error coram nobis. From an order denying petition, the petitioner appeals.

Affirmed.

Fred Tate, in pro. per.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft and with prior convictions. He admitted the prior convictions and a jury found him guilty on the main charge. He was adjudged an habitual criminal and sentenced to state prison for the term prescribed by law. He appealed and the judgment of conviction was affirmed. (People v. Tate, 72 Cal.App.2d 467, 164 P.2d 556.) Thereafter, he filed in the trial court a petition for a writ of error coram nobis. After a hearing, at which the defendant was present and represented by counsel, the petition was denied. From the order denying said petition this appeal was taken.

[1] The appellant argues that he was denied his statutory and constitutional rights; that the original information was not sufficient; that "there was not a corpus delicti proven"; that it was not proved that there had been a crime committed; that the court made erroneous rulings on the admission of evidence; and that the fact that he was an habitual criminal was not established. All of these matters could have been raised on the appeal from the judgment and practically all, if not all, were so raised. It is well settled that under such circumstances a second review cannot be secured through the writ here relied upon. (People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Egan, 73 Cal. App.2d 894, 167 P.2d 766.) In principle, every point here raised was covered, adversely to the appellant, in the opinion in the case last cited.

The appellant further contends that the judgment was based upon perjured testimony, and that his counsel at the time of trial failed to bring out the fact that the testimony was perjured. There is nothing in the record to sustain this contention. At the hearing on this petition in the trial court, while there was considerable argument and the appellant made several statements as to his contentions, no evidence was produced or offered. While in his statements the appellant complained that the transcript of the evidence taken at the preliminary examination was not produced and introduced at the trial, and that the variance between certain testimony as given at the preliminary hearing and as given at the trial constituted perjury, it was not pointed out just what testimony was claimed to be perjured and no evidence was introduced for the purpose of establishing such a fact.

[2] In his briefs on this appeal, the appellant refers to and relies on certain testimony which purports to be a quotation from the record at the preliminary hearing and other testimony from the record at the time of the trial. Assuming that this record was properly before us, the matters referred to either constitute slight variances in testimony concerning immaterial matters, or relate to things concerning which there was an abundance of other evidence. Nothing now presented by the appellant would justify any interference with the judgment of conviction. (People v. Kirk, 76 Cal.App.2d 496, 173 P.2d 367.)

Nothing appears to indicate that the appellant did not have a fair and impartial trial and, as this court said in deciding the appeal from the judgment, "the evidence of his guilt was overwhelming."

The order appealed from is affirmed.

MARKS, and GRIFFIN, JJ., concur.

78 Cal.App.2d 708

## DEMMER v. CITY OF EUREKA et al.

Civ. 7324.

District Court of Appeal, Third District, California.

March 24, 1947.

1. Negligence ⇐39

A pond or pool of water is not per se an "attractive nuisance" which will subject the owner of the land upon which it is located to liability in the event that a child trespassing upon the property is attracted and lured to play therein and is injured or drowned. Code Civ.Proc. § 376.

See Words and Phrases, Permanent Edition, for all other definitions of "Attractive Nuisance".

2. Negligence ⇐32(4), 33(3)

A 10 year old boy who was walking along highway and became attracted to adjoining pond on defendant's property, and was drowned in attempting to ride upon a floating log, did not become an "invitee" or "business visitor", and did not occupy any higher position than that of a "trespasser" or "licensee" as respects defendant's liability. Code Civ.Proc., § 376.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee", "Business Visitor", "Trespasser" and "Licensee".

3. Negligence ⇐32(3), 33(2)

One who, while lawfully upon the property of another or upon public property as invitee, leaves that portion of the property upon which he has been invited, or uses the property upon a venture in his own interests and not within the scope of his invitation or purpose for which the property was reasonably intended, loses his status as an invitee and becomes a trespasser or mere licensee.

4. Negligence ⇐32(2)

An "invitee" and a "licensee" are distinguishable in that an invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them.

5. Negligence ⇐32(1), 33(1)

One who enters the premises of another as a trespasser or mere licensee does so at his own risk, and the owner owes him no duty to keep the premises in a safe condition, his only duty being to abstain from wanton or wilful injury.

6. Negligence ⇐52

The owner of land is under no duty to give a warning or remedy conditions which may be dangerous and which are obvious to the person so using the property.

7. Negligence ⇐105

With respect to the use of a pool or pond even by children of tender age, the danger of drowning which such use entails is an obvious and open danger which the user assumes. Code Civ.Proc. § 376.

8. Municipal corporations ⇐786

The Municipal Liability Act did not render a city liable for the death of a 10 year old boy who left the highway to play in an adjoining pond and was drowned. Gen.Laws, Act 5619, § 2; Code Civ.Proc. § 376.

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Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Action by Edward L. Demmer against City of Eureka and Kenneth D. Sevier to recover for the death of plaintiff's minor son who was drowned while playing in a pond alleged to have been a nuisance which the defendants negligently failed to abate. From a judgment in favor of defendants, upon sustaining general demurrers to the complaint, the plaintiff appeals.

Affirmed.

Michael McHugh, of Eureka, for appellant.

Harry W. Falk, of Eureka, Kenneth D. Sevier, of Eureka, in pro. per., for respondents.

PEEK, Justice.

Plaintiff appeals from the judgments entered in favor of both defendants upon the failure of the plaintiff to amend his complaint within the time allowed after the trial court sustained general and special

demurrers filed by each of the defendants. In view of the holding here that the general demurrers were properly sustained, it is unnecessary to consider the questions raised with respect to the special demurrers.

The salient points set forth by the appellant in his complaint, which is in three counts, are substantially as follows: In 1934 the defendant City of Eureka, graded and improved Buhne street in that city by constructing an embankment or fill across a natural ravine, which for a long period of time had drained the property along its course including that of defendant Sevier. This fill consisted of loose earth, clay, sand, debris, and refuse logs. No retaining wall or other device was provided to prevent the embankment from sliding or washing into the ravine. In the construction thereof the city installed a metal pipe 18 inches in diameter and 80 feet long at the bottom of the ravine and across Buhne street for the outlet of water through the ravine. This pipe was, at times, inadequate to carry off the water flowing in the creek, and as a result thereof such water accumulated on the south side of the embankment, causing the soil to gradually wash down into the ravine. Owing to this condition the pipe became completely closed during January 1945, muddy water was impounded to a depth of 30 feet, and the accumulation of water thus formed caused the greater part of the fill on the south side of Buhne street to cave in and slide into the ravine. The deep pond thus created extended over a part of Buhne street and over the property of the defendant Sevier a distance of some 50 feet. Refuse logs floated on this surface, one of which was 10 feet long and 3 feet in diameter, and were presumably a part of the material used in the construction of the fill. It is alleged that the existence of this condition was known or should have been known to each of the defendants.

On April 17, 1945, plaintiff's son, Edward Lorenz Demmer, deceased, approximately 10 years of age, his brother, about 9 years, and a youthful companion of approximately the same age, were walking on Buhne street. Upon arriving at the point in question they were attracted by the pond and the log floating therein, climbed on the log and paddled it out beyond the limits of Buhne street and over the property of the defendant Sevier, where Edward fell off and was drowned. Plaintiff brought this action under section 376 of the Code of Civil Procedure to recover damages for the death of his minor child.

Plaintiff's first cause of action, which is against the City, is upon the theory that the embankment was improperly planned, constructed and maintained, and as a result thereof a public nuisance was thereby created by the defendant city.

The second cause of action is likewise solely against the City, and is based upon its alleged negligence in failing to take any measures to remedy the dangerous condition or to protect children who were using the log as a raft in the pond with the knowledge of the City.

The third cause of action is against the individual defendant upon the theory of negligence substantially as that set forth in the second cause of action against the City.

[1] It is a well settled rule of law under the decisions of the courts of this state, and one which is no longer open to question, that a pond or pool of water is not per se an "attractive nuisance" which will subject the owner of the land upon which it is located to liability in the event that a child trespassing upon the property is attracted and lured to play therein and is injured or drowned. Peters v. Bowman, 115 Cal. 345, 47 P. 113, 56 Am.St.Rep. 106; Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971; King v. Simons Brick Co., 52 Cal.App. 2d 586, 126 P.2d 627.

The appellant concedes that such is the established law in California but attempts to predicate liability upon the ground that the boy was not a trespasser while within the limits of Buhne street where he climbed on the log nor while over the property of the defendant Sevier to which he had paddled, and where he fell off and was drowned. Therefore, he contends, since the boy was not a trespasser, the attractive nuisance

doctrine is inapplicable, and the above cited cases are not in point.

[2, 3] The theory advanced is that the child while lawfully using the highway was attracted to the pond, and that he retained his legal status as a user of the highway while so digressing. To support this contention appellant relies upon the case of Kataoka v. May Dept. Stores Co., 60 Cal. App.2d 177, 140 P.2d 467 and Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356. In the Kataoka case a child of four caught his hand in an escalator while in the company of his mother who was shopping in the defendant's store. In the Crane case a child of three under similar circumstances was held to be a business visitor at the time she placed her finger in a coffee grinder situated in an aisle of defendant's store.

The cases cited are clearly distinguishable. Here, the deceased did not place his hand or other part of his body into a dangerous contrivance while a business invitee upon the premises of the defendants. On the contrary, he left the clear portion of the highway upon which he was walking and proceeded to use the pond as a playground.

It cannot be said that while on such venture he was either an "invitee" or "business visitor". At most he was a mere "licensee". One who, while lawfully upon the property of another or upon public property as an "invitee", leaves that portion of the property upon which he has been invited, or uses the property upon a venture in his own interests and not within the scope of his invitation, or purpose for which the property was reasonably intended, loses his status as an "invitee" and becomes a trespasser or mere "licensee". Polk v. Laurel Hill Cemetery Ass'n, supra; Lindholm v. Northwestern Pac. R. Co., 79 Cal.App. 34, 248 P. 1033; Bush v. Weed Lumber Co., 63 Cal.App. 426, 218 P. 618; Kirkpatrick v. Damianakes, 15 Cal.App.2d 446, 59 P.2d 556; Howard v. City of Fresno, 22 Cal.App.2d 41, 70 P.2d 502; Koppelman v. Ambassador Hotel Co., 35 Cal. App.2d 537, 96 P.2d 196.

[4] The distinction between an invitee and a licensee is clearly stated in Bush v. Weed Lumber Co., supra, 63 Cal.App. at page 432, 218 P. at page 620: "An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them." If it be a fact that here the child was attracted or lured into the premises by the pond, such fact does not give him a higher position than that of a trespasser or licensee.

[5] One who enters the premises of another as a trespasser or mere licensee does so at his own risk, and the owner owes him no duty to keep the premises in a safe condition. His only duty is to abstain from wanton or wilful injury. Giannini v. Campodonico, 176 Cal. 548, 169 P. 80; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Herzog v. Hemphill, 7 Cal. App. 116, 93 P. 899; Brown v. Pepperdine, 53 Cal.App. 334, 200 P. 36; Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353; Kirkpatrick v. Damianakes, supra; Koppelman v. Ambassador Hotel Co., supra.

[6, 7] It is said that a licensee receives the use of the land as a gift, and has no right to demand that the premises be made safe for his use. The owner of the land is under no duty to give a warning or remedy conditions which may be dangerous and which are obvious to the person so using the property. With respect to the use of a pool or pond even by children of tender age, the courts of this state have held that the danger of drowning which such use entails is an obvious and open danger—one which the user assumes. In Polk v. Laurel Hill Cemetery Ass'n, supra, 37 Cal. App. at page 634, 174 P. at page 418, the court makes the following observation: "A pond of water, it may be conceded, is always attractive to youngsters; but the dangers connected with and inherent in a lake or pond of water, natural or artificial, are obvious to everybody—even to a child old enough to be permitted by its parents to go about and play unattended upon the streets or in the public parks. It would not conform to the dictates of

common reason to say that a child of the age of eight years, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death."

[8] Equally without merit is the contention that the City is liable under the Public Liability Act of 1923 as amended, Stats.1923, p. 675, Stats.1943, ch. 134, Deerings General Laws, Act 5619. This act as it now stands and as it existed at the time of the unfortunate death of the Demmer boy, reads as follows: "Section 2. Liability of counties, etc. Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways * * * in all cases where the governing or managing board of such county, municipality * * *, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

In Beeson v. City of Los Angeles, supra, the plaintiff likewise attempted to predicate liability upon the Public Liability Act. After citing numerous cases construing the act the court states, 115 Cal.App. at page 132, 300 P. at page 997: "In all of the cases thus far decided the injured party was using the street in which he was injured, or the property which caused the injury, in the usual and ordinary manner in which it was contemplated that the street or property would be used. We are of the opinion that in passing and adopting section two of the act approved June 13, 1923, the Legislature intended to limit the liability of the city for damages resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof."

Applying the rule stated in the Beeson case to the facts alleged in plaintiff's complaint it is readily apparent that said complaint is insufficient. The factual situation so presented is not comparable to that found in that class of cases where recovery is allowed, i. e., where an individual while lawfully using the highway in a customary manner strikes an obstruction or falls into an excavation thereon or so near as to present a peril to any one so using it. Here the plaintiff's son was not fatally injured while using Buhne street in a customary manner but rather he had left the improved portion of the street where he and his brother had been walking, climbed on a log and, using it as a plaything, paddled out on the pond where he fell off and was drowned.

While it is true, as plaintiff lastly contends, that certain jurisdictions have held liability to exist where, in addition to the creation of the pond itself, there has been added further element such as a floating object (see Davoren v. Kansas City, 308 Mo. 513, 273 S.W. 401, 40 A.L.R. 488), such is not the rule in this state. Our courts have consistently followed the rule laid down in the Beeson case (Rodkey v. City of Escondido, 8 Cal.2d 685, 67 P.2d 1053; George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723; Woodman v. Hemet Union High School Dist., 136 Cal. App. 544, 29 P.2d 257; Howard v. City of Fresno, 22 Cal.App.2d 41, 70 P.2d 502), and have cited it with approval in cases presenting factual situations similar to those of the instant case. Melendez v. City of Los Angeles, 8 Cal.2d 741, 747, 68 P.2d 971, 974.

Particularly pertinent to this phase of the controversy is the concluding statement in the case last cited. There the court in affirming the order of the trial court sustaining a demurrer to a complaint which alleged the drowning of a small boy as the result of the use of an object floating on a pond created by the caving in of the sides of a storm drain and the clogging up of a conduit, stated: "The rule announced and applied in the Beeson Case should govern the disposition hereof." It therefore follows that the order of the trial court

herein sustaining defendants' demurrers likewise was proper, and the judgments entered accordingly should be affirmed.

The judgments are affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem, concur.




78 Cal.App.2d 881

**GELB v. BENJAMIN et al.**

**Civ. 3551.**

District Court of Appeal, Fourth District, California.

April 2, 1947.

**1. Appeal and error ⇐173(6)**

Question of illegality of contract sued upon may be raised at any time, provided illegality clearly appears, otherwise illegality is an affirmative defense that must be specially pleaded.

**2. Appeal and error ⇐173(6)**

Where contract between employer and employee relative to wages was lawful when entered into and its illegality because of war time regulations did not appear, defense of illegality, not having been raised in trial court, could not be raised on appeal. Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, § 901 et seq.

**3. Contracts ⇐9(2)**

Employment contract, which provided for a five per cent bonus to employee as a branch manager in the event he did $100,000 or more in business in first year, in light of testimony that monetary figure referred to sales, was not unenforceable as indefinite and uncertain.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Peter Gelb against David M. Benjamin and Linda Benjamin Stein, doing business as Paris Beauty Supply Co., also known as Paris Supply Co., and against David M. Benjamin individually, to recover for breach of an employment contract, wherein defendants cross-complained. Judgment for plaintiff and defendants appeal.

Affirmed.

Mitchell & Gold, of Los Angeles, and Matt Goldstein, of Fresno, for appellants.

Paul Staniford and G. R. Lovejoy, both of Fresno, for respondent.

BARNARD, Presiding Justice.

The defendants operated a wholesale beauty supply business, with headquarters in Los Angeles and branches in five other cities. About May 1, 1942, they employed the plaintiff as manager of their Fresno branch under an oral agreement, with a certain salary and commission. In order to carry out its original purpose, this agreement was orally modified by the parties about July 1, 1942, by providing that if the business done by the plaintiff in this branch amounted to $100,000 or more during the first year of his operation thereof the defendants would pay him an additional 5% on the amount of business done. It was stipulated that the business done in this branch for the first year of the plaintiff's employment totaled $132,930.11 and that 5% of that figure amounts to $6,646.50.

The plaintiff remained as manager of this branch until June 5, 1946, when it was closed by the defendants and his services terminated. While the other portions of the plaintiff's compensation were paid in accordance with the agreement, the 5% on the amount of business done during the first year was not paid, and this action was brought to recover that portion. The only defense set up in the answer was that no agreement to pay the extra 5% was made, and that all monies due to the plaintiff had been paid. The defendants also filed a cross-complaint seeking to recover approximately $350 for various items for which it was alleged the plaintiff was indebted to them. The action was tried before a jury which brought in a verdict in favor of the plaintiff for $6,332.24, being the amount sued for less certain allowances made to the defendants in accordance with their

cross-complaint. Judgment was entered accordingly and the defendants have appealed.

The appellants' main contention is that the contract here sued upon was subject to the provisions of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, § 901 et seq., and that it was, therefore, illegal and unenforceable. The appellants rely on the amendment to the Price Control Act passed by Congress on October 2, 1942, and on the various executive and departmental orders and regulations issued for the purpose of carrying out the provisions of the act, as amended. The orders relied on had the effect, where applicable, of freezing wages and salaries as of certain dates in October, 1942, and of prohibiting increases in salaries or wages after those dates except as provided in the act and in the various regulations, rulings and orders made thereunder, and except where any such increases were approved or permitted by the officers or departments authorized to pass thereon. Among other things, it was provided in these orders that the burden of justifying an increase in a salary rate should be upon the employer seeking to make such increase and that, unless otherwise expressly exempted, any change in a salary rate which was provided for in any agreement in existence on certain dates in October, 1942, which change was to take effect at a future date or on the happening of some future event, was subject to the provisions of the regulations regardless of when the agreement was made. It is argued, therefore, that the agreement here in question, although made some months before these laws and regulations were enacted and issued, comes within their terms and is illegal and unenforceable.

This defense is raised for the first time on appeal and it was in no way pleaded or presented in the trial court. The price control regulations relied on contain a number of exceptions, and no evidence having been received in this connection there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here. Aside from a number of other possible exceptions, while the respondent was given a new position in the appellants' organization it does not appear that the compensation agreed upon, including the 5%, was more than had theretofore been paid in the same position and for the same work.

[1] While the appellants contend that the question of illegality may be raised at any time this is true only where the illegality clearly appears. The facts alleged in the complaint in this action do not show on their face that the contract sued upon was unlawful. Under such circumstances, illegality is an affirmative defense that must be specially pleaded. Bernstein v. Downs, 112 Cal. 197, 44 P. 557. In 6 Cal.Jur., at page 487, it is said: "Especially must a party who would upon this ground repudiate a contract into which he has entered, and which has been fully executed by the other party, make his right to such defense manifest, not only by alleging the facts constituting illegality, but also, if the terms do not disclose illegality, by negativing the existence of any facts or circumstances under which the contract could be held valid."

[2] The contract here in question was valid and lawful when entered into and a large part of it had been performed before the laws and regulations relied on were passed and issued. If it be assumed that these laws and regulations were otherwise applicable, there is nothing in the record to show that the existing facts did not bring this contract within one of the permitted exceptions and, further, there is nothing to show that any permission, if required, was not obtained. There is an entire failure in this regard both as to pleading and proof. The respondent made out at least a prima facie case, and under the circumstances here appearing the burden was upon the appellants to show a violation of the regulations they rely on. Basler v. Sharp & Fellows Co., 73 Cal.App. 2d 480, 166 P.2d 403; Balfour v. Heuer, 77 Cal.App.2d 227, 175 P.2d 55; Thacker v. American Foundry, 78 Cal.App.2d 76, 177 P.2d 322.

[3] The only other point raised is that the contract, as testified to by the respondent, was indefinite and uncertain. From a

portion of the respondent's testimony, in which he testified that an agreement was made to the effect that if he did $100,000 or more in business the first year "I will pay you a 5% bonus", it is argued that it is indefinite and uncertain as to what figures were intended to be used as the basis upon which the 5% was to be calculated. It is then argued that the only reasonable explanation is that the parties intended that the respondent's other salary was to be taken as a basis for calculation, and that he was to receive an additional 5% of that other compensation. Not only was the case tried on the other theory, but other portions of the respondent's testimony clearly show that the 5% was to be calculated upon the amount of sales made during the year in question. He testified that the agreement, in the event the business amounted to $100,000 or more during the year, was that he would receive 5% on all of the sales made during the year. When all of the testimony is considered no uncertainty or indefiniteness appears.

The judgment is affirmed.

MARKS, and GRIFFIN, JJ., concur.




78 Cal.App.2d 701

**MARSIGLIA v. MARSIGLIA.**
**Civ. 15474.**

District Court of Appeal, Second District, Division 3, California.

March 21, 1947.

**1. Husband and wife ⇐278(1)**

Property settlement agreements occupy a favored position in the law and are sanctioned by the Civil Code. Civil Code, §§ 158, 159.

**2. Husband and wife ⇐278(1)**

Courts are loath to disturb a property settlement agreement except for equitable considerations, and, hence, such agreement that is not tainted by fraud or compulsion or is not in violation of confidential relationship of the parties is valid. Civil Code, §§ 158, 159.

**3. Husband and wife ⇐36**

A husband, in dealings with wife, must act in good faith, and to avoid presumption of undue influence emanating from procurement of any advantage over her must make a full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else must deal with her at arm's length, as he would with a stranger, advising her as to her rights in the premises.

**4. Husband and wife ⇐36**

The presumption of undue influence which arises where husband gains an advantage in a transaction with his wife is a disputable one and may be overcome by proof of a full and fair disclosure of all that wife should know for her benefit and protection concerning nature and effect of the transaction.

**5. Husband and wife ⇐36**

Proof of receipt by wife of independent advice is not essential in order to overcome presumption of undue influence which arises where husband gains an advantage in a transaction with his wife if the evidence shows wife was fully advised as to nature of the transaction, as to all facts essential to her protection and that she voluntarily executed and delivered the conveyances.

**6. Husband and wife ⇐278(3)**

Evidence overcame presumption of undue influence on husband's part in his dealings with wife concerning a property settlement in contemplation of divorce whereby wife signed all of her interest in community property owned by them, having an approximate value of $7,500, to husband upon his payment of $500 to her.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Thelma M. Marsiglia against Sam Marsiglia to set aside and cancel a property settlement agreement and to quiet

title to certain real property. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Sullivan, Lane & Clarke, of Los Angeles, for appellant.

John J. Craig, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

This is an appeal from a judgment in favor of defendant following trial of an action instituted by plaintiff in which she seeks by her complaint to set aside and cancel a property settlement agreement and to quiet title to certain real property. By count I of her complaint she alleges that on July 14, 1944, she filed a complaint for divorce against her husband, the defendant herein; that thereafter he threatened her with bodily injury and that if she did not consent to go to an attorney of his choosing and sign a type of property settlement agreement meeting with his approval that he would kill or maim her; that under fear of such threats she consulted and substituted in the divorce action the attorney designated by her husband in place of the counsel of her own choosing; that the new counsel prepared a written property settlement agreement which was signed by the parties on September 26, 1944.

Plaintiff further alleged that at the time of the filing of the complaint for divorce and of the execution of the property settlement agreement she and defendant owned community property of the value of approximately $7,500, consisting of a house and lot situate at North Hollywood, California, household furniture and furnishings, one 1935 Plymouth sedan, and certain War Bonds; that pursuant to the property settlement agreement all of said community property was granted and assigned to defendant, with the exception of $500 in cash which was paid to plaintiff; that the agreement is void by reason of the manner in which it was procured from plaintiff. For a second cause of action plaintiff sought to quiet title to her one-half interest in the above-mentioned real property.

Defendant by his answer denied substantially every allegation of the complaint, excepting the execution of the property settlement agreement and the entry of the interlocutory decree of divorce. By way of affirmative defenses, defendant alleged that prior to the filing of the divorce action by plaintiff she retained attorneys Redmond and Redmond to represent her, following which she employed attorney Daniel W. Gage, and thereafter employed and had substituted as her attorney of record, Jay Gralla; that after the filing of the divorce action but prior to the entry of defendant's default therein, the plaintiff committed an act of adultery; that plaintiff confessed to defendant and admitted to her attorney that she committed such act of adultery and signed a written statement to that effect; that plaintiff told defendant that she did not want her act of adultery to become public and did not want defendant to file a cross-complaint against her on the ground of adultery or otherwise, and that if he would not charge her with such act she would accept the sum of $500 in full of all claims for alimony, support, attorney's fees and costs, and would transfer and convey all of the property described in plaintiff's complaint as being community property to defendant; that thereupon the property settlement agreement was prepared by plaintiff's attorney, Jay Gralla, and was signed by the parties hereto without any duress of any kind being exercised on plaintiff; that at the same time and under the same conditions plaintiff executed and delivered to defendant a grant deed to the real property described in her complaint; that plaintiff's causes of action are res judicata, she is estopped from prosecuting this action and has been guilty of laches in prosecuting her claim herein.

After trial of the instant cause the court by its written findings of fact and conclusions of law found that the parties did, at the time of the filing of the complaint, own the community property described therein excepting the war bonds; that, with the exception of the marriage and the filing of the complaint for divorce, all of the other allegations of her complaint are untrue. The court further found that

the property settlement agreement between the parties was freely and fairly entered into, that plaintiff understood the contents thereof, that she was fully advised in connection therewith by her attorney, that no force, threats, duress or fraud was practiced upon her and that said agreement is a valid and binding one. The court further found that plaintiff no longer has any interest in the property described in the complaint and that the allegations of defendant's affirmative defenses are true.

The primary point urged by plaintiff on this appeal is that the court's findings of fact and conclusions of law are not supported by the evidence. She concedes that, while it is probably true that the question of threats alone made to the plaintiff under the circumstances here existing would not be such as to necessitate the cancellation of the contract of the parties, nor would the question of advice, whether proper or improper, of her attorney, nor the fact that the wife received only a nominal consideration be sufficient in and of themselves upon which to base a cancellation of the contract between the parties, nevertheless, she contends, when taken as a whole and the entire record is considered these things, if true, would necessitate a cancellation of the contract between the parties.

[1, 2] "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417; Hensley v. Hensley, 179 Cal. 284, 287, 183 P. 445; Civ.Code §§ 158, 159. Such agreements are usually made with the advice of counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. Hill v. Hill, supra, 23 Cal.2d at page 89, 142 P.2d 417. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court." Adams v. Adams, 1947, 29 Cal.2d 621, 177 P.2d 265, 267.

[3] In our examination of the record for the purpose of ascertaining whether the finding of the court to the effect that no fraud, compulsion or violation of the confidential relationship of the parties occurred either in the terms of the property settlement agreement or in the circumstances surrounding its execution, is sustained by the evidence, we are governed by several established principles of equity. As was said in the case of Estate of Cover, 1922, 188 Cal. 133, 144, 204 P. 583, 588: "[A] husband by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith, and as a consequence is obligated in such dealings not to obtain and retain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises." See also Auclair v. Auclair, 1946, 72 Cal.App.2d 791, 801, 802, 165 P.2d 527; Norris v. Norris, 1942, 50 Cal.App.2d 726, 733, 123 P.2d 847.

[4, 5] The presumption of undue influence which arises where the husband gains an advantage in a transaction with his wife is a disputable one and may be overcome by proof of a full and fair disclosure of all that the wife should know for her benefit and protection concerning the nature and effect of the transaction. Proof of the receipt by the wife of independent advice is not essential in order to overcome the presumption if the evidence shows she was fully advised as to the nature of the transaction, as to all facts essential to her protection and that she freely and voluntarily executed and delivered the conveyances. Smith v. Lombard, 1927, 201 Cal. 518, 524, 258 P. 55; Estate of Brim-

hall, 1943, 62 Cal.App.2d 30, 34, 143 P.2d 981; Stevens v. Hutton, 1945, 71 Cal. App.2d 676, 683, 163 P.2d 479; Macaulay v. Booth, 1942, 53 Cal.App.2d 757, 760, 128 P.2d 386; Brown v. Canadian Indus. Alcohol Co., 1930, 209 Cal. 596, 599, 289 P. 613. This is true even where the attorney who prepared the conveyances had been consulted by and was acting for both the parties. Smith v. Lombard, supra, 201 Cal. at pages 524, 525, 258 P. 55.

The evidence bearing upon the issues is somewhat conflicting but viewing it most favorably in support of the judgment shows, in part, that no threats of any kind were ever made by defendant to plaintiff in connection with the divorce proceedings or to get her to make or execute the property settlement agreement or the grant deed, unless the statement by defendant of his then intention to contest the divorce on the ground of adultery may be so considered. After plaintiff, at the trial of the within action, had specifically waived any question of privileged communication between herself and her attorney, Jay Gralla, the latter testified that he met plaintiff and defendant at the same time as a result of going to their home by appointment to interview them as prospective witnesses in another case. They thereupon told him of the pending divorce action and in response to a question addressed to her by defendant plaintiff told of the circumstances surrounding the commission by her of the act of adultery heretofore mentioned. Plaintiff's counsel thereupon offered to stipulate that the act of adultery was committed by plaintiff, which offer of stipulation was accepted. Mr. Gralla then continued with his testimony to the effect that the parties then told him that they had agreed upon a property settlement by which plaintiff would get $500 and the remainder of the community property would be given to defendant; that although plaintiff then had an attorney of record in the divorce action, Gralla was asked if he would be willing to be substituted as counsel in the case. Upon his accepting the appointment, a substitution of attorneys was prepared and filed. Thereafter, Gralla invited plaintiff to his office to discuss the case and the property settlement agreement. She came to his office alone and he asked her whether, by reason of the circumstances under which the matter of the property settlement had theretofore been discussed, the proposed terms were agreeable with her or whether there was anything to which she might wish to object; that so long as he acted as her counsel he would see that her rights were protected and if she had any other desires to inform him and he would do whatever he possibly could for her; that under a charge of adultery the court could in its discretion give defendant all of the property. Thereupon, plaintiff told Gralla that under the circumstances she was satisfied with the terms of the property settlement agreement and wanted to get the matter settled and over with as quickly as possible. He thereupon drew the property settlement agreement, mailed it to plaintiff's residence, and a few days thereafter received it back, duly executed by the parties. At the trial of the divorce action the defendant was not present, he having previously defaulted therein, and Gralla asked plaintiff as a part of her testimony in the divorce proceedings whether or not a property settlement agreement had been entered into and as to whether she was satisfied with the payments and conditions contained therein, to which she replied in the affirmative.

Plaintiff testified in the instant case that while the community property in question was worth about $7,500, some $2,300 was owed against the house and lot. Defendant testified that he paid plaintiff in connection with the property settlement had between them the sum of about $1,000 and some war bonds.

The foregoing evidence justifies the trial judge in believing that, regardless of the nature of origin of the attorney-client relationship between Gralla and the plaintiff, she was subsequently afforded the opportunity, and was invited by her attorney to fully discuss the terms of the proposed agreement and to register any objections which she might have to its contemplated provisions. She was alone with her attorney, free from any coercion which the presence of the defendant might have

implied and was assured by Gralla of his determination to see that her rights and interests were protected.

[6] The evidence, taken as a whole, is amply sufficient to overcome any presumption of undue influence on the part of the defendant in his dealings with plaintiff as to the property in question. There is substantial evidence to sustain the court's findings, including, in effect, that plaintiff had full knowledge of all the facts necessary for her protection prior to the time she executed the property agreement and grant deed; that she executed them with full understanding of their contents and meaning, and with the benefit of the independent advice of her attorney.

We have considered the several additional points presented by plaintiff but consider them to be of minor importance and as having no bearing upon the ultimate result of this appeal.

The judgment is affirmed.

WOOD, J. concurs.

WOOD, Acting Presiding Justice.

I concur in the foregoing opinion, but wish to add a few remarks with respect to a phase of the case not treated in the briefs. Plaintiff, with an action for divorce pending, confessed to adultery with her husband's brother. At the trial of the instant case her counsel stipulated to her guilt. In the face of her confession and defendant's threat to charge her with the adultery by cross-complaint, she entered into a collusive agreement with defendant, by the terms of which, in consideration of an agreed division of the community property, the existence of facts which would have constituted the defense of recrimination would be concealed from the court and plaintiff would be enabled to obtain a decree of divorce without having to meet that defense. In plain terms, the parties agreed to perpetrate a fraud upon the court and they accomplished that purpose. The property settlement agreement of which plaintiff now complains was an inseparable part of their unlawful scheme. Granted that either one could have withdrawn from the agreement before it had been fully executed, neither could be heard to complain after the purposes had been fully accomplished. The parties stood in pari delicto; the judgment leaves plaintiff in the bed she made for herself and hence does her no injustice.




78 Cal.App.2d 659

**CARNEY v. RKO RADIO PICTURES, Inc., et al.**

**Civ. 15499.**

District Court of Appeal, Second District, Division 1, California.

March 21, 1947.

**1. Automobiles ⇐217(2, 3), 246(58)**
**Death ⇐17, 104(2)**
**Trial ⇐194(16)**

Instructions that if pedestrian crossed street outside of marked crosswalk and failed to yield right of way, he was negligent and that if it contributed to the accident, verdict should be for defendants, and that even though the pedestrian was in crosswalk, he was required to exercise ordinary care and that if pedestrian died of disease that was not natural and probable consequence of the injuries the verdict should be for defendants were correct and pertinent under the evidence and not subject to criticism that they virtually directed jury to find for defendants. Vehicle Code, § 562(a).

**2. Trial ⇐228(1)**

The court was not required to embody all the issues in a single instruction.

**3. Trial ⇐295(6)**

In action for death of pedestrian struck by automobile at crossing instructions that only reasonable and ordinary prudence was required by the law and that if jury found from the evidence that a party to the action had conducted himself in violation of the Vehicle Code that such conduct constituted negligence as a matter of law were not conflicting, but were correct state-

ments of the law when the charge was considered as a whole. Vehicle Code, §§ 562, 563.

**4. Trial ⇐295(1)**

A judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context when such charge in its entirety fairly and correctly states the law.

**5. Appeal and error ⇐1170(1)**

A consideration of the entire case, including all the instructions failed to show that any miscarriage of justice had resulted and in such circumstances the judgment could not be reversed. Const. art. 6, § 4½.

**6. Trial ⇐296(3)**

Where by other instructions, the jury was properly informed as to what constituted proximate cause an instruction that plaintiff could not recover if decedent died as a result of a disease not the natural and probable cause of his injuries, was not prejudicial. Const. art. 6, § 4½.

**7. Evidence ⇐351, 370(4)**

A hospital record is admissible in evidence when relevant to an issue and when a proper foundation has been laid. Code Civ.Proc. §§ 1953e, 1953f.

**8. Death ⇐61**

In action for death of pedestrian, evidence as to pedestrian's alcoholic history, liver condition and high blood pressure was proper in support of defendants' contention that accident was not proximate cause of death.

**9. Appeal and error ⇐1170(7)**

In action for death of pedestrian, where trial court found on conflicting evidence that entire document, only a portion of which was admitted in evidence, was not taken to jury room, and received evidence as to decedent's alcoholic breath and evidence of decedent's previous alcoholic indulgence, the record as a whole did not show that there had been a miscarriage of justice. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Elizabeth Marie Carney, a minor, by her guardian ad litem, Margaret Keeney, against RKO Radio Pictures, Inc., and Harold E. Richmond for the wrongful death of the father of the minor plaintiff who was struck by automobile owned by corporate defendant and driven by individual defendant. From an order overruling motion for a new trial, and from a judgment for defendants, the plaintiff appeals.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

Earl E. Howard and Gilbert J. Heyfron, both of Los Angeles, for appellant.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondents.

WHITE, Justice.

In this action for the wrongful death of the father of the minor plaintiff, a jury returned a verdict in favor of defendants. From the judgment entered on such verdict plaintiff appeals. Plaintiff also attempts to appeal from the order denying her motion for a new trial.

The decedent was struck by an automobile owned by defendant RKO Radio Pictures, Inc. and driven by defendant Richmond, who was then and there an employee of his codefendant, and operating the vehicle within the scope and course of his employment. By their answer to plaintiff's complaint defendants denied that the driver, Richmond, was guilty of negligence, denied that the injuries sustained in the collision were the proximate cause of decedent's death, and as affirmative defenses alleged that the decedent was guilty of contributory negligence and that the accident was unavoidable. Upon this appeal it is not contended that the verdict is unsupported by the evidence, but it is asserted by appellant that prejudicial error, resulting in a miscarriage of justice, occurred by reason of the giving of certain instructions and the admission of certain evidence.

The defendant Richmond was driving the Pontiac sedan owned by defendant RKO Pictures, Inc., westerly on Sunset Boulevard in the City of Los Angeles, about 6:30 p. m. on April 16, 1944. The vehicle was being driven in the lane nearest the center

of the street, on the streetcar tracks. The decedent was in a streetcar loading zone or "safety zone" located on the north side of the tracks and just east of the intersection of Silver Lake Boulevard. As the automobile approached the intersection, passing to the south of the safety zone, the decedent stepped out of the safety zone and was struck by, or walked into, the front fender of the vehicle. There was conflicting testimony as to the speed of the automobile, as to whether the decedent was in the marked crosswalk when he was struck, and as to whether the automatic traffic signals were red or green for Sunset Boulevard traffic.

The owner of a barber shop located on the southeast corner of the intersection testified that he heard a crash, looked out of his shop, and saw the automobile; that the decedent was thrown, rolled away from the car and landed in the crosswalk; that the automobile went on into the intersection before it stopped; that at the time he looked up he saw the traffic signals; "I looked at the one going westward; it was red and the one on the other side was green." On cross-examination he testified that when he first saw the automobile the back end of it was at about the middle of the safety zone (the safety zone it was stipulated, was 55 feet long); that his attention was attracted by hearing a noise; that the automobile was between him and the pedestrian; that he did not see the pedestrian before he was hit.

A newspaper vendor testified that he was standing on the southeast corner of the intersection selling papers; that he was looking north; that he saw decedent start to walk toward him, saw him take his first step, and as soon as the man was hit he looked at the traffic signal on the northeast corner and that it was red; that the driver "came through a bunch of cars that were already stopped there at the stop sign"; that he did not notice the signal on the Silver Lake side of the intersection. He further testified that when he first saw decedent, "he had just entered inside the line there from the safety zone into the crosswalk" and was just in the act of taking a step toward the witness. The witness estimated the speed of the car at 30 miles per hour.

Another witness testified that he was standing alongside the newsman; that the decedent "got off in the safety zone, and the light was green and he walked on into the crosswalk and the light turned red." "* * * Q. That is, the light on the northeast corner * * * turned red? A. Yes. Q. And you saw the pedestrian stop? A. Well, when it turned red in about 3—1, 2, 3,—he started across and he just got over the first rail there * * * and this car came along and hit him and threw him about 8 feet across that safety zone." He further testified that about "three seconds" after the light turned red the other signal (for Silver Lake traffic) turned green; that the automobile in question came through the intersection after two other lines of cars had stopped; that he did not see the decedent look toward the car.

The defendant driver testified that as he approached Silver Lake Boulevard the signals were green; that there were five or six pedestrians in the safety zone; that he was going 25 miles per hour, but slowed down as he neared the safety zone to about 10 or 12 miles per hour. "As I drove along the edge of the safety zone I got a flash of this gentleman in the safety zone. As I looked over to see if I still had a clearance to a 'Go' signal, and I had just started to step on the gas, and I looked again and he was at the west end of the safety zone about to step out. About that time I got a flash of the man as he stepped into the right fender of the car. * * * I was a trifle east of him. * * * possibly five or six feet. * * * Q. You didn't know you were going to strike him until he took the third step, did you? A. No, sir. * * * He had not completed his third step when he stepped into the fender." The witness indicated the course of the pedestrian as southwesterly from the southwest corner of the safety zone. He further testified that the signal remained green until he had stopped his car; that the injured man said he "must have looked at the wrong signal"; that the decedent was never at any time within the crosswalk or in

front of the automobile, but stepped into the side of the right front fender as the witness sought to avoid the accident by swerving to the left.

The defendant driver further testified that he helped Mr. Carney to the automobile and took him to the Hollywood Receiving hospital; that he could smell the odor of liquor on Mr. Carney's breath.

The testimony of defendant Richmond was substantially corroborated by that of Corporal Stocker, a passenger in defendant's vehicle, who testified that the pedestrian was not in the crosswalk at the time of the accident, but was "angling across the street in a southwest direction and he was outside of any zone."

In support of their contention that the death of decedent was not proximately caused by the accident, defendants introduced the evidence of two physicians of the Hollywood Receiving Hospital, where decedent was taken by the defendant Richmond directly from the scene of the accident. Dr. Jesse testified that he was an orthopaedic surgeon experienced in operations connected with injuries similar to that sustained by the decedent; that early on the morning of April 16, 1944, he read the clinical history of Mr. Carney which had been taken by the nurse and doctor on duty during the night of April 15, and after which he examined Mr. Carney and corroborated the patient's history as had been written up, which was done in connection with his diagnosis of Mr. Carney's condition and injuries; that he smelled the odor of intoxicating liquor on Mr. Carney's breath, and Carney admitted he had been drinking prior to the time of the accident and had a "few shots and some beer"; that he had for many years been a heavy user of intoxicating liquor; that Carney was not in condition to be operated on at the time of the examination on April 16, 1944, and therefore was not transferred to the orthopaedic surgery ward until two days later; that X-rays had already been taken prior to his examination and said X-rays were viewed in connection with his examination and treatment of Carney; that he continued to attend and treat Carney; that his condition insofar as the injuries received in the accident were concerned continued to improve; that it was necessary for Carney to be treated for his alcoholic condition as well as for the fractures he had received in the collision; that about 10:00 o'clock on the evening of April 23, 1944, Carney began hemorrhaging from a ruptured esophagus as a result of which bright red blood, free from any sputum, came out through the mouth; that some blood passed into the intestines but there was no intestinal bleeding; that Carney had cirrhosis of the liver; that by reason of the condition of the liver and arteries the inter-venous blood pressure was sufficiently great to produce a rupture wherever the pressure was concentrated; that whenever the pressure becomes localized at a weakened place in a vessel it may produce a rupture, which in this instance occurred in the esophagus; that the hemorrhage which caused his death was not caused by the accident, but might have developed sooner had the accident not occurred, as the shock would tend to lower the blood pressure. Dr. Sugarman, who also treated Mr. Carney, testified to the same effect, that the immediate cause of death was the ruptured esophagus, which would have occurred as it did even though there had been no accident. This testimony was in contradiction of that of the autopsy surgeon, who stated that from his examination of the body he was of opinion that the deceased died as a result of the injuries received in the accident.

Two police officers testified that they interviewed the decedent at the hospital; that the odor of liquor was on his breath. Objections were sustained to proffered testimony by the officers as to admissions made by decedent that he looked at the "wrong signal", that he had had "a few shots and some beer", and that he had not looked in the direction from which the automobile approached.

It is asserted by appellant that the trial court erred in giving conflicting and contradictory instructions. The basis for this contention is that in the settled statement on appeal the two following instructions appear in succession:

"45. (101-B) You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious indi-

vidual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

"46. (149-A) If you should find from the evidence that a party to this action conducted himself in violation of the section just read to you, you are instructed that such conduct constituted negligence as a matter of law."

While the foregoing instructions appear consecutively in the settled statement, it is alleged by respondent that they were not given in that order, but that No. 46 (BAJI No. 149-A) followed No. 35 (BAJI No. 149), to the effect that conduct in violation of sections 562 and 563 of the Vehicle Code constituted negligence per se, or rather, a presumption of negligence which might be overcome by other evidence that under the circumstances the conduct was excusable or justifiable.

Under the same heading appellant charges prejudicial error in the giving of an instruction to the effect that it was the duty of the pedestrian "to obey such traffic signals and not to attempt to cross or start across Sunset Boulevard unless and until such traffic signals were actually red or 'stop' for traffic going east and west on Sunset Boulevard and green or 'go' for traffic going north and south on Silver Lake Boulevard." This instruction is supported by the cases of Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922, and Leek v. Western Union Tel. Co., 20 Cal. App.2d 374, 66 P.2d 1232. The cases cited by appellant do not support the contention that the pedestrian was not required to wait for the released traffic. Taylor v. Sims, 72 Cal.App.2d 60, 164 P.2d 17, involved two automobiles, and it was held that a driver entering an intersection controlled by traffic signals was not required to maintain a look-out for vehicles which might enter the intersection in violation of the signal; while in Morgan v. Los Angeles Rock & Gravel Corporation, 105 Cal.App. 224, 287 P. 152, it was held that under all the evidence the circumstances presented a question of fact for the jury.

Appellant complains further of instructions (1) that if the pedestrian crossed the street outside of a marked crosswalk, and failed to yield the right-of-way (Veh.Code. sec. 562, subd. (a)), such conduct constituted negligence, and if it contributed to the accident the verdict should be for the defendants; (2) that even though the pedestrian was in a crosswalk he was nevertheless required to exercise ordinary care for his own safety; (3) that if the decedent died as a result of a disease or pathological condition which was not the natural and probable consequence of the injuries, the verdict should be for the defendants.

[1] It is urged that the first two instructions are "formula" instructions and that neither had any pertinency to a situation where the intersection was controlled by traffic signals. The instructions were correct statements of the law. There was some testimony that the pedestrian was not within the crosswalk, but was attempting to cross the street at an angle and at a point east of the crosswalk. The east boundary of the crosswalk was 10 or 12 feet from the west end of the safety zone. The instruction that the pedestrian was required to exercise ordinary care even though in the marked crosswalk was pertinent. There was testimony, for instance, properly received as part of the res gestæ, that Mr. Carney, immediately after the accident, said that he "must have looked at the wrong signal". It was also possible under the evidence for the jury to conclude that Mr. Carney stepped into the path of the car simultaneously with the change of signal and failed to look to his left, and that it was then too late to avoid striking him.

[2] There is no merit to the contention that by the alleged "formula" instructions the jury was virtually directed to find for the defendants. By its instructions the trial court attempted to cover all the factual theories advanced by either side and supported by substantial evidence. It was not required to, and could not, embody all of the issues of the case in a single instruction. Hall v. Steele, 193 Cal. 602, 609, 226 P. 854. "* * * the charge to the jury must be read in its entirety, each instruction being considered in connection with the others. If they harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal

inaccuracies, or because a separate instruction does not contain all of the elements which are to be gathered from the instructions as a whole." Westover v. City of Los Angeles, 20 Cal.2d 635, 637, 128 P.2d 350, 351. The instructions challenged by appellant as "formula" instructions, or as assuming the existence of facts in dispute, are to be considered, not separately from their context, but as part of the entire charge to the jury. When so considered, they are correct statements of the law, and a reading of the entire charge discloses that the jury was fully and fairly instructed upon all issues.

[3–6] What has just been said applies also to the complaint that instructions Nos. 45 and 46 hereinbefore set forth were conflicting. As heretofore stated, the entire charge to the jury fairly and correctly stated the law. A judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context, when such charge in its entirety fairly and correctly states the law. Lund v. Pacific Elec. Ry., 25 Cal. 2d 287, 153 P.2d 705. From a consideration of the entire cause, including all the instructions, it must be concluded that no miscarriage of justice has resulted, and in such circumstances the judgment may not be reversed. Const.Calif., Art. VI, sec. 4½; Wood v. Moore, 64 Cal.App.2d 144, 150, 148 P.2d 91; Radisich v. Franco-Ital. Packing Co., 68 Cal.App.2d 825, 842, 158 P.2d 435; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Marr v. Postal Union Life Assoc., 40 Cal.App.2d 673, 105 P.2d 649. The asserted error in instructing the jury that plaintiff could not recover if decedent died as a result of a disease not the natural and probable consequence of his injuries was not prejudicial. By other instructions the jury was properly informed as to what constituted proximate cause.

We come now to a consideration of the asserted errors in admitting testimony of the police officers as to the alcoholic breath of the decedent and the testimony of the two doctors heretofore set forth as to decedent's previous alcoholic indulgence. At the outset, it should be noted that no objection was made to the testimony of the police officers, or the physicians, so far as the statement on appeal discloses. Testimony as to the decedent's alcoholic breath had already been received from the defendant driver, likewise without objection. No motion to strike was made, so far as the record discloses. Appellant cites cases to the effect that "where the weight of the evidence shows a party to have been entirely sober at the time of the accident, the admission of such testimony is reversible error." Such cases are not in point.

[7, 8] In support of their diagnosis as to the cause of death, the two physicians from the receiving hospital who testified on behalf of defendant relied in part upon the patient's history as given by him and the facts set forth in the clinical record of the hospital. Their evidence disclosed an alcoholic condition at the time of decedent's admission to the hospital and also an alcoholic history. The hospital record was not admitted in evidence in its entirety, but portions thereof were read into the record. A hospital record is admissible in evidence, when relevant to an issue and when a proper foundation has been laid. Code Civ. Proc., secs. 1953e, 1953f; McDowd v. Pig'n Whistle Corporation, 26 Cal.2d 696, 700, 701, 160 P.2d 797, and cases cited. In the instant cause, however, appellant predicates error upon the fact that although the trial court admitted only portions of the document, the entire record was taken into the jury room, and that the following entry, which had been excluded by the court, thereby got to the jury:

"4–15–44 50 year old Cauc male

"10 p. m. C.C. & P.I. (Stepped off streetcar. Looked wrong way and was struck by automobile as he walked across street.) (Was knocked down) (Denies being out) Hurt left hip and leg.

"H. B. D.—few 'shots' & some beer."

[9] This alleged error was made one of the grounds of a motion for a new trial, supported by affidavits of two jurors. The clerk of the trial court filed an affidavit to the effect that the document did not go to the jury room. Appellant asserted on oral argument that the clerk's affidavit merely stated that he did not think it went to the

jury room. The record on appeal contains none of the affidavits in question, although counsel argued the cause on the assumption that such affidavits are before this court. However, there is no question but that the issue was raised on motion for a new trial and decided by the court adversely to appellant upon conflicting affidavits. This decision, in effect holding that no prejudicial error was shown, finds support in a consideration of the entire record. Evidence as to decedent's drinking had already been received in evidence without objection. Evidence as to his alcoholic history, liver condition and high blood pressure was proper in support of respondent's contention that the accident was not the proximate cause of the death. In view of all the evidence presented, it cannot be held that there has been a miscarriage of justice.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

YORK, P.J., and DORAN, J., concur.




78 Cal.App.2d 464

## GORDON v. BOARD OF EDUCATION OF CITY OF LOS ANGELES et al. (PEPPIN et al., Interveners).

Civ. 15584.

District Court of Appeal, Second District, Division 1, California.

March 10, 1947.

Hearing Denied May 8, 1947.

**1. Constitutional law ⇐84**
**Schools and school districts ⇐165**

The statute providing that pupils with written consent of parents may be excused from schools to participate in religious exercises or to receive religious instruction does not violate that provision of the state constitution guaranteeing free exercise and enjoyment of religious worship nor provision of the federal constitution that congress shall make no law respecting an establishment of religion. Education Code, § 8286; Const.Cal. art. 1, § 4; U.S.C.A. Const.Amend. 1.

**2. Schools and school districts ⇐3, 165**

The statute providing that pupils with written consent of parents may be excused from schools to participate in religious exercises or to receive religious instruction does not violate that section of the state constitution prohibiting the appropriation of any public money for support of any sect or denominational school and forbidding the teaching of any sectarian or denominational doctrine in the common schools of the state, though expense of preparation of literature and registration cards was paid by school system. Education Code, § 8286; Const. art. 9, § 8.

**3. Schools and school districts ⇐3**

The statute providing that pupils with written consent of parents may be excused from schools to participate in religious exercises or to receive moral and religious instruction does not violate that section of the state constitution prohibiting appropriations or the granting of anything in aid of any religious sect, church, creed or "sectarian purpose". Education Code, § 8286; Const. art. 4, § 30.

See Words and Phrases, Permanent Edition, for all other definitions of "Sectarian Purpose".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Mandamus proceeding by Rita Gordon, petitioner, against the Board of Education of the City of Los Angeles, Lawrence L. Larrabee, and others, as members of the board, respondents to compel the board to discontinue the "released-time plan" in Los Angeles under section of Education Code providing that pupils, with written consent of their parents may be excused from schools to participate in religious exercises or to receive moral and religious instruction, on ground that the section is unconstitutional wherein Louise H. Peppin and others intervene. From an adverse judgment, the petitioner appeals.

Judgment affirmed.

George S. Gordon and Herbert Ganahl, both of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for respondents.

Joseph Scott, J. Howard Ziemann, Dockweiler & Dockweiler and Thomas A. J. Dockweiler, all of Los Angeles, for intervener Lashley.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles, for intervener Eitzen.

Joseph L. Lewinson, of Los Angeles, for intervener Falk.

Thomas S. Bunn, of Los Angeles (J. Howard Ziemann, of Los Angeles, of counsel), for intervener Peppin.

DRAPEAU, Justice pro tem.

Section 8286 of the Education Code was added to our laws by legislative enactment in 1943. This section provides that pupils, with the written consent of their parents, may be excused from schools to participate in religious exercises or to receive moral and religious instruction. Upon complying with the provisions of the statute such absences are not counted in computing average daily attendance. However, allocations of state and county school funds are based upon average daily attendance.

The Board of Education of the City of Los Angeles adopted regulations setting up a plan of compliance with the statute, as follows: An Interfaith Committee composed of representatives of various religious denominations was to act as coordinating agent for the denominations participating in the plan. There were a number of such denominations so represented, including Catholics, those of the various Protestant faiths, and Jews.

At the request of the Interfaith Committee the Board of Education caused to be sent to parents of pupils in the Los Angeles schools literature describing the plan, and cards for the parents to return to the Board. These cards contained a form for the parents to sign consenting that the children take part in the plan, and designating the faith they were to be taught. The expense of preparation, printing or mimeographing, and mailing of the literature and cards was paid by the school system. Teachers and superintendents of schools were directed to keep attendance records and to oversee the working of the plan.

As the plan operates, children are segregated according to the preferences expressed by their parents regarding religious instruction, transported from the school grounds to places arranged for by the Interfaith Committee, and there taught the doctrine of the church to which they have been assigned. Expenses of transportation are not paid by the school system, nor are the officers of the schools in charge of the children during their absence from school. Children not participating in the program remain in school and such teaching as they receive is optional with their teachers. This project, sponsored by the religious leaders, the parents and educational authorities of the County of Los Angeles may be denominated the "released-time plan."

Petitioner is a tax payer, and applied to the Superior Court for a writ of mandate to compel the Board of Education to discontinue the released-time plan. The petition alleged that the statute is void because it is in contravention of the Constitution of California, and that the released-time plan as carried on in Los Angeles violates not only the constitution and laws of the state but also the Constitution of the United States. The trial court found against petitioner, denied the petition, and the case is now before this court on appeal.

The primary question for decision here is whether the operation of the released-time plan in Los Angeles under Section 8286 of the Education Code is unconstitutional.

Section 4 of Article I of the Constitution of California provides that: "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; * * *."

Section 8 of Article IX prohibits the appropriation of any public money for the support of any sectarian or denominational school, "nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly,

in any of the common schools of this State."

Section 30 of Article IV prohibits appropriations or the granting of anything "in aid of any religious sect, church, creed, or sectarian purpose."

The First Amendment to the Federal Constitution, applicable to all the states by the fourteenth amendment, provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

These sections of our California constitution have been considered and applied in several cases in this state involving school affairs.

In Evans v. Selma Union High School Dist. of Fresno County, 1924, 193 Cal. 54, 222 P. 801, 802, 31 A.L.R. 1121, the Supreme Court of California held that the purchase of a King James version of the Bible by a school board for library and reference purposes is not prohibited by our law. In that case the Supreme Court observed that there is nothing objectionable in the use of religious books in our schools. To be objectionable such books must be "sectarian, partisan, or denominational in character". And the words "sectarian" and "denominational" are defined: "'Sect,' strictly defined, means 'a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system' (Standard Dict.), and 'denominational' is given much the same definition. But the term 'sect' has frequently a broader signification, the activities of the followers of one faith being regarded as sectarian as related to those of the adherents of another."

In this connection we find the following comment in 11 Cal.Law Review, 187:

"The problem of defining the word 'sectarian' has come before the courts of other jurisdictions in a number of cases. The rulings of the courts vary with the theory adopted as to the purpose of such provisions. Are they intended to secularize state activity, particularly in the schools, or merely to prevent discriminatory religious instruction, leaving room for teaching of moral precepts and of the generally accepted fundamentals of religion, and certainly permitting literary and historical uses? Only one state, Washington, unequivocally declares its purpose as complete secularization of school instruction. One other state, Illinois, reaches this result by judicial construction of the usual prohibitions as to using public money for sectarian purposes. Two states, Nebraska and Wisconsin, hold that it is not impossible to use the Bible or parts of it in connection with school work, although the facts presented to the courts in each case were found to show that the use which had been made was sectarian. The leading Michigan decision, Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 77 N.W. 250, 42 L.R.A. 536, may imply a similar theory, since it concerned the use of a book of moral excerpts embodying moral principles set forth in the Bible. Michigan is, however, generally regarded as aligned with Kentucky, Georgia, Maine, Texas, Massachusetts, Kansas, and Iowa in regarding the use of the Bible in the King James translation as non-sectarian, even when this use extended to daily readings made part of the school exercises."

In Bowker v. Baker, 1946, 73 Cal.App.2d 653, 167 P.2d 256, 258, the District Court of Appeal of California held that section 16257 of the Education Code does not infringe constitutional prohibitions against appropriation of public funds in aid of religious sects or in support of denominational schools. This section authorizes the governing board of any school district to transport pupils attending private schools in school busses.

Also in this case the function of the judicial power in passing upon the constitutionality of legislative enactments is commented upon and the rule quoted from People v. Standard Acc. Ins. Co., 42 Cal.App. 2d 409, 108 P.2d 923, 926: "And in considering the constitutionality of the statute the question presented is not whether it is possible to condemn it, but whether it is possible to uphold it. It is not to be declared invalid, because incidental to the main purpose, there results an advantage to individuals. Patrick v. Riley, 209 Cal. 350, 287 P. 455. The legislature is vested with a large discretion in determining what

is for the public good and what are public purposes for which public moneys can be rightfully expended and that discretion cannot be controlled by the courts except when its action is clearly evasive. Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L.R.A. 474, 27 Am.St.Rep. 95.

In Bowker v. Baker, supra, a number of cases relative to furnishing of transportation by public school authorities to pupils of sectarian schools are cited; and some of them are analyzed. And the reasoning underlying the cases holding this practice to be lawful is summed up as follows (p. 661 of 73 Cal.App.2d, page 260 of 167 P.2d): "The general line of reasoning running through those cases which uphold the right of the school district to provide free transportation for school children finds its starting point in the undoubted police power of the State to promote the public welfare by aiding in practical ways the education of the young. It is generally held that the direct benefit conferred is to the children with only an incidental and immaterial benefit to the private schools; that this indirect benefit is not an appropriation of public moneys for private purposes and does no violate any constitutional provisions against giving State aid to denominational schools."

And also in Bowker v. Baker, supra, the court finds support for its decision in a number of California cases holding that the Veterans Educational Act, Stats.1921, Chap. 579, p. 967, is constitutional. This act authorizes the State to pay for the education of qualified veterans of the first world war in private schools when suitable facilities are not available in public or semi-public institutions, and also to pay for transportation of said veterans to such private schools.

And finally in Bowker v. Baker, supra, the court restates another rule binding upon us in determining the constitutionality of the legislative enactment now under attack.

"In University of Southern California v. Robbins, supra [1 Cal.App.2d 523, 37 P.2d [163,] 164], it was said:

"'"If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." In re Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 274, 675, 14 L.R.A. 755, 27 Am.St.Rep. 106 * * *.'"

Research by counsel and the court fails to find any California case in which the released-time plan has been considered. There are two cases involving the operation of the released-time plan in New York. And New York's constitutional provisions and statutes forbidding state aid to sectarian institutions are similar to ours.

In Stein v. Brown, 1925, 125 Misc. 692, 211 N.Y.S. 822, the trial court of Westchester County, New York, held that the furnishing of cards for a released-time plan of religious education by the Board of Education violated constitutional provisions prohibiting the use of public funds or property to aid denominational schools.

But, in People ex rel. Lewis v. Graves, 1927, 245 N.Y. 195, 156 N.E. 663, a contrary conclusion was reached by the Court of Appeals upon substantially the same facts. In commenting upon these decisions in 141 A.L.R. 1151, it is said:

"So far as appears, the only difference between the facts in the two cases is that whereas in the later case the cards upon which the parents of the pupils were to give their consent to the outside religious instruction of their children were furnished by agencies other than the school authorities, in the earlier case such cards were printed by the pupils as an exercise on materials furnished at the expense of an outside agency."

The Graves case was first heard by the trial court of Albany County, New York, in April of 1926, and the application for mandate denied. Lewis v. Graves, 127 Misc. 135, 215 N.Y.S. 632. Upon appeal to the Appellate Division of the Supreme Court (a five judge intermediate court of appeals) the ruling of the trial court was affirmed with the following remark: "The state by its educational policy seeks to build from its youth useful citizens of intelligence and character, not merely pedants and philosophers. In following this policy

it should not only consider the wishes, but invite the aid, of parents. When the wish of parents for weekday religious instruction for their children involves no serious interruption to school attendance, the state can have no purpose to defeat it. If local school authorities render their assistance by methods so innocuous as those detailed here, it does not amount to illegality. Reasonableness in the method adopted is the test of such legality. Neither the local school officers nor the commissioner of education have here violated that rule." People ex rel. Lewis v. Graves, 219 App.Div. 233, 219 N.Y.S. 189, 196.

In finally deciding the case (People ex rel. Lewis v. Graves, [245 N.Y. 195, 156 N.E. 664] supra) the Court of Appeals, which is the court of last resort of the State of New York, states:

"Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school.

"The separation of the public school system from religious denominational instruction is thus complete. Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

Thus it is to be observed that the trial court, the appellate division, and the court of appeals, the highest court of the State of New York (of which one of its members was the late Mr. Justice Benjamin N. Cardozo), were unanimous in upholding the constitutionality of a statute similar to ours of California and its application to a released-time plan of religious education in the New York school system.

Similar cases have involved the attention of the Illinois Courts.

In Chicago, Illinois, for the past sixteen years pupils have been excused by the school board for one hour a week to attend classes in religious instruction. What was done is described in People ex rel. Latimer v. Board of Education of City of Chicago, 1946, 394 Ill. 228, 68 N.E.2d 305, 309. The decision in People ex rel. Lewis v. Graves, supra, is approved and followed by the Supreme Court of Illinois. In commenting upon this application of the released-time plan, the Illinois court says:

"The school authorities in Illinois and in every jurisdiction in the United States have always been vested with discretionary power to determine what constitutes a sufficient excuse for absence from school, and the courts should not interfere or attempt to control the exercise of such power, unless it has been substantially abused. The regulation complained of does not do violence to the compulsory attendance law and in our judgment is a reasonable rule for the practical administration of the public schools.

"In the examination of the constitutional provisions cited by the appellants, and admitting all the facts well pleaded in the mandamus petition to be true, we do not find any constitutional or statutory violation by the board of education in this case."

In the latest Illinois case, People ex rel. McCollum v. Board of Education, 396 Ill. 14, 71 N.E.2d 161, decided by the Supreme Court of Illinois, January 22, 1947, classes were held in the public schools once each week. Teachers were supplied by religious denominations. Cards were used as in the California released-time plan. Separate rooms were provided for Catholics, Jews and Protestants, and for those pupils who did not desire to take part in the plan. Objections to this plan were presented by petition for mandate, upon the same legal grounds urged in the pending case, with the additional one that the classes were held in public school buildings. The Illinois Supreme Court followed its prior decision in People ex rel. Latimer v. Board

of Education of City of Chicago, supra. In discussing the use of public funds in aid of the plan as applied in this case, the Court observes [396 Ill. 14, 71 N.E.2d 166]:

"In the case of Nichols v. School Directors, 93 Ill. 61, 34 Am.Rep. 160, this court held that permission to hold stated meetings for religious purposes in the schoolhouse did not compel a taxpayer to aid in supporting a house of worship in violation of the above constitutional restraints. As the court there aptly said, 'It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions.' The court there further said, 'Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State.' This decision has been cited and followed by this court in a number of cases. It is our judgment the incidental expenses that might occur here are not in violation of the constitutional restraints insisted upon."

Whether the plan conflicts with Federal and State guaranties of religious freedom is also commented upon as follows: "We have the record here, which, relieved of its excess verbiage, technicalities and niceties, presents the simple question, does either the Federal or State Constitution, or both, in their guaranty of religious freedom, prohibit voluntary religious classes in the public schools under the plan as disclosed by this record? Certainly, such classes do not violate the freedom of conscience of any individual or group so long as the classes are conducted upon a purely voluntary basis. Freedom of religion as intended by those who wrote the State and Federal constitutions means the right of an individual to entertain any desired religious belief without interference from the State. Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble of our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the constitution itself."

This then brings us to a consideration of the California constitutional provisions and their application to the case at bar. Reference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination. Our pioneer forefathers did not have the remotest idea that they were laying the foundations of the great Commonwealth of California that was to be as a jejune, godless state; they believed one of the great pillars of our national strength to be the general acceptance of religion by our people.

Proceedings of the California State Convention of 1878 are not well indexed. Section 30 of Article IV was reported to the convention December 23, 1878, as Section 37 (p. 189). Upon the presentation of the section and throughout the convention there was debate upon amendments to permit allocation of public funds to orphanages maintained by religious organizations. One of these amendments was finally adopted. (Pages 1252-1254-1259-1264-1265-1266-1272-1273.)

The policy of the American people in the inclusion of similar provisions in most of our state constitutions is well described in Bryce's "The American Commonwealth", Vol. 2, p. 767:

"The abstention of the State from interference in matters of faith and worship may be advocated on two principles, which may be called the political and the religious. The former sets out from the principles of liberty and equality. It holds any attempt at compulsion by the civil power to be an infringement on liberty of thought, as well as on liberty of action

which could be justified only when a practice claiming to be religious is so obviously anti-social or immoral as to threaten the well-being of the community. Religious persecution, even in its milder forms, such as disqualifying the members of a particular sect for public office, is, it conceives, inconsistent with the conception of individual freedom and the respect due to the primordial rights of the citizen which modern thought has embraced. Even if State action stops short of the imposition of disabilities, and confines itself to favouring a particular church, whether by grants of money or by giving special immunities to its clergy, this is an infringement on equality, putting one man at a disadvantage compared with others in respect of matters which are (according to the view I am stating) not fit subjects for State cognizance.

"The second principle, embodying the more purely religious view of the question, starts from the conception of the church as a spiritual body existing for spiritual purposes and moving along spiritual paths. It is an assemblage of men who are united by their devotion to an unseen Being, their memory of a past divine life, their belief in the possibility of imitating that life, so far as human frailty allows, their hopes for an illimitable future. Compulsion of any kind is contrary to the nature of such a body, which lives by love and reverence, not by law. It desires no State help, feeling that its strength comes from above, and that its kingdom is not of this world. It does not seek for exclusive privileges, conceiving that these would not only create bitterness between itself and other religious bodies, but might attract persons who did not really share its sentiments, while corrupting the simplicity of those who are already its members. Least of all can it submit to be controlled by the State, for the State, in such a world as the present, means persons many or most of whom are alien to its beliefs and cold to its emotions. The conclusion follows that the church as a spiritual entity will be happiest and strongest when it is left absolutely to itself, not patronized by the civil power, not restrained by law except when and in so far as it may attempt to quit its proper sphere and intermeddle in secular affairs."

No one who keeps pace with the trends of modern society can deny that instruction of the youth of the state in faith and morality is of utmost necessity and importance. All too regretfully it must be said that in present-day American life the family as a unit has not done its part in this vital field of education of our boys and girls. Else juvenile courts would not be groaning under an avalanche of cases of derelictions of children. What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?

[1] Description of the released-time plan demonstrates it to be nonsectarian and not in violation of Sec. 4 of Article I of our constitution, nor of the Constitution of the United States.

"Laws in aid of religion, which do not establish a particular religion or prohibit the free exercise of religion or give a preference to a particular religion or mode of worship, are consistent with the constitutional guaranties of religious liberty and freedom of conscience. (Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1.) Statutes providing for the incorporation of religious societies, without discrimination, preference or restriction do not violate the guaranties of religious liberty and freedom of conscience." Terrett v. Taylor, 9 Cranch 43, 3 L.Ed. 650; 12 C.J. 945, note 5; 16 C.J.S., Constitutional Law § 206, p. 601.

Again, research by counsel and the court fails to find any case in the United States Supreme Court directly in point. But there are two cases in that court which are helpful in determining the constitutional questions here involved. In Cochran v. Louisiana State Board of Education, 1929, 281 U. S. 370, 50 S.Ct. 335, 74 L.Ed. 913, it is held that the furnishing by a Louisiana School Board of secular text books without charge to private religious sectarian and other schools does not constitute aid to religion in

violation of the Fourteenth Amendment to the Federal Constitution. "Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. 370, 50 S.Ct. 336, 74 L.Ed. 915.

In Everson v. Board of Education of Ewing Tp., 1947, 67 S.Ct. 504, it is held that the transportation of children to Catholic parochial schools by the state is not contrary to the first amendment to the United States Constitution or any prohibition against the use of public funds in aid of such schools. In this five-to-four decision by the Justices of the Supreme Court many pages in the main opinion and the dissenting opinions are given to a review of the American doctrine of separation of Church and State. The decision is based upon a determination by the court:

(a) That the far-reaching authority of the United States Supreme Court to strike down state statutes on the ground that the purpose for which tax-raised public funds were to be expended was not a public one, must be exercised with the most extreme caution, and,

(b) That the State of New Jersey has the right to pay out of public moneys fares of pupils attending parochial schools, because it is a part of a general program under which the state pays fares of all pupils attending both public and private schools.

[2] Measured by the standards set forth in the foregoing authorities, in the operation of the released-time plan in Los Angeles, there is no appropriation of public money in support of any sect or denomination and no teaching of sectarianism in the school system of Los Angeles County in violation of section 8 of Article IX of the California Constitution.

[3] And neither the California law nor the Los Angeles released-time plan is prohibited by section 30 of Article IV.

In addition to the constitutional questions appellant complains of rulings by the trial court excluding evidence of sectarian antagonism and ill feeling resulting from the conduct of the plan, and appellant presents several specifications of error of the trial court in finding or failing to find certain facts from the evidence. Whatever may have been the result of the application of the released-time plan is a matter of discretion of the Board of Education with which, in this case at least, the courts have nothing to do. From the findings as a whole, no error is apparent.

The judgment is affirmed.

YORK, P. J., concurs.

WHITE, Justice (concurring).

I concur with the foregoing opinion and the reasoning supporting it.

That the legislation which gave rise to this proceeding is not in the remotest degree tinged with sectarianism or denominationalism is attested by the fact that arrayed in defense of the constitutionality of the challenged Educational Code section are parents whose children, under the Released Time Religious Educational Program, are being instructed in the Jewish, various Protestant, and Roman Catholic religious faiths.

Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for is freedom *from* religion rather than freedom *of* religion. Appellant's argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the wellbeing of the community. The preamble of the Constitution of the State of California says:

"We, the People of the State of California, *grateful to Almighty God* for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution". (Emphasis added.) As was so cogently stated by the United States Supreme Court in the case of The Rector, etc., of Holy Trinity Church v. United States, 143 U. S. 457, 12 S.Ct. 511, 514, 36 L.Ed. 226: "* * *

no purpose of action against religion can be imputed to any *legislation,* state or national, because *this is a religious people*". (Emphasis added.) And again in the same case, after offering historical proof in support of the language just quoted, the court says: "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people."

That ours is a religious nation is historically true from the discovery of this continent to the present hour. Coming down to our own Declaration of Independence we find a recognition of Almighty God in the words: "We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator* with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". Also, in the same document we read:

"We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to *the Supreme Judge of the world* for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare," etc. And in bringing this immortal charter of liberty to a close, the signers thereof, "with a firm reliance on the Protection of *Divine Providence,*" mutually pledged their lives, fortunes, and sacred honor to the end that, as President Lincoln said in that military cemetery at Gettysburg, there might be "brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal". In further proof that this is essentially a religious nation we have the form of oath universally prevailing in our courts and concluding with an appeal to Almighty God. And here I pause to recall the admonition of President George Washington in his Farewell Address when he cautioned us:

"Of all the dispositions and habits, which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. Let it simply be asked, *Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle.*"

In addition, we have the custom of opening the Congress of the United States, and State Legislatures, with prayer for divine guidance; the prefatory words so prevalent in wills, "In the Name of God, Amen"; exemption of churches from taxation; and the closing of our courts, legislatures and similar public assemblages and public offices in observance of the Sabbath day. In the face of all these, shall it be believed or said that the constitution of this state operates to make void legislation, the effect of which is to promote religion? While eternal vigilance is yet the price of constitutional rights, a long line of cases establishes as a fact that neither the constitution nor the law discriminates against religion. It is denominational religion that is placed outside of public aid or support.

History, both ancient and modern, bears striking witness to the inevitable fate that has befallen peoples whose government has engaged in undermining or destroying belief in the existence of God and attempted to replace Him with idols, either in the form of a man, groups of men, or of the state. Inalienable, natural rights of every kind disappeared and the individual became but the pawn and chattel of the state, stripped of any rights, privileges or guaranties except such as might be conferred upon him

by the state—a veritable system of ignominious slavery.

The essence of the released Time Religious Education Program (Educational Code, section 8286) is to authorize governing boards of school districts, within their discretion, to permit pupils to be excused from school at the request of their parents for the purpose of attending classes of religious instruction maintained and operated by religious faiths of their own choosing. Examination of the statute reveals nothing opposed to the constitutional guarantee insuring religious liberty, freedom of conscience and preventing the establishment of a particular religion. The code section in question does not in any way interfere with religious freedom. It does not work an establishment of religion, provide for compulsory support, by taxation or otherwise, of religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief.

The California Released School Time Religious Education Program authorized by section 8286 of the Educational Code, is not new in the United States. Either by express statutory provisions, court decisions, rulings of the State Attorneys General, or opinions of state boards of education or Chief State School Officers, forty states authorize the release of public school pupils for weekly religious education classes. And it is noteworthy that no appellate court of any state has held such programs unconstitutional. In both the states of New York and Illinois judicial attacks have been made upon the released time programs on identical grounds as the attack in the instant case, to-wit, that the plans violated the constitutional guarantees of freedom of religion and were in aid of a religious purpose. Because of the similarity of the facts and of the constitutional provisions in those cases and the ones involved in the case with which we are here concerned, the decisions of those courts are persuasive and entitled to great weight. I refer to the cases of People ex rel. Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663, 664; People ex rel. Latimer, et al. v. Board of Education of City of Chicago, 394 Ill. 228, 68 N.E.2d 305; and People ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Ill., 396 Ill. 14, 71 N.E.2d 161.

Under our California statute, no particular denomination or religious faith is favored, no part of the religious instruction is held in the schoolroom on school property, and no one is required to attend. To act in accordance with his lack of religion is the right of the man of no religion, but he has no right to insist that others shall have no religion.

The recent California case of Bowker v. Baker, 73 Cal.App.2d 653, 167 P.2d 256, 261, is a complete answer to appellant's contention that the Released Time Religious Education Program violates the provisions of Article IV, section 30, or Article IX, section 8, prohibiting the granting by the state of anything in aid of any sectarian purpose. In the case just cited, after an exhaustive review of many cases, the court says:

"While these cases do not directly touch on the main question before us they do support the theory that where the main purpose of an enactment is lawful, and an incidental or immaterial benefit results to some person or organization, which benefit is not directly permitted by law, this incidental benefit alone will not defeat the legislation, its main purpose being lawful. * * *

"If the transportation of pupils to and from public schools is authorized, as it certainly is, and if the benefit from that transportation is to the pupils, then an incidental benefit flowing to a denominational school from free transportation of its pupils should not be sufficient to deprive the legislature of the power to authorize a school district to transport such pupils."

The true and essential purpose of the American doctrine of separation of church and state is to protect people in the fullest enjoyment of religious freedom and to forestall compulsion by law of the acceptance of any creed or the practice of any particular form of worship, but the decisions in both the federal and state courts furnish unmistakable authority for the proposition

that the doctrine of separation of church and state does not mean that there is any conflict between religion and state in this country or any disfavor of any kind upon religion as such.

Appellant's argument also ignores the long established doctrine in the United States that the alien philosophy that the child is the creature of the state finds no countenance in the American system of government. Boens v. Bennett, 20 Cal.App. 2d 477, 482, 67 P.2d 715. Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family. The parents, unless their parental authority has been taken away by the courts, are the ones to decide the extent and character of the education of their children, beyond what is provided by the school system of the state. As was said by the United States Supreme Court in the case of Pierce v. Society of Sisters of Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 39 A.L.R. 468, 1078:

"Under the doctrine of Meyer v. [State of] Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The released time plan for religious education does no violence to any constitutional prohibition. It is in use and has been approved by appellate courts in other states. It does not discriminate in favor of any sect or religion. It is squarely within the purview of Article IX, section 1 of the California State Constitution which provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, *moral,* and agricultural improvement." (Emphasis supplied.)




78 Cal.App.2d 778

## In re FELDMAN'S ESTATE.

No. 13167.

District Court of Appeal, First District, Division 1, California.

March 27, 1947.

**1. Wills ⇐675, 858(1)**

An attempted trust pursuant to a holographic will devising a designated amount of money to be distributed according to personal wishes of testator, without expressing personal wishes as to part of the money, was invalid as to the portion not designated, and such part went to the residuary legatees under the will.

**2. Wills ⇐675**

Under will leaving $15,000 to named person, $3,000 for himself "and the rest to be distributed according to my wishes", evidence sustained findings that testator gave legatee specific oral instructions as to some persons who were to receive gifts but left remainder of the distribution to legatee's judgment, so that valid trust was not created as to such remainder.

**3. Executors and administrators ⇐314(13), 497**

An allowance of $500 each to executor and attorney for extraordinary services to be paid out of $15,000 legacy which was to be distributed $3,000 to legatee and the remainder according to personal wish-

es of testator was proper, where executor and attorney were put to additional trouble because legatee declined to disclose to executor who legatees were, making it necessary to impound certain sums and have citation issued to legatee to come into court and a hearing to interpret will so that estate could be finally closed. Probate Code, § 902.

**4. Appeal and error ⇐878(2)**

Reviewing court could not consider question as to whether an allowance to attorneys for appellant was proper, where appellant was not complaining about award and respondent did not appeal therefrom.

**5. Executors and administrators ⇐314(13)**

An allowance to attorney for legatee or claimant to portion of trust fund created by will, to be paid out of the fund itself, was improper, particularly so where claimant was not entitled to the award made to her.

**6. Executors and administrators ⇐314(13)**

Where decree of distribution made by lower court in respect of devise of money to be distributed according to personal wishes of testator was affirmed in part and in part reversed and modified, the cost of the appeal should be borne by the estate in the interests of justice.

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Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of Carl Feldman, deceased, wherein Ernest Meelit appeals from portions of a supplemental decree of distribution, opposed by Dr. Jason Noble Pierce as executor.

Affirmed in part, reversed in part, and otherwise modified.

Bartley C. Crum, of San Francisco, for appellant.

Ernest M. Gibbons, of San Francisco, for respondent.

BRAY, Justice.

Appeal by Ernest Meezit from portions (hereinafter designated) of a supplemental decree of distribution rendered in the Estate of Carl Feldman, deceased. The only respondent on the appeal is Dr. Jason Noble Pierce, as executor of the last will and testament of said deceased.

The will of the deceased is holographic. After making certain specific gifts the will provides: "To Ernest Meezit, 60 Mirabel Avenue, San Francisco, Cal, 15 fifteen thousand Dollars, Three thousand for his personal use, and the rest to distribute according to my personal wishes." It is this clause in the will that caused the litigation, as to which litigation the trial judge observed: "* * * this is the most unusual case, I think, in the history of probate law."

The will was admitted to probate, and the administration of the estate continued in the normal way until time for distribution. The court then entered a decree of distribution in which it ordered $3000 of the $15,000 mentioned in the above clause of the will to be distributed to appellant, and the balance of $12,000 to be impounded until such time as that clause could be interpreted and the further order of the court. Actually the amount impounded was only $11,162.85, as that was the balance left in the estate after paying the other specific legacies, claims and expenses of administration. However, the court frequently, as will hereafter appear, referred to $12,000, instead of the exact sum on hand, and for convenience hereafter we will generally refer to it as $12,000 instead of the specific amount.

Carl Feldman died May 2, 1943, and the will was admitted to probate May 24, 1943. On the Saturday preceding his death, Feldman was ill in the Gordon Hotel. Appellant, his friend, spent the night with him in his room. According to appellant's testimony, Feldman on that occasion requested appellant to distribute moneys to certain named persons. After the death of Feldman, and all during the probating of the estate and even at the time of the making of the decree of distribution above mentioned, appellant did not disclose to anyone what persons the testator intended to receive moneys under the clause "and the rest to distribute according to my personal wishes."

In the petition for distribution the executor called attention to the clause in question, stated that appellant had refused to advise the executor whom the testator intended to be the distributees under that provision of the will, and requested that a citation issue requiring appellant to come into court and disclose who these persons were. One Alma Loose thereupon filed a pleading denominated "Answer to Petition for Final Distribution" and in it alleged that she was "the undisclosed distributee referred to" in the will and that appellant had "promised to convey" the $12,000 to her, and thereby claimed that sum as a legatee.

On the day after the decree of distribution impounding the $12,000 was filed, appellant filed in the probate proceeding an "Objection to Executor's Report and Petition for Settlement of First and Final Account" verified by him. This is a rather amazing document in view of the later position taken by him and his testimony at the hearing. This states that under the terms and provisions of the will appellant "was bequeathed the sum of Fifteen Thousand ($15,000.00) Dollars, Three Thousand ($3000.00) of which was for his own personal use and the rest to be distributed according to the testator's personal wishes. Said legatee, Ernest Meezit, denies that he has refused to advise petitioner as to whom the testator intended to be the legatees under said provision of the Will or whether or not said testator's instructions relative thereto were oral or in writing. Said legatee further denies that he evades information relative to the intention of the testator and the executor and in this connection *alleges that there are no known legatees who are to be advised as to their rights and interests in the said Twelve Thousand ($12,000.00) Dollars* * * * that at the time of the execution of said Will on October 12, 1942, no mention was made to him by said testator regarding said legacy, and at no time either prior to the execution of said Will or thereafter did the said legatee, Ernest Meezit, promise or agree either expressly or impliedly with said testator that he would distribute said legacy in accordance with the personal wishes of said testator." (Emphasis added.) The appellant then goes on to pray that the total sum of $15,000 be distributed to him "as his sole and separate property, and that no trust be impressed on the sum of Twelve Thousand ($12,000.00) Dollars or any portion thereof, and that petitioner's request that the status of the Twelve Thousand ($12,000.00) Dollars be determined to be impressed with a trust, be denied."

A citation was issued by the court to appellant directing him to appear on a certain day and reveal to the court "any wishes expressed to him by the testator concerning the distribution of the" $12,000. At the hearing which followed, the respondent-executor, Alma Loose and appellant Meezit were the only parties of record. At the conclusion of the hearing, the court signed a supplemental decree of distribution in which, after setting forth that the executor in his petition for final distribution had requested that said provision of the will be interpreted by the court for the purpose of ascertaining the intentions of the executor, it is recited that the court had issued a citation to Meezit to appear and reveal to the court any wishes expressed to him by the testator; that the citation came on for hearing on certain days; that testimony was taken from appellant and several other witnesses as to the intentions of the testator as to who the undisclosed beneficiaries were. The court then found that out of the $12,000, Peter Kore should receive $1000, less inheritance tax of $70, or a balance of $930; Michael A. Kruger, $1000, less inheritance tax of $70, or a balance of $930; Vera Kreekis, $1000, less inheritance tax of $70, or a balance of $930; Mary Kreekis, $1000, less inheritance tax of $70, or a balance of $930; Alma Loose, $2000, less inheritance tax of $140, or a balance of $1860; Fritz Cecul, $500, less inheritance tax of $35, or a balance of $465. The court further found that Dr. Jason Noble Pierce should receive the sum of $500 for extraordinary services as executor; E. M. Gibbons, $500 in fees for extraordinary services as attorney for the executor; Leslie C. Gillen, $500 in fees as attorney for Alma Loose; Alfred Del Carlo, $750, and William B. Hornblower, $750 in fees as attorneys for the legatee Meezit; and Dr. Jason Noble Pierce, executor, $77.10 for transcript and court costs advanced.

The court thereupon distributed, and ordered the executor to pay to the executor, legatees and attorneys above mentioned, the amounts which it found they should receive as above set forth. After such payments there was left on hand out of the $12,000 in question $2040.54, which sum the court ordered distributed and paid equally to the First Congregational Church of San Francisco and Goodwill Industries of San Francisco, who were the residuary legatees in the will. In discussing the case, for clarity, we shall ignore the deduction of inheritance tax from each legatee's share and refer only to the gross sum which he or she would receive before deduction of that tax. It will be noted that the total amount of legacies allowed by the court out of the $12,000 is only $6500. Then the court from said $12,000 allowed attorneys' fees and executor's fees and court costs in the amount of $3077.10, totalling the sum of $9577.10, being the amount which the court distributed under the disputed clause in the will.

Appellant appeals from the portions of the decree of distribution which ordered to be distributed and paid out of the $12,000 the following sums: $1000 to Vera Kreekis; $2000 to Alma Loose, $500 to Dr. Pierce as fees for extraordinary services as executor; $500 to E. M. Gibbons as fees for extraordinary services as attorney for the executor; $500 to Leslie C. Gillen for attorney's fees in representing Alma Loose; $1020.27 to the First Congregational Church of San Francisco and $1020.27 to Goodwill Industries of San Francisco, as residuary legatees; and $77.10 to Dr. Pierce, the executor, for court costs advanced; and also from the portion of the decree "wherein the court finds that Vera Kreekis and Alma Loose are undisclosed legatees and beneficiaries of parts of said sum of $12,000 * * * to be distributed according to the testator's 'personal wishes.'"

The grounds of the appeal are that the court failed to distribute the $12,000 according to the wishes of the testator as testified to by appellant, and improperly allowed attorneys' fees, executor's fees and court costs out of that sum.

To understand the manner in which it is claimed the court disregarded the beneficiaries as listed by appellant, it is necessary to discuss at some length appellant's testimony. With certain exceptions which will be hereafter pointed out, appellant is the only person who knows what the testator had in mind when he wrote in his will the phrase "and the rest to distribute according to my personal wishes."

Appellant's testimony is a maze of contradictions, irrelevant answers to the questions asked, failure to answer some questions, garbled English, uncertainties and confusions, which caused the court at one stage of the trial to remark: "I tried to get all the information we could out of this gentleman [Meezit], and everything that took place here is supposed to have taken place between the decedent and Mr. Meezit, but it is so uncertain, so vague, so indefinite, so ambiguous and all that, that no Court could give it any amount of weight or credence to distribute any estate on testimony of that kind. * * * to dispose of it, according to that kind of testimony, no court in the land would do it."

Both testator and appellant were of Latvian origin and had been friends for about twenty years. On the Saturday night preceeding the Monday of testator's death, testator was very sick, but refused to go to a doctor. Testator gave appellant what money he had in his possession and an envelope to be given to Dr. Pierce, the executor. Appellant calls this a "will envelope" and indicates that the testator told him there were two wills, one in the envelope and one in the safe deposit box at the bank. The will in the safe deposit box was the one admitted to probate. It is not clear whether there was a will in this envelope. Appellant's severe language difficulties while testifying may be responsible for this confusion. Testator did not tell appellant what was in the will or wills, and appellant did not know that his own name was in the will until it was opened at the bank after testator's death. That Saturday night, "while I sleep—on the carpets" in testator's room, the testator mentioned "figures and sums to give some. * * * Then he told me to—he mentioned some

persons to whom I should give a specified sum; at the same time, then, he say to use my judgment in every case I give money." When asked whom the testator mentioned by name, appellant testified that the testator wanted appellant to give Peter Kore $1000, Michael Kruger $1000, and Fritz Cecul $500. From this point on the testimony is quite confusing, but apparently these were the only persons—with the exception of Mary Kreekis, to whom, appellant later states in his testimony, testator wanted him to give $1000—whom the testator actually mentioned that night, and as to whom the testator mentioned amounts. After some more confusion in his testimony, appellant produced a list of names and amounts which he had written down on the insistence of his attorney about a month before the hearing and approximately two years after his talk with the testator on the important Saturday night. On that night he had made no note of his conversation with the testator nor list of the persons who were to get money, nor did he make any until he made the list above mentioned. At one point of his testimony he states that he memorized the names of the persons exactly as the testator gave them to him that night. However, it is clear from the testimony, if anything can be clear in such a jumble, that with the exception of the four persons, Kore, Kruger, Cecul and Mary Kreekis, the testator did not give him any names or amounts, but told him to use the money for the benefit of such Latvian friends of appellant's as in appellant's judgment he might wish to help. Appellant testified that testator at no time told him how much money there was to be distributed, nor that the money was mentioned in the will, nor where appellant was to get the money he was to pay out. In fact, appellant testified that he wondered that night where he was to get the money to pay the persons mentioned by testator.

It is also apparent from the testimony that the persons on the list which appellant produced in court, none of whom, other than the above four, were mentioned by testator, were persons—Latvian with one exception and the Eagles Lodge as another exception—whom appellant, using his judgment as he claimed testator had asked him to, felt needed or would appreciate his help. For example there is listed one Baltgalw for $2000, whom testator had only met once but who was a long standing friend of appellant's. Again in the list, appellant includes $500 for the Eagles, a lodge of which appellant was a member but testator was not. Appellant testified that the testator told him to give money to "anyone to whom I feel like, to give, who in my life time helped me out;" also, "he [the testator] mention in every case, use my judgment."

The following are the persons and amounts included on the list presented by appellant: Kore, $1000; Kruger, $1000; Cecul, $500; Mary Kreekis, $1000; Miss Washburn (a non-Latvian), $2000; Blumberg, $1000; Krawen, $1000; Baltgalw, $2000; Semsirg, $1000; and the Eagles, $500.

Of this list, the trial court allowed the names of and amounts to the first four, who are the four whom appellant testified the testator specifically mentioned that night, and rejected all the others. In addition, the court included two other persons who were not on the list, awarding Vera Kreekis $1000, and Alma Loose $2000. Appellant concedes that the court was right in the awards to the first four, but claims it erred in not following the complete list, and also erred in including the two persons not on the list.

As to the four persons on the list whom the court recognized—not only did the appellant testify directly that their names and amounts were given him by the testator, but the fact that they were to get something was corroborated. Michael Kruger testified that in 1942 testator told him, "I let you know I leave money for you when I pass away;" also that the witness was mentioned in his will. Kruger also testified that testator said that he was going to help Mary Kreekis and Vera Kreekis "something for education," although he mentioned no amounts. Testator also mentioned Peter Kore and Fritz Cecul as beneficiaries of his will.

Peter Kore testified that in November or December, 1942, testator told him he was

leaving him something in his will, and in Kore's presence, testator told appellant that appellant was provided for in the will and that testator was leaving $1000 to Peter Kore and a like amount to Mike Kruger.

Mrs. Frances S. Degman, who was given specific bequests of corporate stock in the will, testified that testator told her before he made his last will that he wanted Mike Kruger and Peter Kore to share a part of his estate, and that he had left appellant a sum of money for his own use and some to distribute according to "my instructions."

It is obvious that the trial court, from the maze of contradictions in appellant's own testimony, found as legatees only those persons on the list submitted by appellant who appellant definitely testified were named by testator that Saturday night. As to these testator had told others than appellant that he wanted them taken care of or they were to get something under his will. As to these four, no complaint is made, and there is no appeal from the court's finding; hence the awards to them must stand.

As to the others on the list, from appellant's own testimony and the lack of any other evidence, the court found in effect that the testator did not have them in mind. Appellant's position is that the evidence is uncontradicted that the testator's instructions to appellant to distribute the $12,000 according to "my personal wishes" was for appellant to use his own judgment as to the manner, amount and persons to whom the money was to be distributed. As pointed out, the court held that as to the first four persons on appellant's list, the testator's instructions were specific. There is substantial evidence to support that finding. As to the balance of the money, there is no substantial evidence to support any finding other than that contended for by appellant, to wit, that the "personal wishes" of the testator were that appellant was to use his own judgment as to the manner, amount and persons to whom the money was to be distributed.

Appellant's position is that the testator gave appellant the names of some beneficiaries, but told appellant to use his judgment as to others. While this is inconsistent with the position appellant took in his sworn answer, in which appellant claimed the entire $12,000 for himself, it is the only conclusion a court can reasonably reach from the appellant's own testimony; and as pointed out, there is no other evidence on the subject in the case.

But what about the distribution of that portion of the $12,000 left after deducting the awards as to which there has been no appeal? There were no persons designated, and the testator merely told the appellant to use his own judgment. Does that create a valid trust? Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76, 77, 96 A.L.R. 953, is definitely in point and answers the question. In that case the will provided: "I give and bequeath in trust to L. R. Kagarise * * * my entire property at my death, both Real and Personal, wherever this property may be situated, and I hereby give and bequeath to the said L. R. Kagarise absolute authority to dispose of this my entire estate as he may see fit. * * *

"I appoint the said L. R. Kagarise as my executor and administrator of my estate as he has always been my good friend, and I have absolute confidence in his honesty, and will do as well in disposing of my estate as I could if I were still alive."

The will contained no residuary clause.

Contending that the trust attempted to be created by the decedent was invalid and void for uncertainty and that the decedent's estate therefore passed to them in equal shares as his next of kin and only heirs at law, two grandsons commenced a proceeding to determine heirship. The lower court found that the will did not create a trust, but instead of distributing the estate to the grandsons, gave it to the executor personally. On appeal the court held: "We agree with the lower court in so far as it found and concluded that the will failed to impress a trust upon the decedent's property. It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject-matter thereof be certain, and that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The 'trust' here involved is defective

and invalid because of its complete failure to indicate either the object or the persons to benefit thereby.

"We cannot, however, accept the further finding and conclusion that the will 'by its terms gives the entire estate' to the respondent executor. The instrument does not purport to vest the property in respondent executor for his own individual use. On the contrary, it declares that the property is left to the respondent 'in trust.' In view of this expressed intention, the property, because of the invalidity of the trust, passes under the laws of intestate succession, and the two grandsons of the decedent, as his next of kin and only heirs at law, are entitled to share equally therein. Wittfield v. Forster, 124 Cal. 418, 420, 57 P. 219.

"There is a well-recognized distinction between an uncertainty where the intent to establish a trust is clear but the provisions are so indefinite as to render the trust void for uncertainty, and the uncertainty which simply indicates the want of intention to create a trust. Loomis Inst. v. Healy, 98 Conn. 102, 119 A. 31. This distinction is discussed in Pratt v. Trustees of Sheppard & E. P. Hospital, 88 Md. 610, 42 A. 51, 56, wherein the following appears:

" 'But it must be borne in mind that there is a distinction between a trust that is void for uncertainty, and an uncertainty that is simply indicative of the absence of an intention to create a trust. In the one case there is no uncertainty as to the intention to create a trust, but merely an uncertainty as to the objects to be benefited or the subject to be affected; in the other case, there is simply an uncertainty as to whether any trust was intended to be created at all. If it be uncertain as to whether there was an intention to create a trust, it is obviously not the province of the courts to ingraft a trust upon the gift; but, if it be apparent from the whole will that a trust was intended to be established, then the uncertainty as to the objects or the subject of that trust will not indicate that there was no intention to raise a trust, but the uncertainty will avoid the trust attempted to be founded. Where the expressions have been held too vague to show an intention to create a trust, the devisee or legatee retains the property for his own use; but where the intention to create a trust is sufficiently expressed, and yet the objects or the subjects of it are uncertain, the gift fails, and the heir or next of kin is let in to the beneficial ownership.'

"In Briggs v. Penny, 42 Eng.Reprint, 371, 375, it is declared: 'Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take.'

"The case of Maught v. Getzendanner, 65 Md. 527, 5 A. 471, 57 Am.Rep. 352, reviews the authorities on the issue here presented.

"In the instant case there can be no doubt as to the testator's intent to create a trust. As already stated, he expressly declared that he left his 'entire property' to the respondent executor 'in trust.' His failure to designate with sufficient certainty the objects or purposes of the trust makes the same invalid and unenforceable. However, his intent being clear that the respondent executor was not to acquire a beneficial interest in the property, it passed upon his death, and, in the absence of a residuary clause in the will, to his next of kin and heirs at law, the petitioners in this proceeding, in equal parts under the laws of intestate succession."

In Sears v. Rule, 45 Cal.App.2d 374, 114 P.2d 57, 60, the testator left the bulk of her estate to her brother, naming him. The will then went on to provide: "(b) The reason of making my brother, Charles T. Rule, aforesaid, the sole beneficiary of my estate, is that I am confident, and place my trust in him to the extent that he will distribute my estate in accordance with my wishes he and I have often discussed." The court held that the testatrix did not intend to make her brother sole beneficiary of her entire estate. The evidence showed that she intended to give him the property

to be distributed to individuals or for the benefit of charitable causes according to an agreement between them. The language of the will did not create a valid trust as it failed to mention the subject, purpose and beneficiary required by section 2221 of the Civil Code. The court, 45 Cal.App.2d on page 379, 114 P.2d on page 60, states: "But if the language of the will, construed in the light of surrounding circumstances, clearly indicates that the testator did not intend to devise his property absolutely, then the will fails to dispose of such property and it must be considered as intestate property which should be distributed to the heirs according to the rules of succession, even though the will may have attempted to create a trust which is void." That appellant cannot prevail upon the theory that in our case this might be a precatory trust is well shown by the following holding in the Sears case, 45 Cal.App.2d page 380, 114 P.2d 60: "It is conceded in the present case that the language of the will is insufficient to create a trust in the residue of the property by the use of precatory terms. We agree with that statement for the reason that it fails to mention the subject, purpose or beneficiaries thereof, as required by section 2221 of the Civil Code, and because the will does not purport to enforce an imperative obligation upon the brother of the testatrix to perform any specific acts. Wills v. Wills, 166 Cal. 529, 137 P. 249; Estate of Mitchell, 160 Cal. 618, 117 P. 774; Estate of Lee, 104 Cal.App. 15, 284 P. 948; Estate of Browne, 175 Cal. 361, 165 P. 960; Estate of Mooney, 25 Cal.App.2d 481, 77 P.2d 1098; 25 Cal.Jur. 288, sec. 146; 26 Cal.Jur. 973, sec. 271; 69 C.J. 713, secs. 1830–1832; 1 Restatement of Law of Trusts, 76 § 25; 1 Bogert on Trusts and Trustees, p. 223, § 48. In the authorities last cited it is said that where a testator has made an unrestricted devise of property by the terms of his will, subsequent precatory language will not be deemed to create a trust therein. In [the] Estate of Browne, supra, it is stated that a trust will not be created in the absence of language imposing upon the devisee an imperative obligation to perform specific acts. The early liberal construction of language upholding precatory trusts has been frequently rejected by modern authorities in this and all other jurisdictions. In 1 Bogert on Trusts and Trustees, § 48, it is said in that regard at page 231:

"'The tide has run so strongly against turning precatory expressions into words of trust that the ordinary words of request, recommendation, wish, and desire are quite generally construed to have no legal effect.'"

[1] Our case is on all fours with the Ralston case. Here there can be no question but that the testator intended to create a trust. He did not intend appellant to get the $12,000 personally for he gave him $3000 for his personal use. Appellant himself testified in effect that the testator intended to create a trust. The testator wanted all the money distributed according *"to my personal wishes"* (emphasis added), but he failed to express his personal wishes as to a part of that money. As to that portion of the money his failure to designate with sufficient certainty the objects or purposes of the attempted trust makes it invalid and unenforceable. His intent being clear that appellant was not to acquire a beneficial interest in that portion of the fund, and there being a residuary clause in the will in question (differing from the situation in the Ralston case), it goes to the residuary legatees under the will, to wit, the First Congregational Church of San Francisco and Goodwill Industries of San Francisco.

[2] We now come to the persons not on appellant's list whom the court made legatees in the decree of distribution. As pointed out in Estate of Ralston, supra, and Sears v. Rule, supra, the language used by the testator is not sufficient to create a valid trust. But there is another reason why, in no event, were the awards to these persons proper, and that is, that the evidence fails to support such awards. Whether or not they were included in the "personal wishes" of the testator is a question of fact to be determined from the evidence. If there was substantial evidence to support the trial court's finding that they were so included, this court would be bound by the court's finding. However, an exhaustive search of the transcript finds no evidence

that would support the court's finding as to these persons. Neither of these persons has seen fit to file a brief in support of her award.

The Vera Kreekis Award.

The first is Vera Kreekis, to whom the court awarded $1000. She is the older sister of Mary Kreekis, who was on appellant's list for $1000. Appellant very strenuously denied that the testator ever told him to give Vera anything. He was questioned several times on the subject and each time was very positive that the testator had never included her in the persons to whom money was to be given, although testator did instruct him to give her sister Mary the sum of $1000. Mrs. Degman testified that before he made his last will, testator told her that appellant had asked him to leave a sum of money to the two daughters of Mrs. Kreekis (Mary and Vera) for their education, but Mrs. Degman was not asked what reply testator made to that request, nor does she testify that testator ever said he was going to give these girls anything. Michael Kruger testified that the testator told him that he was going to help Vera and Mary Kreekis, by giving them something for their education. However, no sum was mentioned.

Mrs. Alvine Kreekis testified that before testator's death appellant came to her and said that he was sent by testator to get the correct names of her daughters as testator wanted to leave them a certain amount for their education. Appellant mentioned $500 for Vera (and the court awarded her $1000); $1000 for Mary and $500 for the witness. Mrs. Kreekis then goes on to testify that there was some discussion between her and appellant about appellant's marrying the older daughter. The witness testified that after testator's death, appellant offered $1000 to buy an engagement ring and stated that he would provide for her last year in college if she would marry him. After testator's death appellant only mentioned the $1000 Mary was to get and did not mention any more about the $500 to Vera. There was some mention, too, of appellant's marrying Mary, but the witness did not know whether he was serious or joking. The witness had talked to testator, who seemed interested in the girls, and wanted to know about their progress in school and what they intended to do. But the witness nowhere in her testimony claims that testator ever mentioned any specific amount to go to her daughters or even that he had said that he was going to give them any money whatever. Appellant denied flatly ever telling Mrs. Kreekis that the testator was going to leave $500 or any sum either to Vera or to Mrs. Kreekis.

The situation then is this—that appellant, who is the only one who knows what the "personal wishes" of testator were, denies that they ever included $500 or $1000 (the amount which the court awarded) for Vera Kreekis, or that he was told to give her anything. The cross examination of appellant on the subject of Vera Kreekis attempted to get appellant to admit that the testator had instructed him to give her some sum of money, but because one of the Kreekis girls would not marry him, appellant was not carrying out the wishes of the testator. However, appellant denied this, and there is no evidence upon which the court could base such a finding. There is no testimony in the case upon which the court could award Vera any sum whatever, much less the $1000 which it did award.

The Alma Loose Award.

The court awarded Alma Loose the sum of $2000. Nowhere in the record is there the slightest justification for this. Alma Loose was employed in the hotel where the testator resided. She claimed that over a period of years she had rendered many services for him; that he had offered to buy the hotel for her; that he would put up the money and then "off and on you can give me a few dollars." She declined. She testified that the testator had told her often that when he died she would never have to work again; that he would put her in his will. Hers was the only testimony on the subject. It is interesting to note that Mrs. Loose filed a claim against the estate in the sum of $24,000 for alleged services rendered to the testator by her during his various illnesses. This claim was settled for $1500.

Counsel for Mrs. Loose tried very hard to get appellant to admit that testator had included her among the beneficiaries to whom appellant was to give money, but appellant vigorously denied that the testator had ever suggested his giving her anything. It did appear on the cross-examination of appellant that, during the negotiations for the settlement of Mrs. Loose's $24,000 claim, appellant had suggested that $300 be taken out of the $12,000 and paid to her, and if necessary she be paid $500. Appellant denied that these sums were offered because he was supposed to treat her as a beneficiary of the will. There is no testimony whatever that Mrs. Loose was to receive $2000, or any other sum, other than Mrs. Loose's own statement that she was to be remembered in the will. How the court decided to award her any sum, much less $2000, it is impossible to determine. Alma Loose's testimony, if true, does not establish a right to an award of $2000. It is interesting to contrast her story on the witness stand with her claim for $24,000 for services to the decedent, and her sworn answer in which she claims that she is "the undisclosed distributee" referred to in the will and entitled to the entire $12,000. Even though testator told Mrs. Loose he was going to mention her in his will, that would not be sufficient to entitle her to an award here, unless testator instructed appellant that that was a part of his "personal wishes." Appellant denied that he was so instructed and there is not one scintilla of evidence to the effect that he was so instructed.

Extraordinary Fees of Executor and His Attorney.

[3] The court found that the executor and his attorney had rendered extraordinary services and allowed them each a fee of $500 to be paid out of the $12,000. Appellant objects to this award. The finding on this subject in the decree of distribution does not state what these services consisted of, whether for extraordinary services rendered in connection with the general administration of the estate, or merely in connection with the proceeding for the supplemental decree of distribution. If for the former, there is no question but that they are allowable. If for the latter, there would appear here special circumstances justifying such an allowance. In the ordinary estate, the duties of the executor and his attorney end with the obtaining of the decree of distribution, and the payment to the heirs and legatees of their distributive shares set forth therein. But in this case, due to the fact that appellant had declined to disclose to the executor who the legatees were, it was necessary to impound certain sums, have a citation issued to appellant to come into court, and then to have a two day hearing to enable the court to interpret the will, so that the estate could be finally closed and the executor and attorney wind up their services to the estate. Under this court's determination of this appeal, these fees are really being paid out of the residue of the estate, and not out of any legacy in the will. While ordinarily the executor and his attorney are not interested in and cannot litigate the claims of one set of legatees against the others at the expense of the estate, here, due to the particular situation evolved by the failure of appellant to disclose the names of alleged legatees, and the necessity of the executor obtaining an order to close the estate, and an interpretation of the court of the will (no one else having asked for it or appearing to be intending to) the case comes within the ruling in Estate of Murphy, 145 Cal. 464, 467, 78 P. 960, 961. That case holds that this rule has well defined limitations and that "wherever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it * * * the rule does not operate." The circumstances of our case bring the executor and his attorney within the following language in section 902 of the Probate Code (the section which provides for the payment of extraordinary services to such persons): "Such further allowances may be made as the court may deem reasonable for any extraordinary services, such as * * * such other litigation or special services as may be necessary for the executor or administrator to presecute, defend, or per-

form." The same ruling would apply to the sum advanced by the executor for court costs.

Attorneys' Fees to Appellant's Attorneys.

[4] Respondent calls attention to the fact that the trial court awarded the then attorneys for appellant, $1500 out of the $12,000 for their fees in representing appellant at the hearing. This appeal is from specified portions of the decree of distribution only. Naturally, appellant did not appeal from, nor is he complaining about this award. The respondent likewise did not appeal therefrom, nor did anyone else, particularly the residuary legatees who are the ones most affected by it. Respondent states in his brief: "When the appellant asked that the case be reviewed he naturally wanted the whole questions involved determined by the Court, which would include the attorney's fees for appellant * * *." Unfortunately this is not the case. We can only consider the questions which are properly before us, and this question is not. Therefore we cannot pass upon its validity. In declining to pass upon the question because there is no appeal concerning it, our action should not be construed as an approval of its validity nor a determination that the fees were properly awarded.

Attorney's Fees to the Attorney for Alma Loose.

[5] The trial court awarded Mrs. Loose's attorney $500 to be paid out of the $12,000. On just what theory that award is based does not appear. Under the law, the attorney for a legatee or claimant must look to his client for payment of his fees and not to the estate. Even if the court had been correct in making Mrs. Loose a legatee of a portion of the $12,000, it would have no authority to take more moneys out of that fund to pay her attorney. She would have to pay him from the moneys coming to her. Under any theory, as Mrs. Loose is not entitled to the award made her, her attorney likewise is not entitled to the award made him. Estate of Walden, 174 Cal. 776, 164 P. 639, holds that the attorney for an unsuccessful claimant to heirship in an estate is not entitled to attorney's fees even though it is claimed that the services rendered aided the successful claimants and also aided in defeating other claimants.

In view of the foregoing, the following order is hereby made:

(a) The awards to Dr. Pierce for extraordinary services as executor and of certain court costs, and to E. M. Gibbons for extraordinary fees as attorney for the executor, are hereby affirmed.

(b) The awards of $1020.27 to the First Congregational Church of San Francisco and of $1020.27 to Goodwill Industries of San Francisco as residuary legatees are hereby affirmed.

(c) Those portions of the order appealed from, finding that Vera Kreekis and Alma Loose are legatees and beneficiaries under the will of the testator, and ordering payment to them of certain sums respectively, are hereby reversed.

(d) That portion of the order appealed from awarding certain sums to Leslie C. Gillen for attorney's fees in representing Alma Loose, is hereby reversed.

[6] (e) The decree of distribution is modified to provide that all sums remaining from the $12,000 after payment of all sums properly deductible therefrom shall be paid to the residuary legatees, the First Congregational Church of San Francisco and Goodwill Industries of San Francisco, in equal proportions. In the interests of justice, the costs of this appeal shall be borne by the estate.

PETERS, P. J., and WARD, J., concur.

78 Cal.App.2d 805

## PEOPLE v. VALDEZ.

Cr. 4059.

District Court of Appeal, Second District, Division 1, California.

March 28, 1947.

Hearing Denied April 24, 1947.

1. Criminal law ⇐1170(2)

Denying cross-examination of victim of robbery respecting ability to identify defendant was not prejudicial in view of subsequent evidence.

2. Criminal law ⇐730(3)

In robbery prosecution, wherein defendant testified that he was with a third person in another city and had left such city, remark of district attorney that defendant did not want to tell them that he left such city with third person, was not prejudicial misconduct, where court instructed jury to disregard the remark.

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Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

George Valdez was convicted of robbery in the first degree, and he appeals.

Judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was found guilty by a jury of robbery of the first degree. The victim of the robbery who was a taxicab operator testified that about 1:30 o'clock in the morning, "I was cruising down the street", in front of the Roosevelt Building and saw the defendant "standing by the edge of the curb". "I came back in about 10 minutes and he was still there, so that I stopped there." "There was another fellow that hailed me." "Mr. Valdez was back by the building by this time and this other fellow was near the curb." Defendant and his companion entered the cab and directed the driver to go to Beverly and Fairfax. The robbery occurred shortly thereafter. The victim further testified, referring to defendant, "he took his wallet out and he started to pay me, and I noticed he had a ten dollar bill in his pocket, and I was just going to say, 'Well I can change that ten dollar bill', and then Mr. Valdez, he says, 'This is it'." Q. "Who said that?" A. "Mr. Valdez, and I looked down and he had a gun in his hand."

[1] It is contended on appeal that the court erred "in the admission and exclusion of evidence". During the cross-examination of the victim of the robbery, defendant's counsel asked the following question: "Isn't it true that you turned to the party next to you and said, 'I don't see the man in court', didn't you make a statement like that?" An objection was sustained. It is argued that the question had reference to the witness's ability to identify defendant and was therefore proper. Appellant's contention that the ruling was prejudicial is without merit. Following the above ruling the witness testified as follows:

"Q. Did you make any statement regarding the identification of this man in the court at that time? A. There was no doubt in my mind, I saw the man, I knew he was there.

"Q. Didn't you say you were not sure that is the man? A. I never said that.

"Q. You never said that? A. No, sir.

"Q. Who was sitting next to you? A. My sister.

"Q. Who was sitting right behind you, if you remember? A. I don't know.

"Q. Do you remember? A. I don't know.

"Q. You didn't notice? A. No, sir.

"Q. Do you see any person in this court room that was sitting right behind you that day? A. No one that I noticed.

"Q. Or in front of you? A. No, sir.

"Q. Mr. Patterson, isn't it true that a police officer had to point Valdez out to you in order for you to know who he was? A. No, sir."

[2] It is also urged on appeal that the District Attorney was guilty of prejudicial

misconduct. Quoting from appellant's brief, the following occurred:

"* * * the defendant had testified that he was with Dominick Perino in Stockston and had left Stockton. The prosecutor asked the defendant:

"Q. You don't want to tell us you left there with Dominick Perino, is that the idea? A. No sir, I did not mean that.

"Mr. Weller: I object to that as prejudicial, intimating that this man is holding something back. Highly prejudicial. I object to it as misconduct.

"The Court: The jury will be instructed to disregard the last remark of counsel."

Appellant argues that, "Although the court instructed the jury to disregard the remark of the prosecutor, it is doubtful whether the remark and its effect could be thus erased." It is quite evident that no prejudice resulted from the ruling.

The evidence supports the judgment and there being no prejudicial errors in the record the judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.




78 Cal.App.2d 528

**Ex parte TROMBLEY.**

**Cr. 2443.**

District Court of Appeal, First District, Division 2, California.

March 12, 1947.

Rehearing Denied March 27, 1947.

**1. Habeas corpus ⇐105**

The scope of inquiry in habeas corpus proceeding after judgment of conviction has become final on appeal is limited.

**2. Habeas corpus ⇐32**

Habeas corpus is available for attack after final judgment on ground of unconstitutionality of statute under which petitioner was convicted.

**3. Master and servant ⇐84**

Allegations in complaint in misdemeanor prosecution for failure to pay wages in violation of Labor Code, that defendant had ability to pay wages which were owing to and were demanded by employee who quit, and that defendant refused to pay with intent to delay and defraud employee, were sufficient to confer jurisdiction on justice court, notwithstanding absence of allegation that defendant falsely denied amount or validity of wage claim or that wage was due. Labor Code, § 216(a, b).

**4. Habeas corpus ⇐92(1)**

The finding, which was before Superior Court on appeal from justice court conviction for failure to pay wages in violation of Labor Code, that accused falsely denied amount and validity of wage claims and that wages were due, with intent to defraud, could not be inquired into in habeas corpus proceeding in which accused attacked constitutionality of Labor Code. Labor Code, § 216(a, b); Const. art. 1, § 15.

**5. Constitutional law ⇐83(3)**
**Master and servant ⇐69**

The Labor Code penalizing failure to pay wages due employee is not violative of constitutional prohibition against imprisonment for debt. Labor Code §§ 202, 204, 207, 216, Const. art. 1, § 15.

**6. Judges ⇐29**

A justice of Class B court cannot pronounce judgment in Class A court, although justice of Class B court trying case in another Class B court may retain jurisdiction to complete case, notwithstanding change of court from B to A status.

**7. Criminal law ⇐977(3), 1083**

An outside justice called to try case by justice disqualifying himself had jurisdiction to pronounce sentence immediately following judgment of conviction, and second sentence by outside justice after affirmance of judgment of conviction by Superior Court was superfluous and did not vitiate first sentence.

**8. Criminal law ⇐90(3)**

A sentence imposing fine of $100 on each of three counts charging failure to pay wages and 30 days imprisonment and providing for suspension of sentence on

payment of overdue wages of the three employees of $455, $474 and $434 respectively was not an attempted adjudication of civil liability of defendant for wages, and hence was not in excess of $300 civil jurisdiction of justice since defendant could accept or reject the alternative offered him which would have suspended the penalty. Labor Code § 216(a, b).

**9. Habeas corpus ⇐4**

Claimed irregularity in impaneling jury, failure to give instructions, insufficiency of evidence, failure to prove petitioner's ability to pay, absence of demand, and various claimed errors in rulings were within jurisdiction of justice court and were reviewable on appeal to Superior Court and were not within scope of habeas corpus proceeding.

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Proceeding in the application of Walter Trombley for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

Opinion followed in 178 P.2d 513.

Cornish & Cornish, of Berkeley, for appellant.

Samuel S. Berman, of San Francisco, Harold J. Fisher, of Los Angeles, and Leon E. Gold, of San Francisco, Attys. for Labor Com'r, amici curiae on behalf of respondents.

GOODELL, Justice.

This is a proceeding in habeas corpus.

A complaint was filed in the Justices' Court of Township Fifteen, Contra Costa county, accusing the petitioner in five counts of five violations of the Labor Code. Four counts charged failure to pay wages to four employees (Labor Code, secs. 202 and 216) and the other charged a failure to maintain semi-monthly pay-days (sec. 204), and a failure to post notices thereof (sec. 207).

Petitioner pleaded not guilty and was tried by jury. He was convicted on four counts (one having been dismissed by the district attorney) and sentenced. On appeal the Superior Court affirmed the judgment and the order denying a new trial. Petitioner then commenced this proceeding.

[1, 2] It is hardly necessary to say that the scope of the inquiry in a proceeding such as this, after the judgment of conviction has become final on appeal, is extremely limited. The petitioner, however, attacks the constitutionality of the statute under which he was convicted, and habeas corpus is available for such attack after final judgment. Ex parte Bell, 19 Cal.2d 488, 495, 122 P.2d 22.

The attack is based on section 15 of Article I of the state constitution which reads: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, * * * ".

The original labor law (Stats.1911, pp. 1268–9) was under attack in In re Crane, 26 Cal.App. 22, 145 P. 733, where it was held that the arrest of Crane on mesne process was violative of the constitutional provision. To replace the 1911 law the statute of 1919, p. 294 was enacted, section 6 of which read substantially as section 216 of the Labor Code now reads.

The 1919 act was held to be constitutional in In re Oswald, 76 Cal.App. 347, 244 P. 940; In re Samaha, 130 Cal.App. 116, 19 P.2d 839; Sears v. Superior Court, 133 Cal.App. 704, 24 P.2d 842, and In re Sears, 137 Cal.App. 308, 30 P.2d 571. See, also, In re Moffett, 19 Cal.App.2d 7, 17, 64 P.2d 1190.

By Statute of 1937, p. 185, the 1919 law was repealed (p. 327) and the present law enacted (pp. 197, 199) and codified in section 202 of the Labor Code which reads: "If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than seventy-two hours thereafter, unless the employee has given seventy-two hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting."

Section 216 of the same code reads: "In addition to any other penalty imposed by this article, any person, or an agent, manager, superintendent, or officer thereof is guilty of a misdemeanor, who:

"(a) Having the ability to pay, wilfully refuses to pay wages due and payable when demanded.

"(b) Falsely denies the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due."

Petitioner concedes that the 1919 law was held constitutional but contends that he was charged, not with a violation of subdivision (b) of section 216, but of subdivision (a) and that subdivision (a) is subject to the same criticism as was the 1911 law.

This calls for an examination of the complaint.

Each of the four counts for nonpayment of wages reads substantially as follows: That petitioner did, on a stated day, commit a misdemeanor, to-wit, a violation of sections 202 and 216, in that "having the ability to pay, and payment of said wages having been demanded, did wilfully and unlawfully fail and refuse to pay * * * the wages due the said employee *with intent to annoy, harass, hinder, oppress, delay, and defraud* the said employee" after such employee had quit, and after his demand for payment. (Emphasis added.)

There is no substantial difference between this allegation and the second count in the Sears case, quoted at 133 Cal.App. at page 708, 24 P.2d 842, and at 137 Cal. App. at page 310, 30 P.2d 571, which allegation was held sufficient in both Sears decisions, supra.

[3, 4] Granting that the 1919 act was upheld because imprisonment was therein imposed only for fraud and oppression (see People v. Perry, 212 Cal. 186, 195, 298 P. 19, 76 A.L.R. 1331) and not merely for nonpayment of debt, it clearly appears both from the complaint and the statement on appeal that the petitioner in this case was accused, tried and convicted under *both* subdivisions of section 216. The record discloses that the case was tried on the theory that the petitioner falsely denied the *amount* and *validity* of employees' wage claims; that he falsely denied *that the wages were due,* and that he did so with the *intent to defraud.* It is true that there is no statement in the complaint in so many words that petitioner falsely denied the *amount* or *validity* of the claims or *that they were due,* but, as said in Sears v. Superior Court, 133 Cal.App. 704, 708, 24 P.2d 842, 844, "Even though the complaint may be defective, its allegations are sufficient to confer jurisdiction upon the justice's court." The jury found on these questions adversely to the petitioner, such finding was before the Superior Court on the appeal, and it cannot, of course, be inquired into on habeas corpus. (See Ex parte Lindley, 29 Cal.2d 709, 177 P.2d 918, and cases there cited.)

[5] As there is no substantial difference between the language of the 1919 law and the present act, it follows that the present law must be held to be constitutional on the authority of the four cases cited above which held the 1919 law valid.

The petitioner's second point touching jurisdiction is that the justice who tried the case lacked jurisdiction to pronounce the second sentence, after affirmance.

[6, 7] Judge Masterson of Township Fifteen disqualified himself and called in Judge Davis of Township Ten (Sec. 105, Code Civ.Proc.) who presided at the trial and pronounced the sentence. After affirmance Judge Davis again sentenced the petitioner in the same terms as those of the original sentence. However, in the interval between the first sentence and the second, the court of Township Fifteen had been increased in rank from a Class B to a Class A Justices' Court. The petitioner contends that after the change from B to A status, the justice of the Class B court (which Judge Davis remained throughout) had no jurisdiction to preside or pronounce sentence in a Class A court. This may be conceded (although he might well have had jurisdiction to complete the case which he had tried, see People v. Dorius, 49 Cal.App.2d 259, 121 P.2d 508), still it was not necessary to resentence the petitioner after the affirmance. Judge Davis had the judicial power at the time of the trial to conduct such trial and to pronounce the

first sentence (People v. Sansome, 98 Cal. 235, 240, 33 P. 202; People v. Sehorn, 116 Cal. 503, 506, 48 P. 495; Sears v. Superior Court, 133 Cal.App. 704, 710, 24 P.2d 842), and such sentence sufficed. The second sentence, after the affirmance, was a superfluous ceremony which could not, and did not, vitiate the sentence pronounced immediately following the judgment of conviction, the terms of which were in no way modified on appeal.

[8] The petitioner's third point is that the sentence was in excess of jurisdiction. The sentence imposed on each of the three counts on the wages was a fine of $100 *and* imprisonment for 30 days in the county jail, the terms to run consecutively. However, attached to each sentence was the proviso that if the petitioner paid within 48 hours to each of the three employees the amounts respectively claimed to be due, $455 in one case, $474 in another, and $434 in the third, the sentences would be suspended. The jurisdiction of the court in civil actions did not go above $300. and it is claimed that "By threat of imprisonment for 30 days the Justice of the Peace attempted to determine civil liability in excess of his civil jurisdiction without a proper trial to determine that liability and to enforce payment of a total sum beyond his power to impose a fine", for which reasons it is argued the petitioner was imprisoned for a civil debt. The court in imposing this sentence by providing terms of suspension (the equivalent of probation) gave the option to the defendant to avoid both fine and imprisonment by paying the employees what they claimed. It was not an attempted adjudication of a civil liability at all. The petitioner could accept or reject the alternative offered him (People v. Billingsley, 59 Cal.App.2d Supp. 845, 849, 139 P.2d 362 and cases there cited) which would have suspended the penalty and he has chosen up to this time to reject it.

The record contains a statement of "Points to be urged on appeal", and it is only fair to say that the three questions just discussed were not among the five points contained therein, four relating to instructions and the other to proof of the petitioner's ability to pay the wages in question.

[9] The petition presents numerous other points—claimed irregularity in impaneling the jury; failure to give instructions; insufficiency of the evidence; failure to prove petitioner's ability to pay; absence of demand, and various claimed errors in rulings. All these matters were within the court's jurisdiction, were reviewable on the appeal, and they are not within the scope of this proceeding. (13 Cal.Jur., p. 218, sec. 4; Ex parte Connor, 16 Cal.2d 701, 705–6, 108 P.2d 10 and cases there cited; Ex parte Lindley, supra; In re Samaha, supra).

The writ is discharged and the petitioner remanded to custody.

NOURSE, P. J., and DOOLING, J., concur.






## TROMBLEY v. JUSTICE'S COURT OF TOWNSHIP FIFTEEN, CONTRA COSTA COUNTY, et al.

Civ. 13352.

District Court of Appeal, First District, Division 2, California.

March 12, 1947.

Rehearing Denied April 11, 1947.

Hearing Granted May 8, 1947.

**Habeas corpus ⇐92(1)**

The scope of inquiry upon habeas corpus is exactly the same as upon writ of review.

Proceeding by Walter Trombley against the Justice's Court of Township Fifteen, County of Contra Costa, State of California and Superior Court of the State of California in and for the County of Contra Costa, for a writ of review.

Application denied.

Following opinion 178 P.2d 510.

Cornish & Cornish, of Berkeley, for petitioner.

Samuel S. Berman, of San Francisco, Harold J. Fisher, of Los Angeles, and Leon E. Gold, of San Francisco, for Labor Com'r, amici curiae on behalf of respondents.

GOODELL, Justice.

This is an application for a writ of review.

The petitioner filed a petition for a writ of habeas corpus, which was granted.

The only question raised herein is as to the constitutionality of certain sections of the Labor Code. The same question was presented in the habeas corpus case. The scope of the inquiry is exactly the same in both proceedings. In re Drew, 188 Cal. 717, 720, 207 P. 249; In re Sears, 137 Cal. App. 308, 310, 30 P.2d 571; Wilde v. Superior Court, 53 Cal.App.2d 168, 176, 127 P. 2d 560.

In an opinion this day filed in the habeas corpus case Cal.App.2d, 178 P.2d 510, the question herein presented is fully discussed. For the reasons given and on the authorities cited therein, the alternative writ is discharged and the application for a peremptory writ of review is denied.

NOURSE, P. J., and DOOLING, J., concur.




78 Cal.App.2d 818

## SEAMANS v. STANDARD HOTEL CORPORATION et al.

Civ. 15532.

District Court of Appeal, Second District, Division 3, California.

March 28, 1947.

Hearing Denied May 26, 1947.

1. Innkeepers ⇐10

In action by guest in hotel for injuries sustained in fall where there was a six-inch drop from patio to basement corridor, evidence of lack of illumination at drop-off was within issues, where petition alleged that defendant negligently failed to warn guests of the drop-off.

2. Pleading ⇐246(3)

In action by guest in hotel for injuries sustained in fall where there was a six-inch drop from patio to basement corridor, court should have permitted guest to amend pleadings to permit introduction of evidence concerning lack of illumination at drop-off.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Minnie E. Seamans against Standard Hotel Corporation, a corporation, and others, to recover for injuries sustained by plaintiff when she fell while descending a stairway of a hotel. From a judgment in favor of defendants, the plaintiff appeals.

Judgment reversed.

W. P. Butcher, of Santa Barbara, for appellant.

Griffith & Thornburgh, of Santa Barbara, for respondents.

WOOD, Justice.

This is an action for damages for personal injuries sustained by plaintiff when she fell while descending a stairway of a hotel. Edward M. Coffman, the owner of the hotel, was the only defendant appearing. In a trial without a jury, judgment was for defendant, and plaintiff appeals therefrom.

On March 12, 1944, about 8:15 a. m., plaintiff, who was a paying guest at the Lobero Hotel in Santa Barbara, had gone into the basement for the purpose of asking the porter to go on an errand for her. He was not there and, the automatic self-serving elevator in which she had gone to the basement being in use, she walked along the basement corridor and through a door into a patio on the east side of the hotel, intending to go upon the street. The patio is higher than the floor of the basement, and access to the patio from the basement is gained by going through a double door and ascending a brick stairway consisting of 3 steps, that is, 3 treads and

4 risers. The tread of each step is about 5 feet in length and 15 inches in width, and each riser is about 6 inches high. Each door of the double door is 2½ feet wide, and the lower 31 inches of each door consists of wood panels, and the part of each door above the panels consists of 8 panes of glass. The doors open into the corridor of the basement, and when the doors are closed the inside face of each door is flush with the riser of the bottom step; in other words, the 6-inch upright part of the bottom step (the riser) extends from the floor of the corridor in a straight line with the inside face of the closed door, and no part of the tread of the bottom step is in the corridor and the floor of the corridor is about 6 inches below the bottom of the door. A person using the stairway to go from the patio to the basement corridor would descend the 3 steps to the doorway, open the door, and then immediately step down about 6 inches onto the floor of the corridor. After plaintiff had gone into the patio, she went to the gate between the patio and the street, but finding the gate locked she returned to the stairway, intending to go to the basement corridor. She descended the 3 steps to the closed double door, then opened one of the doors and, while stepping into the basement corridor, fell to the floor, sustaining severe injuries.

The floor of the corridor is also made of bricks. The wall of the corridor facing the patio is 33 feet in length, and the double door is in the middle of the wall. On each side of the double door, and as a part of the doorway framework, there is a french door about 18 inches wide, of the same height and construction as the double door, with 4 panes of glass in it above the 31-inch wooden panel. Over each door there is a glass transom. At the side of each french door, and about 3 feet therefrom, there is a window about 7' x 7' containing 28 panes of glass. A large recreation room in the basement, in which there were 20 cots, was being used at the time of the accident as sleeping quarters for men in the armed services.

It was alleged in the complaint, in part, that while plaintiff was descending the steps, leading from the patio into the hotel building, she passed over the perpendicular drop-off which is adjacent to said doorway, and as a proximate result of defendants' negligence slipped and fell headlong and was severely injured; that the defendants negligently "permitted the said entrance and or doorway and or perpendicular drop-off to be and remain in said dangerous, defective, and hazardous condition; that said defendants at said time and place as aforesaid carelessly and negligently failed to warn and advise guests and patrons and business invitees of said hotel among whom was the plaintiff, of the existence and presence of said perpendicular drop-off which was maintained in immediate proximity to said entrance * * *."

At the close of plaintiff's case, her counsel made a motion to amend the complaint by adding the words "or to illuminate" after the words "presence of" in the part of the complaint just quoted, so that the complaint would read, at the place amended, that said defendants "negligently failed to warn and advise guests and patrons and business invitees of said hotel among whom was the plaintiff of the existence and presence of *or to illuminate* said perpendicular drop-off which was maintained in immediate proximity to said entrance * * *." (Italics added.)

The court denied the motion, stating in substance that the question of illumination was not involved, and that it was purely a question as to whether there was a hazardous condition. The court had also stated during the trial, in sustaining defendant's objection to evidence regarding lack of illumination, that since plaintiff had alleged special acts of negligence she was limited by them.

Appellant (plaintiff) contends that the original allegations to the effect that defendant negligently failed to warn and advise the guests of the existence of the drop-off were sufficient to entitle her to offer testimony as to lack of illumination, but contends further that if such allegations were not sufficient she should have been permitted to amend. She also contends that the court erred prejudicially in refusing to consider the evidence as to lack of illumination, which evidence was received subject to a motion to strike but which was

not expressly stricken out. She argues that it is obvious from the ruling of the court, to the effect that illumination was not involved, that the court refused to consider such evidence.

During the early part of the trial the plaintiff testified that it was a dark, foggy morning. Counsel for defendant then moved to strike out that statement on the ground that it was not responsive, and the motion was granted. Thereupon, counsel for plaintiff said: "I am going to ask leave at the conclusion of this case to file an amended complaint to conform to proof by alleging as a further ground of negligence the absence of proper illumination." Counsel for defendant then said: "You are bound by the Complaint. If there is going to be an Amendment, let him dismiss and re-file. We don't have to come in here and defend, not on any other ground." Plaintiff's counsel said: "I will just simply make that statement. My motion hasn't been made yet." The court said: "Let's arrive at that, gentlemen, when we get there." On cross-examination of plaintiff, in response to a question as to whether she stepped into the corridor without looking, she said: "Oh, I looked all right, but I couldn't see anything. It was because it was so dark. There was no light there and it was a dark foggy morning." Then counsel for defendant said: "Dark, foggy morning, so you couldn't see anything." Subsequently, on cross-examination, he exhibited to her a written statement signed by her, and called attention particularly to a part thereof which recited that "the weather was clear and sunny."

Plaintiff's sister, who also lived at the hotel, went into the basement within a few minutes after the accident. She testified:

"It was a dark morning. You see, we had fog all that year, a great deal of it and it was dark when I went down and when I entered that corridor. I had to get used to the light and I had to be shown really where to go, and when I got there, I could just see.

"Q. [By plaintiff's counsel] Was there a light? A. No, there was no light burning in the hall."

Then the following occurred:

"Mr. Thornburgh [counsel for defendant]: I object to that on the grounds that it is incompetent, irrelevant and immaterial. Move to strike it out.

"Mr. Butcher [counsel for plaintiff]: On the grounds that it is not embraced within the issues?

"Mr. Thornburgh: That is correct.

"Mr. Butcher: May I ask leave, your Honor, to put it in subject to a motion to strike.

"Mr. Thornburgh: Yes.

"The Court: Yes, subject to a motion to strike.

"Q. There was no light, no illumination in the corridor? A. No, none whatever. An order is given to conserve light."

Subsequently, on cross-examination, counsel for defendant exhibited to the witness, plaintiff's sister, a written statement signed by her, and called attention particularly to a part thereof which recited that, "It was damp outside; the sun was shining, but not strong."

At the close of plaintiff's case when her counsel made the motion, as above stated, to amend her complaint, counsel for defendant objected to the motion on the ground that "we prepared for trial confronted by one thing in the complaint filed many months ago as being a dangerous condition, namely, a drop-off"; that defendant had not prepared any evidence on illumination; and that if plaintiff intended to amend she should have sought such permission previously. Counsel for plaintiff replied that he had assumed, until the ruling of the court in the morning session of the trial, that the words in the complaint, "failed to warn and advise the guests," would be broad enough to include the question of visibility. The court said: "Which is elementary, that when you plead special facts of negligence, you are confined and limited to them." Counsel for plaintiff then said that an objection to his question regarding visibility had been sustained; that on cross-examination counsel for defendant had brought out whether it was light or dark; that since plaintiff had

shown an absence of a light in the hallway, she should have the right to make her complaint conform to the proof; that, if counsel for defendant had been taken by surprise, plaintiff was willing to stipulate that the case be continued for such time as might be required by defendant to prepare for trial under the amendment. Counsel for defendant said: "[T]he only thing here is failure to warn and advise plaintiff of the existence of said perpendicular drop-off. That's the only allegation in the complaint. Now I didn't bring up the subject of light. The two,—the plaintiff testified it was a dark, gloomy day and the sister testified that it was the same sort of a day. I introduced their statement that it was a clear sunshiny day, the one being admission against and the other as impeachment. Now it doesn't seem to me that that changes it." He said further that plaintiff relied upon a particular act of negligence and she is bound by it, and that he resisted the motion to amend. The court said: "I believe that was the situation. The court is inclined to view motions to amend to conform to proof with some large degree of leniency, but I don't believe that the question is involved. I think it is purely a question of whether there was an imperfect and hazardous condition and I am not convinced, after listening, that it is a question of lighting and illumination and for that reason the motion is denied."

Thereafter defendant called the weather observer as a witness, and asked her: "What kind of a day was it [referring to the day of the accident]?" Counsel for plaintiff objected to the question on the ground that it was "immaterial, in view of the ruling of the Court—that that was not within the issues of this case, the question of visibility. * * * We were not permitted to * * * keep in evidence on that subject, and it is an attempt to impeach the witnesses of the plaintiff's case on an immaterial matter."

Counsel for defendant said: "It is a definite statement by your own plaintiff.

"The Court: Yes. It is at least admissible for the purpose of impeachment.

"Mr. Butcher: On an immaterial matter.

"Mr. Thornburgh: I don't think it is immaterial; that's her own excuse for not seeing or doing anything else—it was a bad day."

The court overruled the objection, and the witness said it was a clear day. It was stipulated, at the close of the evidence when the judge took the case under advisement, that he might view the premises, but the record does not show whether or not he did it.

The court found that the stairway, leading through the double doors to the floor of the basement corridor, and the doorway with the two doors were not, either together or singly, defective or dangerous or hazardous to persons using them; that the presence of said stairway, doorway and doors, and the type of construction of the same, "are open, apparent and patent to anyone using the same, either for ingress to or egress from said basement corridor"; that "plaintiff's fall was not caused by any dangerous or defective or hazardous condition existing in the stairway and doorway or in either of them, or in any other facility of said hotel, nor was it caused by any negligent act or conduct on the part of defendant"; that her fall and injuries were caused by reason of her "negligent and careless failure to look where she was walking and stepping," and that her negligence proximately caused the injuries received by her.

[1] Plaintiff contends, as above stated, that the court erred prejudicially in refusing to consider the evidence introduced by her concerning the lack of illumination in the hallway. Counsel for defendant asserts that "it must be presumed that the Court considered the evidence on illumination produced by appellant as well as the other evidence on that subject." In this case, since the record shows that the trial judge ruled that the question of illumination was not involved, it must be assumed that, in conformity with his declaration, he regarded the evidence concerning a lack of illumination in the hallway as immaterial to the issues, and that he did not consider it. It is true, as defendant asserts, that if specific acts of negligence are alleged, rather than negligence generally, evidence of acts of negligence other than those speci-

fically alleged would be immaterial and not within the issues. Plaintiff made a specific allegation concerning the alleged structural defect in the stairway and doorway, namely, the drop-off, but she made a general allegation as to negligence in failing to warn the guests of the existence of the alleged structural defect, that is, she did not specify in what particular manner defendant failed to warn them. Evidence regarding a structural defect other than the one alleged would have been immaterial and not within the issues, but evidence to the effect that defendant failed to warn the guests of the existence of the alleged defect, by reason of a lack of illumination in a dark hallway, was material and within the issues. A warning that a 6-inch step-down exists in a dark hallway just inside an inward swinging door which is at the bottom step of an entrance stairway to a public building might be given in various ways. Illuminating the perpendicular drop-off would have been one way to warn the guests. Plaintiff was not required to designate specifically in her complaint the various ways in which such a warning could properly be given, and then allege particularly as to each kind of warning so designated that defendant failed to give it. Plaintiff's cause of action included a combination of the alleged negligence of defendant in permitting a specifically described hazardous defect in the building to exist and of his alleged negligence in failing to warn the guests of its existence. The evidence regarding a lack of illumination was material and within the issues presented by the complaint, and should have been considered by the court.

[2] Under the view taken by the trial court, that the allegations of the complaint were insufficient to present an issue as to lack of illumination, the trial court should have allowed plaintiff to amend to allege that defendant failed to illuminate the drop-off. Defendant's objection to evidence regarding light was upon the sole ground that it was immaterial because it was not within the issues. Plaintiff's counsel stated to the trial court that he had assumed, until the court ruled otherwise, that the allegation of the complaint regarding failure to warn the guests was broad enough to include the question of visibility, and suggested that if defendant was taken by surprise the case be continued to give him an opportunity to prepare for trial under the amendment. It does not appear that a continuance for such purpose would cause a great delay or prejudice the rights of defendant. After counsel for defendant had objected to evidence on the subject of light, and after the objection had been sustained, he elicited testimony from plaintiff to the effect that there was no light and that it was a dark morning; he presented evidence, on cross-examination of plaintiff and her sister by reference to their written statements, to the effect that the sun was shining that morning, and that the wall, in which the doors were located, faced the east and had a great many panes of glass in it; and by calling the weather observer as a witness, he presented evidence that it was a clear day. He asserts that he did not bring up the subject of light, but that he introduced evidence as to written statements of plaintiff and her sister to impeach their testimony that it was a dark day. The presentation of evidence by defendant as to visibility was inconsistent, of course, with his objection that such evidence was immaterial. The result was, however, that the condition with respect to light outside the hallway was rather fully presented by defendant. Even if the morning was clear and the sun was shining into the hallway through the glass panes on the east wall, as argued by defendant, that circumstance would not be determinative that the space in the hallway below the 31-inch baseboard and panels was not dark, particularly the space below the threshhold referred to as a drop-off. It would seem that the matter of light inside the hallway at that particular point would be especially important, since the stairway and floor, both being made of bricks, might create a deceptive appearance that the bottom step and the floor of the hallway were on the same level. If the sun should be shining brightly, it would seem that such deception would be more probable, since the space in the hallway below the 31-inch baseboard would undoubtedly be in the shadow of the baseboard at that time in the morning, and an interval of time would be required for the

eyes to become adjusted to the different condition of light at the drop-off. There was substantial expert testimony that there was a defect in the construction—a building contractor of extensive experience in constructing large public buildings having testified that the location of the door in relation to the steps is "entirely wrong," that the customary method of construction is to swing the door to the outside, but if it is desired to swing it inside the building there should be a step extending inside from the threshhold for a distance equal to the width of the door. The circumstances relative to the alleged defective construction of the stairway and door were such that the evidence presented by plaintiff as to visibility within the hallway should have been before the court for its consideration, in order that plaintiff might properly present her case.

In the case of Marr v. Rhodes, 131 Cal. 267, 63 P. 364, it was said, at pages 270, 271 of 131 Cal., at page 366 of 63 P.: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." If a delay had been caused by the amendment the court could have required an immediate amendment and imposed terms commensurate to the time and expense of the continuance.

In the case of Hanna v. Hirschhorn, 112 Cal.App. 438, 296 P. 891, 892, wherein the plaintiffs sought damages for breach of contract, the time specified in the contract for performance of certain conditions necessary to consummate the transaction had expired, and plaintiffs pleaded "that the time for performance was extended." The question on appeal was whether tthe trial court should have permitted plaintiffs to amend their complaint by alleging facts which might have constituted a waiver of the provision in the contract that the conditions were to be performed on a certain date. The trial court had denied plaintiffs' motion to amend. In reversing the judgment for defendant therein, it was held (112 Cal.App. at page 440, 296 P. 891) that ordinarily waiver must be pleaded specially, but since plaintiff had pleaded an extension of time it should have been manifest to defendants that plaintiffs relied upon an express or implied extension of time within which to comply with the contract; and that (at page 441 of 112 Cal. App., at page 892 of 296 P.) the pleading had put defendants on notice that "by reason of some unspecified acts or declarations of defendants, plaintiffs asserted a right to perform the conditions provided for by the contract at a date subsequent to that specified therein as a limit for such performance." In the present case the allegation that defendant negligently failed to warn the guests of the drop-off should have placed the defendant on notice that plaintiff intended to prove that defendant failed to warn the guests in all the respects in which he might reasonably have been expected to warn them; and, under the view of the pleadings taken by the trial court, the plaintiff should have been permitted to amend her complaint.

The court found that plaintiff's negligence was the sole proximate cause of the accident, and this finding is relied upon by respondent as furnishing a separate ground for affirmance of the judgment. We are not satisfied to accept it as determinative of the case. The question whether plaintiff was guilty of contributory negligence was one of fact. The finding against plaintiff upon this issue was made without considering whether the failure to illuminate the location was a negligent omission. If upon a retrial the court should find that the absence of illumination constituted negligence, it might also find that such negligence was the sole proximate cause of the accident, adopting the theory that if the step had been illuminated plaintiff probably would not have fallen. The issue of contributory negligence must be redetermined upon a trial had in accordance with the views hereinbefore expressed.

The judgment is reversed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

78 Cal.App.2d 652

**PEOPLE v. SPENCER et al.**

Cr. 4066.

District Court of Appeal, Second District, Division 1, California.

March 20, 1947.

1. Criminal law ⇐407(1)

An accusatory statement against defendant, in his presence, is hearsay, but statement and defendant's failure to deny it may be admitted as an exception to hearsay rule as evidence of defendant's acquiescence in truth of statement or as indicative of a consciousness of guilt, provided accusation was made under circumstances calling for a reply, that defendant had opportunity to make reply, that reply was not under restraint, that defendant understood statement, and that defendant's conduct did not merely indicate desire to invoke rule against self-incrimination.

2. Criminal law ⇐407(1)

The rule of admissibility of testimony concerning defendant's failure to deny an accusatory statement makes defendant's freedom to speak spontaneously, and existence of circumstances calling for a reply, the determinative factor.

3. Criminal law ⇐407(2)

Where officer told defendant and his codefendants that all conversations while all of the parties were present could be used against all of them, defendant's disclaimer of guilt was not naturally called for when a codefendant made a confession implicating defendant, since defendant was merely exercising his constitutional privilege against self-incrimination by his silence and hence such confession and defendant's silence were inadmissible against him.

4. Criminal law ⇐407(1)

The practice of police of confronting a defendant with codefendant and having codefendant make a statement implicating defendant in crime, but which statement contains a vast amount of hearsay testimony otherwise utterly inadmissible and offering entire statement in evidence merely because defendant did not flatly deny statement, is condemned and admission of such evidence in first instance was an abuse of trial court's discretion.

5. Criminal law ⇐633(1)

A defendant, whether guilty or innocent, is entitled to have his case fairly tried according to established rules of law.

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Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Clarence Vollis Spencer, Walter Latimore, and Willie Lee Dandridge were accused in an information of first degree robbery. From a judgment of conviction and an order denying his motion for new trial, defendant Willie Lee Dandridge appeals.

Reversed and remanded.

Francis C. Jones, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, appellant herein, Willie Lee Dandridge, together with Clarence Vollis Spencer and Walter Latimore, were charged in two counts with the crime of robbery allegedly committed on February 28 and March 4, 1946, respectively, in the County of Los Angeles.

Appellant entered pleas of not guilty to each count charged in the information. Trial before the court, sitting without a jury, resulted in the conviction of appellant on both counts, which the court found to be robbery of the first degree. A motion for a new trial was denied. From the judgment and the order denying his motion for a new trial, appellant prosecutes this appeal.

In view of the single question presented on this appeal, it becomes unnecessary to narrate in detail the factual background which gave rise to this prosecution. It will suffice to say that on March 8, 1946, about 2:30 o'clock in the morning, appellant was placed under arrest, in connection with the

foregoing crimes, by officer James P. Brady of the Los Angeles Police Department. The only evidence presented at the trial of this appellant to connect him with the commission of the offenses charged against him was that given by officer Brady, who testified that on the day he arrested appellant he had a conversation with him wherein he inquired of appellant as to whether he "was involved in this robbery, or either of these robberies" to which appellant replied that he was not. On the next succeeding two days officer Brady informed appellant that his codefendants Spencer and Latimore were involved in the aforesaid crimes and in response to further questioning as to his being involved in the commisson of the offenses appellant insisted, "I don't know anything about it." On the morning of March 11, officers Brady and Murphy assembled all defendants in a room at central police station. Thereupon officer Murphy advised the four men "that all conversation that we would have when all four were present, that we could use against all four of them." Officer Murphy then said, "I want you Spencer (one of the defendants), to tell us what happened." Defendant Spencer thereupon, in detail, described the manner in which both robberies were committed. In the course of his narrative, defendant Spencer stated that on the day prior to the commission of one of the robberies—a jewelry store—appellant herein went into the store "to look over the place" on the pretext of making inquiry "pertaining to getting a link fixed on his wrist watch." Defendant Spencer further stated that on the occasion of both robberies their automobile was parked a short distance from the scene of the crimes and that appellant Dandridge remained in the "getaway" vehicle until the two men who actually perpetrated the robberies returned with the loot, whereupon they drove away and later divided the spoils among themselves.

At the conclusion of defendant Spencer's statement, according to the testimony of Officer Brady, "Officer Murphy asked Latimore and the rest if they were in on the job. Walter (defendant Latimore) said that he was, that everything Spencer said was right; and Dandridge (appellant herein) did not say anything * * *." When officer Brady was asked, "Now, at the time of this conversation when the four defendants were present, did you ask at that time the defendant Dandridge (appellant herein) specifically again if he was involved in the crime?" the witness answered, "Specifically, no."

At the trial, a timely motion was made on behalf of appellant "to strike from the record any of the statements involving him in this affair." In denying the motion, the trial judge said, "At one conversation when the accusatory statement was made, the officer testified that the defendant Dandridge remained silent. He had an opportunity to deny it. * * * But the officer testified on one occasion Dandridge remained silent."

[1] Appellant urges a reversal on the ground that the court committed prejudicial error in admitting into evidence as binding on him the foregoing testimony of officer Brady concerning the confession made by defendant Spencer in the presence of appellant, contending that as to appellant it was hearsay.

In the case of People v. Simmons, 28 Cal. 2d 699, 712, 172 P.2d 18, the Supreme Court held that accusatory statements of the character here involved are plain hearsay, and may properly be admitted only as admissions, under the wellknown exception to the hearsay rule. That if such statements are denied then there is no admission and the statements cannot properly find their way into the record. If the accused admits the truth of such statements then, of course, they may be admitted into evidence. But when, as in the instant case, an accused stands mute in the face of the accusatory statements, it has been held "that *under certain circumstances* both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt." People v. Simmons, supra, 28 Cal.2d at page 712, 172 P.2d at page 25. This doctrine is founded on human experience, which dictates that the usual propensities and passions of people falsely accused provoke a prompt

denial. But the test for admitting such a statement into evidence is not, as announced by the trial court, that the accused "had an opportunity to deny it", but "whether the accusation has been made under circumstances calling for a reply * * *". People v. Simmons, supra, 28 Cal.2d at page 712, 172 P.2d at page 25. When the trial court determines, under the circumstances surrounding the making of the statement, that the silence of an accused gives rise to an inference of acquiescence or guilty consciousness, the statement may be admitted, not as substantive evidence in proof of the fact asserted, but merely as a basis for showing the reaction of the accused to it.

Biblical history of Pontius Pilate's condemnation of Jesus, as well as human experience, has taught us that silence or an equivocal reply in the face of an accusatory statement is not always indicative of a consciousness of guilt. People v. Simmons, supra, 28 Cal.2d at page 712, 172 P.2d at page 25.

Whatever may be the rule in other jurisdictions, it is now firmly established in California that the admissibility of evidence of the character with which we are here concerned depends upon whether the occasion and the circumstances were such as to afford the accused person an opportunity to act or speak, and whether the accusatory statement was one made upon such occasion and under circumstances that would naturally call for some action or reply. Each case must, therefore, be determined upon the facts and circumstances therein presented. People v. Simmons, supra, 28 Cal.2d at page 715, 172 P.2d at page 27. In the case just cited 28 Cal.2d at page 716, 172 P.2d at page 27, the Supreme Court expresses grave concern over what is characterized as "* * * *a growing tendency on the part of trial courts to indulge too broad a discretion* in allowing admission of such evidence in the first instance; a failure to fully consider the question of whether the accused replied under restraint; whether the circumstances under which the accusation was made called for a reply; whether the accused understood the statement; and *whether his conduct merely indicated a desire to avail himself of the rule against self-incrimination or whether it could reasonably give rise to an inference of acquiescence or guilty consciousness.*" (Emphasis added.)

[2] The rule of admissibility followed in this state does not make the statement inadmissible simply because the accused is under arrest, but as heretofore pointed out, the determinative factor is whether the defendant was free to speak spontaneously and whether the circumstances are such that a reply is called for. Other forms of restraint recognized in the case of People v. Simmons. supra, 28 Cal.2d at page 715, 172 P.2d at page 27, are a belief on the part of the accused that his best interests will be served by silence, advice of counsel, and admonition as to silence. In the case just cited, it is said, 28 Cal.2d at page 719, 172 P.2d at page 29, "No violation of the privilege against self-incrimination can be sanctioned".

In the light of the foregoing rules, let us now analyze the circumstances surrounding the making of the challenged statement to determine whether the occasion and the circumstances were such as to naturally call for some action or reply upon the part of the appellant.

In the first place, the record reflects that for two or three days following his arrest, appellant, when informed by the police officers that his codefendants were involved in the robberies and when asked whether he too was involved therein, consistently denied any involvement in the crimes.

[3] When the codefendant Spencer was brought before appellant and the other defendants, according to the testimony of officer Brady, "Officer Murphy told the defendants that all conversation that we would have when all four were present, that we could use against all four of them." And he said, "I want you, Spencer, to tell us what happened." Thus we see that on the occasion in question the police officer advised defendants including appellant that any and all conversation had in their presence could be used against all four defendants. Under such circumstances can it reasonably be said that a disclaimer of guilt was naturally called for? As was said by the Supreme Court in the case of People v. Simmons, supra, 28 Cal.2d at page

716, 172 P.2d at page 27: "Of what avail is it to warn a defendant that he need not reply to police questioning unless he wishes to, and that anything he may say may be used against him, if, in the event he is unresponsive under this admonition, his silence or equivocal reply is later turned against him as indicative of a consciousness of guilt?" To us it is also obvious that in view of the admonition of the police that anything he might say would be used against him, appellant was, as he had a right to do, simply exercising his constitutional privilege against self-incrimination. Furthermore, no specific request for an answer was made directly to appellant.

[4] In the case of People v. Simmons, supra, 28 Cal.2d at pages 716, 717, 172 P.2d at page 27, the Court, referring to the police practice of reading detailed statements of the crime purportedly made by a codefendant or companion in the crime with a view toward eliciting either a complete confession or an admission by silence, to be used against the defendant to whom the statement is read, characterizes this procedure as "* * * another growing practice in the use of the accusatory statement which is erroneous and must be unqualifiedly condemned." Among the objections cited by the Supreme Court to this form of evidence is "that there is placed before the jury under the guise of an accusatory statement a vast amount of hearsay testimony otherwise utterly inadmissible." The same objection can be urged to the practice indulged in the instant case where, instead of confronting the appellant with a written statement made by the codefendant, the latter was brought into the presence of the appellant, and because, under the circumstances present herein, appellant did not respond with a flat denial, the statement of the codefendant was put in evidence in its entirety. If we assume that the trial judge, who in this instance was the trier of facts, did not receive it as substantive evidence in proof of the facts asserted, but merely as a basis of showing the reaction of the accused to it, it must be held in view of the particular circumstances attending and preceding the making of the statement in the case at bar, that it was an abuse of discretion on the part of the trial court to admit the evidence in the first instance. The circumstances hereinbefore narrated were such as to foreclose it. And the exercise by appellant, under the circumstances of this case, of his constitutional privilege against self-incrimination is an added reason for holding that his silence was not such as to give rise to an inference of acquiescence in the truth of the statements or of guilty conscience. Consequently, the admission of the statement into evidence must be held to be prejudicial error requiring a reversal.

[5] Fundamental rules such as the one with which we are here concerned were not adopted to secure immunity for the guilty but for the protection of the innocent. Whether guilty or innocent, appellant was entitled to have his case fairly tried according to the established rules of law, for as was said in Hurd v. People, 25 Mich. 405, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community." The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions. It is by silent approaches and slight deviations from established legal modes of procedure that illegitimate and unconstitutional practices get their first footing. We are counseled by Mr. Justice Sutherland of the Supreme Court of the United States in a strong dissenting opinion delivered in the case of Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, to "withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxtion of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy.

The judgment and the order denying a new trial are and each is reversed, and the cause remanded.

YORK, P. J., and DORAN, J., concur.

78 Cal.App.2d 540

## PEOPLE v. DENTON.

Cr. 1987.

District Court of Appeal, Third District, California.

March 13, 1947.

As Modified March 20, 1947.

1. Criminal law ⇐1159(3)

Inconsistencies and contradictions in testimony are matters for jury, not to be weighed by appellate tribunal.

2. Sodomy ⇐6

Evidence sustained conviction of sexual perversion and crime against nature. Pen.Code, § 288a.

3. Witnesses ⇐45(2)

A ten year old boy who said he knew that it was wrong to tell a lie and that he would be punished if he did not tell truth was competent. Pen.Code, § 1321; Code Civ.Proc. § 1871.

4. Witnesses ⇐35

All persons capable of perception and communication may be witnesses. Pen. Code, § 1321; Code Civ.Proc. § 1871.

5. Witnesses ⇐40(1)

A child under ten is competent if he appears to trial judge to have capacity to receive impressions and relate them truthfully. Pen.Code, § 1321; Code Civ.Proc. § 1871.

6. Criminal law ⇐1153(2)

Judge's determination that child was competent witness, made after hearing child testify, is no more a matter of review than his ruling upon capacity of any other witness. Pen.Code, § 1321; Code Civ.Proc. § 1871.

7. Criminal law ⇐350, 745

In prosecution for sex perversion and crime against nature, evidence of victim's black and swollen eye two days after alleged offenses was admissible, and relation to the offenses was for jury. Code Civ. Proc. § 1870, subd. 15.

8. Witnesses ⇐269(2)

Where defense witness explained having talked with victim of alleged sodomy by statement that she decided to find out for herself whether what she had heard about case was right or wrong, district attorney could ask her on cross-examination "So you became a detective?"

9. Witnesses ⇐329, 372(1)

Wide latitude should be allowed in cross-examination to test accuracy or credibility, especially if witness is reluctant, hostile, a party in interest or a witness against defendant in criminal prosecution.

10. Witnesses ⇐329, 372(1), 387

Cross-examination may include questions designed to test knowledge, recollection, interest, mental condition and character of witness, and to elicit answers contradicting his testimony.

11. Criminal law ⇐730(3)

Defendant was not entitled to instruction that cross-examination of defense witness on whether she had threatened alleged victim of sodomy and his mother was improper, on ground that prosecuting attorney was shouting at witness.

12. Criminal law ⇐419(10)

Where prosecution made no attempt to introduce in evidence the results of lie detector test taken by defendant or fact of defendant's failure to take such test, defendant's reason for not taking such test or any comments on the subject were immaterial, and evidence of answers given to defendant's offers to take the test was properly excluded as hearsay, incompetent and immaterial.

13. Criminal law ⇐473

Physician could testify about his examination of prosecuting witness shortly after alleged sodomy and give opinion on cause of abrasions and irritations in anal area. Pen.Code, § 288a.

14. Criminal law ⇐1166½(12)

Trial judge's remarks calling attention of defense counsel to his repetition of questions, and stating that counsel wouldn't get two days for particular witness, were not prejudicial. Pen.Code, § 1044.

15. Criminal law ⇐1186(4)

Court's telling defense counsel to "Shut up. Sit down and behave yourself" was improper even though court were justifi-

ably exasperated at counsel's persistence, but was not ground for reversal where evidence against defendant was overwhelming. Const. art. 6, § 4½.

**16. Criminal law ⇐655(1)**

In prosecution for "infamous crime against nature" trial judge's inadvertent reference to the offense as "terrible crime against nature" was a milder characterization of the charge and not error. Pen. Code, § 288a.

**17. Criminal law ⇐730(8), 1037(1, 2)**

Argument of district attorney giving his theory of what evidence showed, without departing from evidence and inferences that could reasonably be drawn therefrom, was not ground for reversal as containing statements not supported by evidence, where jury was instructed that statements of counsel were not evidence and defendant did not object or request admonition of jury when remarks were made.

**18. Criminal law ⇐855(4), 1174(2)**

Ride given by prosecution witness to juror was improper but not prejudicial in absence of showing that juror disobeyed instructions not to talk with any one about case.

**19. Criminal law ⇐1144(15)**

In absence of contrary showing, reviewing court must presume that juror heeded instructions not to talk with any one about case.

**20. Criminal law ⇐867**

Defendant was not entitled to mistrial on ground that constable passed money to prosecution witness and told him how to testify, where all testimony concerning such event was before jury which impliedly found against defendant on the point.

**21. Criminal law ⇐829(17)**

All proper matters in requested instruction that jury should not disregard defendant's testimony because he is charged with crime, but should give it same weight and credibility as though he were not charged, were covered by other instructions considered in connection with instructions on presumption of innocence and reasonableness.

**22. Criminal law ⇐834(2)**

Trial court is not required to give verbatim every instruction offered by defendant, and defendant is entitled only to have jury fully and fairly instructed on all material phases.

**23. Criminal law ⇐778(4)**

After giving requested instruction that jury should adopt view of evidence leading to acquittal rather than view leading to conviction, if as reasonable, court did not err in immediately adding "that means he is presumed to be innocent until he is found guilty. All doubt should be resolved in his favor." Pen.Code, § 1096.

**24. Criminal law ⇐808½**

An instruction on presumption of innocence and reasonable doubt in statutory language, with addition that such presumption goes with defendant all through the case and operates in his favor until verdict is arrived, fully and fairly states the law. Pen.Code, § 1096.

**25. Criminal law ⇐778(4)**

Instruction on presumption of innocence was not improper for using word "found" instead of "proven".

**26. Criminal law ⇐785(16)**

An instruction that a witness willfully false in one material part of his testimony is to be distrusted in others, correctly stated California rule.

**27. Criminal law ⇐823(1)**

Statement to jury that "the second count is a terrible crime against nature" was not prejudicial where court instructed that he was expressing no opinion on weight of evidence, truth or falsity of any witness' statement, or that any fact was or was not proven. Pen.Code, § 288a.

**28. Criminal law ⇐798(1)**

Where instructions clearly stated what was charged in each count, and court submitted to jury two forms of verdict as to each count and told jury they must agree unanimously before arriving at verdict, failure to instruct that jury must agree unanimously as to each of first two counts was not error.

**29. Criminal law ⇐678(1)**

Where defendant denied commission of any sodomy, but evidence indicated a single continuous incident including several attempts and but one completed act of sodomy and one act of sex perversion, court's failure to require prosecution to elect, and jury to find, upon which act of sodomy and sex perversion they were finding defendant guilty, was not error in absence of request therefor.

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Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Jack Denton was convicted of sex perversion and of the infamous crime against nature, and he appeals.

Affirmed.

Arthur DeBeau Carr and Kenneth W. Donelson, both of Sacramento, for appellant.

Fred N. Howser and Robert W. Kenny, Attys. Gen., and Charles W. Johnson and James O. Reavis, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice pro tem.

An information was filed against defendant and appellant in which he was accused as follows: In count one of the crime of sex perversion, a violation of Section 288a of the Penal Code, it being alleged that defendant and appellant on May 13, 1946, participated in an act of copulating his male sexual organ with the mouth of one Joe Hernandez. In count two of the infamous crime against nature, committed on the same date upon the person of one Joe Hernandez; in counts three, four and five of prior convictions of felonies, one of arson and two of burglary. Appellant pleaded not guilty to counts one and two, and admitted the prior convictions charged in counts three, four and five. Upon trial the jury returned separate verdicts finding appellant guilty on counts one and two. Appellant's motion for a new trial was denied and appellant was thereupon sentenced to concurrent terms of imprisonment in the State Prison. This appeal is from said judgment and from the order denying a new trial.

The first of appellant's numerous claims of reversible error is that the evidence is insufficient to support the verdicts. The substance of appellant's contention upon this point is that the evidence of the prosecution, and particularly the complaining witness, Joe Hernandez, was so palpably false and incredible that it cannot afford a base for the verdicts. Before discussing this contention we shall briefly state what the testimony in the instant case shows.

It is apparent that appellant accosted Joe Hernandez, aged 10, Billie Hernandez, aged 8, and Bob Keola, aged 10, in the forenoon of May 13, 1946, while they were playing hookey from school and were fishing under the M Street bridge across the Sacramento River on the Yolo County side. The appellant soon separated the three boys, striking Bobby Keola and causing Billie and Bobby to take to their heels to secure help. Joe was left alone with Denton who pulled his pants down, and tried to insert his penis in the boy's "seat." Joe then put his pants on, and Denton kept hold of his arm and guided him on top of the levee. The two then walked up the river about a block towards the I Street bridge and stopped under a tree at a point between the levee and the river, when the defendant pulled the boy's pants down again, and unbuttoned his own trousers. While the boy was lying down, defendant then attempted to insert his penis in the boy's "seat". Denton then told the boy to put Denton's penis in his mouth, and struck the boy in the eye and tried to choke him, following which the boy placed his mouth around Denton's penis. Following this performance, Denton again inserted his penis in the boy's rectum, inserting it to such an extent that it hurt. Joe began to cry, and the act hurt him so much that he had to urinate. Joe Hernandez recounted in detail the acts of sexual perversion and degeneracy practiced upon him; and the witnesses Nathan Ballansaw and Leon Watkins, who had been summoned to the scene by the two boys who had run off, both observed appellant in a most compromising position, his trousers lowered, the trousers of the boy also lowered, and appellant's private parts exposed. The witnesses Ballansaw and Watkins came into

view of appellant and the boy from different directions and not at the same moment. Ballansaw testified that the boy was facing appellant, his face being about five inches from appellant's penis while Watkins testified that appellant had his penis by the boy's rectum. Appellant attempted to flee from the scene and pleaded with Ballansaw and Watkins to "allow him a chance." An examination of the victim's rectum indicated that the mucous membrane appeared to be irritated, which irritation the examining doctor testified could have been caused by the insertion of a penis. While the opinion given by the doctor did not positively limit the cause of the boy's anal disorder to a criminal attack, it was certainly consistent therewith.

Appellant in his testimony denied any criminal acts and introduced testimony seeking to impeach the complaining witness and other witnesses for the People, but the verdicts of the jury indicate that they did not place much reliance upon the testimony of appellant and his witnesses.

[1, 2] Appellant in his brief seeks to point out inconsistencies and contradictions in the testimony of Joe Hernandez and other witnesses, but these were all matters for the jury to pass upon and are not matters to be weighed by an appellate tribunal. A reading of the record not only convinces us that the evidence is sufficient to support the judgments, but makes it difficult for us to understand how the jury could have arrived at any other verdicts. There is nothing inherently improbable in the testimony relied upon by the prosecution and we can only conclude that the contention of appellant that the evidence is insufficient to support the verdicts is entirely devoid of merit.

Appellant's second contention is that Joe Hernandez, the complaining witness, was incompetent to testify. The record shows that said witness was ten years old and that at the outset of his testimony he was interrogated as to the nature of an oath and answered that he knew it was wrong to tell a lie and that he knew he would be punished if he did not tell the truth. The trial court after participating in the preliminary questioning and seeing and hearing the witness ruled that the witness was competent to testify.

[3-6] This contention of appellant lacks substantial merit. The law is well settled in California that all persons capable of perception and communication may be witnesses. Penal Code, sec. 1321; C.C.P., sec. 1871. The law upon this subject is well stated in the case of People v. Harrison, 46 Cal.App. 2d 779, at page 785, 117 P.2d 19, 22, as follows: "It is the law that children under ten years of age cannot be witnesses where they appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly. Sec. 1880, Code Civ.Proc. The last cited section means nothing more than that if a child under ten years of age appears to the trial judge to be competent, i. e., to have the capacity to receive impressions and to relate them truthfully, he becomes a competent witness. People v. Gasser, 34 Cal.App. 541, 543, 168 P. 157. After the judge has heard the child give his testimony and has determined that it was a competent witness, such determination is not a matter of review any more than his ruling upon the capacity of any other witness. People v. Craig, 111 Cal. 460, 44 P. 186; People v. Morcumb, 28 Cal. App.2d 465, 82 P.2d 714. There is nothing in the testimony of any of the five children that indicated in the slightest degree his incompetency to testify. The only two daughters under ten years of age were ID and OV. At the time of the trial, ID was more than 9½ years of age; her testimony was responsive, coherent and intelligent. The fourth daughter was OV, eight years of age. The trial judge satisfactorily tested her qualifications on voir dire. In addition to the fact that the trial judge became satisfied as to her competency, the record of her testimony shows that she was intelligent enough to receive impressions and competent intelligibly to relate them. Since a review of her testimony appearing in the record shows that the court was justified in allowing her to testify before the jury, we are not concerned here with any lack of thoroughness in her voir dire examination. People v. Freeman, 24 Cal.App.2d 619, 75 P.2d 640." See also People v. Car-

penter, 3 Cal.App.2d 746, 748, 40 P.2d 524; People v. Watrous, 7 Cal.App.2d 7, 10, 45 P.2d 380.

[7] Appellant next contends that the trial court committed certain errors of law in ruling upon the admissibility of evidence. The first of these concerns the testimony of Tom Wallace, a deputy sheriff, who was called to testify as to the physical condition of Joe Hernandez on May 15th, two days after the alleged offenses. Counsel for appellant objected to such testimony, but did not state any ground of objection. The court overruled the objection, stating that "it goes to the weight and not to the admissibility." The witness then testified that Joe Hernandez's eye was black and swollen. The evidence was clearly admissible and it was for the jury to determine whether the physical condition of the complaining witness on May 15th bore any relation to the events of May 13th. A judicial determination to the effect that "the remoteness of the testimony would go to the weight and not to its admissibility" is contained in the case of People v. Collins, 195 Cal. 325, at page 351, 233 P. 97, 107, citing 10 Cal.Jur. 798, and Sec. 1870, subd. 15, C.C.P.

[8] Bessie Dameron was a witness called by appellant and upon direct examination testified that Joe Hernandez had made statements to her indicating that appellant was not guilty of the offenses charged. The district attorney cross-examined her vigorously as to how she happened to go to the Hernandez home to talk with Joe and the witness stated she had read about the matter in the paper, and had then talked with a woman who knew appellant and that she had then decided to find out for herself whether it was right or wrong. The district attorney then asked this question, which was objected to by appellant: "So you became a detective?" to which the witness answered in the negative. In view of the testimony which preceded it, the question was quite proper, and in any event it is difficult to understand how it can be prejudicial.

Appellant also cites as prejudicial error the following which occurred during the cross-examination of the same witness, Bessie Dameron:

"Q. You threatened the boy? A. I did not.

"Q. While you were in there you threatened his mother? A. I did not.

"Mr. Carr: I ask that the jury be instructed that this is improper examination.

"The Court: I don't see anything out of the way.

"Mr. Carr: I do, your Honor, he is shouting at her.

"The Court: Overruled."

[9, 10] It must be borne in mind that the prosecutor was cross-examining a defense witness. As to the latitude allowed in cross-examination it is stated in 27 California Jurisprudence, page 96, paragraph 76: "The authorities all agree that wide latitude should be allowed in cross-examination for the purpose of testing accuracy or credibility, especially if the witness is a reluctant one or is hostile, or if he is one of the parties in interest, or is a witness against a defendant in a criminal prosecution." And on page 103 of the same work, paragraph 78, it is stated: "A witness may be cross-examined for the purpose of testing his accuracy, veracity or credibility, and great liberality is shown in the allowance of questions directed to that end. Thus it is proper to ask questions which are designed to test the knowledge, recollection, interest, mental condition and character of the witness, and likewise to elicit answers which will contradict his testimony."

[11] We are unable to agree with appellant's contention that the trial court erred in refusing to instruct the jury that the said cross-examination was improper.

[12] Appellant next contends that the trial court erred in sustaining two objections made by the district attorney to questions asked by appellant's counsel in his direct examination of appellant. Appellant's counsel asked him if he had gone down to Berkeley and asked them to give him a lie detector test and he had answered in the affirmative. His counsel then asked: "What did the man tell you down there?" This question was objected to upon the ground that it was hearsay, which objection was sustained by the court. Later appellant testified that his former attorney,

Mr. Green, had told the sheriff that appellant wanted to take the lie detector test. He was then asked what answer the sheriff gave to Mr. Green and the court quite properly sustained an objection to the question as it was not only hearsay, but otherwise incompetent and immaterial as well. Since no attempt was made by the prosecution to introduce in evidence either the results of a lie detector test taken by appellant or the fact of his failure to take such a test, it follows that the reason why appellant did not take such a test, or any comments on the subject, were entirely immaterial, and the trial court properly refused to permit the questions to be answered.

[13] It was clearly competent for Dr. Coleman to testify concerning his examination of the prosecuting witness made a short time after the alleged offense, and to give his opinion that certain abrasions and irritations in the anal area could have been caused by the insertion of a penis or could have been caused by the boy's falling on a rock or in some other way. Appellant's objections to this testimony were properly overruled.

[14] Appellant's fourth major contention is that the trial judge made certain comments within the hearing of the jury which constituted prejudicial misconduct. Appellant sets out in his brief a number of comments by the court which merely show that in view of the extreme heat the trial judge appeared to be anxious to have the trial move along as rapidly as possible, and after counsel for appellant had asked the same questions of the complaining witness a number of times, the trial judge called his attention to that fact, whereupon counsel stated to the court: "Your Honor, it wouldn't at all surprise me, if I have the indulgence of the Court, that I get two days for the witness." The court then stated: "Now I can tell you you won't get two days." These remarks of the court were in no sense prejudicial to appellant and appellant's counsel did not even except to them. Furthermore, it must not be lost sight of that Section 1044 of the Penal Code provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

[15] Perhaps the nearest approach to a prejudicial comment by the court occurred after counsel for appellant had objected to asserted prejudicial conduct on the part of the district attorney. The court evidently considered the matter closed and when appellant's counsel sought to discuss the matter further, the court stated: "Shut up. Sit down and behave yourself," to which comment appellant's counsel took an exception. Due to the persistence of counsel, the court evidently lost its patience and spoke more sharply than it should have done. When a defendant is on trial in a criminal case, particularly one as serious as the one in which appellant was on trial, a trial judge should be extremely careful not to make any comment that would tend to lower defendant's counsel in the estimation of the jury because such a comment could hardly fail to be prejudicial to a defendant. We believe that it was improper for the trial court to use the language that it did toward appellant's counsel even though the court may have been justifiably exasperated at counsel's conduct of the case. However, we are mindful of the provisions of section 4½ of Article VI of our State Constitution which provides that "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." As we read the record, the evidence against appellant was so overwhelming that the remarks of the court complained of, even though improper, could not have resulted in a miscarriage of justice.

[16] There is no merit in appellant's contention that the apparent inadvertent use by the trial judge in his statement to the jury of the language "a terrible crime against nature" instead of "the infamous

crime against nature" was prejudicial error. In our opinion the word "terrible" is a milder characterization of the charge than the word "infamous".

Appellant's next main contention is that the district attorney was guilty of prejudicial misconduct during the trial of the case. Appellant's first point that the district attorney asked certain improper questions upon cross-examination of the defense witness, Bessie Dameron, has already been disposed of by us in holding that the said questions were proper cross-examination.

[17] Appellant then contends that certain portions of the district attorney's argument to the jury were prejudicial misconduct. Appellant contends that the district attorney made certain statements which were not supported by the evidence. A reading of these portions of the argument, together with a reading of the record, convinces us that the district attorney was giving his theory of what the evidence showed and that he did not depart from the evidence and the inferences that could reasonably be drawn therefrom. Furthermore, the jury was instructed by the court that the statements of counsel on either side were not evidence in the case and that they must look entirely to the proof in ascertaining what the facts were. And even if the remarks of the district attorney were improper, it would be a sufficient answer to appellant's contention to point out that he failed to make any objection to them at the time, and failed to request the trial court to properly admonish the jury at the time the alleged errors took place. See 24 C.J.S., Criminal Law, § 1798, p. 613; People v. Pilgrim, 73 Cal.App.2d 391, 397, 166 P.2d 636.

Appellant next contends that the trial court committed error in denying appellant's motion for a mistrial. The grounds of said motion were: (1) Misconduct of a juror, and (2) Perjury with the knowledge of a public official.

[18, 19] The first ground was based upon the fact that Constable Ellis Barry, a witness for the prosecution, drove juror Mrs. Frances M. Sherman from the Yolo County Court House at the conclusion of the first day of the trial to Broderick in Yolo County. We think it was improper for the prosecution witness to have given the juror a ride and the trial court was correct in expressing his disapproval of it, but there is no showing that the juror talked with the constable about the case, and it must be presumed that the juror heeded the instructions of the court given prior to adjournment admonishing the jurors not to talk with any one concerning the case. We believe that witnesses should keep out of the presence of jurors during the trial of a case because such contact could easily result in a mistrial, but we do not believe that any prejudice resulted in the instant case as it merely appears to be a matter of the witness giving the juror a ride home.

The second ground of the motion for a mistrial was that Constable Ellis Barry passed money to prosecution witness Nathan Ballansaw and instructed him how to testify. Two defense witnesses testified that they saw the constable pass money to the witness in the hallway of the Court House and heard him instruct the witness how to testify. This testimony was denied by Ballansaw. All of the testimony was before the jury and by its verdict the jury impliedly found against the testimony of the defense witnesses on this point, as did also the trial judge when he denied the motion for a new trial.

[20] We are therefore unable to agree with appellant's contention that the court erred in denying his motion for a mistrial.

Appellant's seventh main contention is that the trial court erred in refusing to give some of the instructions offered by appellant and in improperly giving other instructions.

Appellant's first point under this heading is that the trial court failed to give the following instruction offered by appellant: "The Court instructs you that you are not to disregard the testimony of the defendant because he is charged with a crime, but you are to consider his testimony, giving it the same weight and credibility as though he were not charged with an offense. You must consider his testimony along with that of other witnesses and facts and circumstances which have been adduced in this

case. And if his testimony is such that it creates a reasonable doubt in your minds, then you must find the defendant not guilty."

However, the court did give the following instructions covering the subject:

"The jury has no right to disregard the testimony of the defendant on the ground alone that he is defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty, and the law allows him to testify in his own behalf and the jury should fairly and impartially consider his testimony together with all the other evidence in the case."

"A defendant in a criminal action is not compelled to testify, but has the right to voluntarily testify in his own behalf, and his testimony is entitled to the same weight and credit as that of any other witness, and the jury should fairly and impartially consider his testimony, together with all other evidence in the case. A defendant having so offered himself as a witness becomes subject to the same rules for testing his credibility before the jury by impeachment or otherwise, as any other witness."

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case."

[21, 22] When the foregoing instructions are considered in connection with the instructions on presumption of innocence and reasonableness, it is clear that all proper matters included in the refused instruction were fully covered by other instructions and that no prejudice resulted to appellant by the court's refusal to give the offered instruction. A trial court is not required to give verbatim every instruction offered by a defendant. All that appellant was entitled to was that the jury be fully and fairly instructed on all material phases of the case, and a reading of the court's instructions convinces us that the court did so instruct the jury in the instant case.

The trial court gave the following instruction at the request of defendant: "As a matter of law, if you believe from an examination of the evidence in certain of its aspects that the defendant is guilty, and if you further believe from an examination of other aspects of the evidence that the defendant is not guilty, then you should adopt that view of the evidence which will lead to the acquittal of the defendant, rather than that view which leads to his conviction, if that view of the evidence which leads to his acquittal is as reasonable as that which leads to his conviction."

Appellant complains, however, because the trial court immediately added: "That means he is presumed to be innocent until he is found guilty. All doubt should be resolved in his favor."

[23, 24] The contention of appellant is without merit. An instruction as to the presumption of innocence, and as to reasonable doubt, given in the language of Section 1096 of the Penal Code, to which the court added that such presumption goes with the defendant all through the case and operates in his favor until a verdict is arrived at, fully and fairly states the law upon the subject. People v. Chaves, 122 Cal. 134, 54 P. 596.

[25] Appellant's contention that the court improperly used the word "found" instead of "proven" is likewise without merit. A judicial opinion squarely in point is the case of People v. Davenport, 13 Cal.App. 632, 110 P. 318, where an instruction was held not to be objectionable as using the word "shown" instead of "proved". The logic of the opinion applies where the term "found" is used instead of "proved".

Appellant next complains that the trial court erred in declining to give the following instruction requested by him: "You are further charged that a witness whom you find to be false in one part of his testimony is to be distrusted in others."

The court did, however, give the following instruction: "A witness wilfully false in one material part of his testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, and the jury, being convinced that a witness has stated what was untrue, as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, may treat all of his testimony with distrust and suspicion, and reject all unless they shall be

convinced that he has in other particulars sworn to the truth."

[26] The instruction given by the court correctly states the rule in California. In the recent case of People v. Wheeler, 75 Cal.App.2d 360, at page 365, 171 P.2d 62, 65, this court said: "Appellant relies upon People v. Hicks, 53 Cal. 354, where the court instructed the jury that 'a witness false in one part of his testimony is to be distrusted in others,' and refused to give a requested instruction 'that if they believed any witness had, upon the stand, wilfully sworn falsely in respect to any matter material to the issue on trial, that they should disregard his testimony altogether.' There the court said, citing People v. Sprague, 53 Cal. 491, that 'the correct interpretation of subd. 3 of sec. 2061 of the Code of Civil Procedure is, that a witness wilfully false in one part of his testimony is to be distrusted in others. Assuming this to be the correct construction, the effect of this provision is that if a witness is wilfully false in one portion of his testimony he "is to be distrusted in others"; and not that his whole testimony is to be absolutely rejected.'"

Near the close of his instructions to the jury, after explaining to the jury the forms of verdict that would be submitted to them, the court stated: "There are two counts. One is what they call sex perversion. You must render one verdict on that count, that is, guilty or not guilty. The second count is a terrible crime against nature. You should render a verdict on that count, either guilty or not guilty. In other words, you render two verdicts, and these forms are prepared for your use, and are simply signed when all twelve of you have found either guilty or against conviction."

[27] Appellant contends that a serious error was committed by the court in referring to the second count as "a terrible crime against nature." Sodomy is invariably designated as the "infamous crime against nature". It is difficult to understand how appellant could be prejudiced by the use of the word "terrible" instead of "infamous", as the latter word is the more opprobrious. Furthermore, the court instructed the jury that in his instructions he was expressing no opinion on the weight of the evidence or the truth or falsity of any witness' statement, or that any fact was or was not proven.

[28] Appellant next contends that the court committed a most serious error in failing to instruct the jury that as to each of the first two counts the jury must agree unanimously. There is no merit in this contention as the instructions clearly state what is charged in each count and the court submitted to the jury two forms of verdict as to each count, and informed the jury that they must agree unanimously before they could arrive at a verdict.

[29] Appellant contends further that the court erred in not requiring the prosecution to elect, and the jury to find upon which act of sodomy and sex perversion they were finding appellant guilty. At first blush there would seem to be some merit in this contention, but upon analysis, it appears to be without substance.

Appellant seems to be contending that the prosecution proved that appellant committed more than one act of both sex perversion and sodomy, although he himself denied the commission of any such act. At the trial his counsel made no demand that the district attorney make an election as to which particular act he relied upon to sustain the conviction. Furthermore, the jury may well have concluded from the evidence that there were not several completed acts of sodomy but that, after attempting to perpetrate acts of sodomy upon the boy, appellant finally achieved but one completed act. As to the charge of sex perversion only one act was testified to by the complaining witness. The entire incident which resulted in the charges against appellant began when appellant accosted the boys under the bridge and continued without interruption until the witnesses Ballansaw and Watkins came upon the scene and appellant started to run away. Appellant did not request that the district attorney make an election, nor did he request any instruction on the subject, and under the circumstances of this case and the evidence in the record we do not believe that any such instruction should have been given.

Appellant's final contention is that, because of the various points enumerated in his brief, which points we have hereinbefore discussed, he did not receive a fair trial. We believe that the evidence of appellant's guilt was overwhelming, that the jury was fully and fairly instructed, that none of the errors complained of resulted in a miscarriage of justice, and that the judgment of conviction and the order denying a new trial should be affirmed. To do otherwise would be to disregard Section 4½ of Article VI of our Constitution.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.




78 Cal.App.2d 631

## HUGHES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 15552.

District Court of Appeal, Second District, Division 1, California.

March 20, 1947.

Rehearing Denied April 7, 1947.

Hearing Denied May 15, 1947.

**1. Judgment ⇐634**

The doctrine of "res judicata" is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is conclusive of rights of the parties thereto and of their privies on all material issues which were tried and determined and upon all issues which might have been properly tendered therein, in all subsequent actions in any tribunal of concurrent jurisdiction involving the same points either directly or incidentally.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

**2. Divorce ⇐255**

An interlocutory decree of divorce becomes a conclusive adjudication of property rights of the parties upon expiration of time for an appeal and for relief pursuant to statute. Code Civ.Proc. § 473.

**3. Divorce ⇐172**

An interlocutory decree in a divorce case is res judicata with respect to all proper or necessary issues determined thereby. Code Civ.Proc. § 473.

**4. Divorce ⇐255**

A decree of divorce is conclusive as to title and property rights of parties to extent that such matters are placed in issue and adjudicated but no further. Code Civ. Proc. § 473.

**5. Judgment ⇐634**

In determining validity of a plea of res judicata, three questions are pertinent, namely, was the issue decided in the prior adjudication identical with the one presented in the present action, was there a final judgment on the merits, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

**6. Divorce ⇐255**

Wife, in instituting action against husband for a judicial declaration as to amounts remaining unpaid on notes secured by trust deed covering two lots adjudged in divorce action to be wife's separate property, subject to incumbrances of record, was bound by judgment in the divorce action, as amended by nunc pro tunc order, fixing the amount of the incumbrances, notwithstanding that neither creditor holding notes nor executor of his estate was made a party to the divorce action. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Euldene Frances Hughes against Bank of America National Trust & Savings Association, as executor of the estate of Arthur Johnson, deceased, and Aloysius Peter Hughes, for declaratory relief. On death of the defendant Aloysius Peter Hughes, the California Trust Company, as a special administrator with general powers of the estate of A. P. Hughes, deceased, also known as Aloysius Peter Hughes, deceased, was substituted as a party defendant. From adverse judgment, the California Trust Company, as special

administrator with general powers of estate of A. P. Hughes, deceased, also known as Aloysius Peter Hughes, deceased, appeals.

Judgment reversed with directions.

M. Lewis Lehman, of Los Angeles, for appellant.

Lee Combs, Wallace B. Scales, and Robert W. McIntyre, all of Los Angeles, for respondent.

YORK, Presiding Justice.

On March 30, 1945, plaintiff Euldene Frances Hughes brought the instant action for declaratory relief against Aloysius Peter Hughes and the Bank of America National Trust & Savings Association, as executor of the Estate of Arthur Johnson, deceased. During the pendency of the action and prior to the completion of the trial, to-wit: on September 29, 1945, Aloysius Peter Hughes died, and the Bank of America National Trust & Savings Association was appointed special administrator of his estate. Thereafter, said banking association resigned and the California Trust Company was substituted in its stead as special administrator with general powers of the Estate of A. P. Hughes, deceased, and is now duly acting in such capacity.

An examination of the record herein discloses that during his lifetime Aloysius Peter Hughes executed and delivered to Arthur Johnson, as beneficiary named therein, three promissory notes, to-wit:

(1) A note for $6,000, dated July 18, 1941, secured by a trust deed covering Lots 11 and 14 of Tract No. 11542;

(2) A note for $6,000, dated November 13, 1941, secured by a trust deed covering Lot 240 of Tract No. 6440 and Lot 635 of Tract No. 6084;

(3) A note for $4,000, dated January 19, 1942, secured by a trust deed covering Lot 636 of Tract No. 6084.

The note dated July 18, 1941, introduced in evidence as defendant bank's exhibit C, indicates by endorsements on the back that a payment of $3,000 was made thereon on January 5, 1942, and another payment of $200 was made on July 7, 1944, although a full reconveyance of the trust deed securing said note was recorded on December 6, 1943.

The note dated November 13, 1941, which was introduced in evidence as plaintiff's exhibit 2, bears endorsement of the payment of $3,000 thereon under date of December 21, 1942, and a partial reconveyance releasing Lot 240 of Tract No. 6440 from the lien of the trust deed of November 13, 1941, was duly recorded on December 19, 1942.

Admittedly, no payments have been made on the third note.

On December 27, 1944, in a divorce action instituted by plaintiff against Aloysius Peter Hughes, an interlocutory decree was entered, under the terms of which plaintiff was adjudged to be the owner of lots 635 and 636 of Tract No. 6084, as her separate property, subject to encumbrances of record.

In her amended complaint to conform to proof, filed in the instant action, plaintiff alleged that defendant Aloysius Peter Hughes claimed that the $3,000 paid by him to Arthur Johnson on December 21, 1942, was on account of the note dated July 18, 1941, wherefore she prayed for a judicial declaration as to the amounts remaining unpaid on the indebtedness represented by the three notes, above referred to, and also an adjudication as to the validity of the endorsement of the $3,000 payment made by the agent of Arthur Johnson on the back of the note dated November 13, 1941.

In his answer, defendant Hughes admitted the payment of $3,000 to Arthur Johnson on December 21, 1942, but he alleged that such payment was to be accredited to the note dated July 18, 1941, and that through error of the agent of Arthur Johnson, it was credited against the wrong note, to wit: the note of November 13, 1941.

Defendant Hughes also alleged as an affirmative defense to the instant action, that the trial judge in the divorce action by a nunc pro tunc order dated March 29, 1945, amended the interlocutory decree of divorce "so that the judgment rendered therein now reads: 'It is further Ordered, Adjudged and Decreed that plaintiff Eul-

dene Frances Hughes have, receive and recover as her sole and separate property and as her share of the community property, subject to encumbrances of record * * *

"'4. Lots 635 and 636, Tract 6084 * * * The foregoing Lots 635 and 636 * * * shall be subject to the encumbrances of record totalling Ten Thousand Dollars ($10,000.00) (Less the sum of $200.00 paid heretofore by the parties hereto).' * * * that the judgment rendered as aforesaid still stands in full force and is Res Judicata of the issues herein contained and the plaintiff is thereby barred from prosecuting and maintaining this action."

Thus, the controversy between plaintiff and the special administrator of the Estate of Hughes, deceased, concerns the amount of the existing encumbrance against said lots 635 and 636 of Tract No. 6084, awarded to plaintiff in the divorce action, it being contended by plaintiff that the amount thereof is $7,000; while defendant Hughes, in his lifetime, and the California Trust Company, as special administrator of his estate, contend that such encumbrance is $9,800.

It was stipulated at the trial "that the amount of recovery on all the notes referred to shall be the sum of $11,450", to-wit: $9,800 principal and $1,650 interest. The trial court found in accordance with said stipulation that $11,450 was the total amount due to the Estate of Johnson; that the payment of $3,000 made on December 21, 1942, was on account of the indebtedness represented by the $6,000 note dated November 13, 1941; and therefore that the sum of $7,420 is owing to the Estate of Johnson by plaintiff and the sum of $4,030 is due to said estate by the Estate of Hughes.

It was also found "that on the 22nd day of December, 1944, in an action then pending in the County of Los Angeles, No. D–250039, between Euldene Frances Hughes, plaintiff, and Aloysius Peter Hughes, defendant, the Honorable Harold B. Jeffery, Judge presiding in said cause, did make and sign a judgment therein and that the same was duly entered December 27, 1945, and that on March 28, 1945, said Honorable Harold B. Jeffery did sign and file in said action a nunc pro tunc order purporting to amend said judgment; that it is not true that said judgment and amendment nunc pro tunc thereof determined or fixed the amount of indebtedness due by Euldene Frances Hughes to Arthur Johnson or the Estate of Arthur Johnson, (Arthur Johnson or the Estate of Arthur Johnson not being a party to said action) under and by virtue of the notes and trust deeds covering lots 635 and 636, Tract No. 6084; that it is true that said nunc pro tunc order attempted to alter and modify the judgment in case D–250039, in a material and substantial way and in so far as it affected the amount of the indebtedness due by Euldene Frances Hughes to Arthur Johnson or the Estate of Arthur Johnson, was void and of no effect; that it is not true, as alleged in Paragraph II of defendant Aloysius Peter Hughes' second affirmative defense to his answer herein, that said judgment or the nunc pro tunc order purporting to amend the same were or are res judicata, or any adjudication of the issues contained in this instant case; that it is not true that plaintiff Euldene Frances Hughes is barred by the judgment in case D–250039 from prosecuting and maintaining the instant action * * *."

From the judgment which was accordingly entered, California Trust Company, as special administrator of the Estate of Aloysius Peter Hughes, deceased, has perfected this appeal.

Appellant excepts to certain of the findings of fact, contending that they are not supported by the evidence:

(1) Finding VII to the effect that on or about December 21, 1942, plaintiff and defendant Hughes paid $3,000 on account of the indebtedness represented by the $6,000 note dated November 13, 1941, secured by trust deed covering lot 240 of Tract 6440 and lot 635 of Tract 6084, and in consideration thereof secured partial reconveyance of trust deed releasing lot 240, leaving a balance of $3,000 on account of principal as of December 21, 1942.

(2) Finding XII, to the effect that Estate of Hughes is indebted to the Executor

of the Estate of Johnson, on account of principal and interest on the note dated July 18, 1941 "in the principal sum of Twenty-eight Hundred ($2800.00) Dollars, and interest on that note and other notes as settled by the compromise stipulation hereinafter referred to, in the sum of Twelve Hundred Thirty ($1230.00) Dollars, making a total amount due to the said Executor of the Estate of Arthur Johnson, deceased, in the sum of Four Thousand Thirty ($4,030.00) Dollars."

It is also contended by appellant that Finding XXI, to the effect that the nunc pro tunc order, hereinabove referred to, was void and of no effect, was not res judicata or any adjudication of the issues herein, is not only unsupported by any evidence, but is irreconcilable with any rule of law.

It is here asserted by appellant that the "judgment and amendment thereof nunc pro tunc in divorce action D250039 is binding on Eugene F. Hughes and A. P. Hughes and is res judicata as to the amount of the encumbrance, viz., $9,800.00 on Lots 635 and 636 awarded to Euldene F. Hughes." In support of this position, appellant cites the case of Krzepicki v. Krzepicki, 167 Cal. 449, 453, 140 P. 13, 14, which holds that: "It is a fundamental rule of judicial procedure that a cause of action between parties can be litigated to judgment but once, and, when a subsequent suit is brought for identically or substantially the same cause of action that was set up and litigated in the former suit, such former judgment is a bar. Whether such prior judgment constitutes a bar to a subsequent suit or not does not depend on the difference in relief sought in the two actions, but upon the question whether the same matter put in issue in the second suit between the same parties was actually in issue in the first and adjudicated. If the issue is the same, the former judgment is conclusive upon it in any subsequent action between the parties and bars the right to seek a different remedy based on the same facts or cause of action."

[1] See, also, Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 918, 132 P.2d 12, 15, where it is said: "The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is conclusive of the rights of the parties thereto and of their privies on all material issues which were tried and determined and upon all issues which might have been properly tendered therein, in all subsequent actions or suits in any tribunal of concurrent jurisdiction involving the same points either directly or incidentally."

Defendant A. P. Hughes' exhibits 24 and 29 in the divorce action were introduced in evidence herein as exhibits F. and G., respectively to-wit: (1) A statement of the financial condition of A. P. Hughes, made by certified public accountants showing that the encumbrance against said lots as $10,000; (2) a balance sheet from the books of A. P. Hughes showing such encumbrance as $9,800.

The records in the divorce action reveal that, pursuant to section 473 of the Code of Civil Procedure, defendant A. P. Hughes moved the court to amend the findings of fact, conclusions of law and the judgment in said divorce action on the ground that they were "not in accordance with the evidence introduced at the trial." This motion was supported by the affidavit of A. P. Hughes setting out the facts. Plaintiff therein, Euldene Frances Hughes, filed an affidavit in opposition to the motion, which was heard on March 16, 1945. On March 29, 1945, the court granted the motion and amended the interlocutory judgment of divorce by an order nunc pro tunc showing the encumbrance against said lots 635 and 636 to be $9,800. On April 5, 1945, Euldene F. Hughes appealed from such order and on June 7, 1945, she filed her notice of abandonment and dismissal of such appeal "as to defendant Aloysius Peter Hughes alone."

[2-4] It is well established that an interlocutory decree of divorce becomes a conclusive adjudication of the property rights of the parties upon expiration of the time for an appeal and for relief pursuant to section 473, Code of Civil Procedure. 5 Cal.Jur. 10-yr. Supp. p. 318, citing Leupe v. Leupe. 21 Cal.2d 145, 130 P. 2d 697. Moreover, an "interlocutory de-

cree in a divorce case is conclusive and res judicata with respect to all proper or necessary issues determined thereby." Green v. Green, 66 Cal.App.2d 50, 61, 151 P.2d 679, 684. "A decree of divorce is conclusive as to the title and property rights of the parties to the extent that these matters are placed in issue and adjudicated, but no further." 15 Cal.Jur. 162, sec. 205, n. 12, and authorities there cited.

The defense of res judicata was raised herein by defendant A. P. Hughes, since deceased, respondent's adversary in the divorce action.

[5, 6] "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895. As applied to the facts in the instant case, these questions must be answered in the affirmative. Upon a motion duly made for that purpose and in accordance with the evidence presented in the divorce action, the trial court settled the amount of the encumbrance existing against the two lots awarded to respondent in that proceeding. Respondent instituted the instant action against A. P. Hughes praying for a judicial declaration as to the amounts remaining unpaid on the notes secured by trust deeds covering the two lots in question. Without question she is bound by the judgment in the divorce action, as amended.

With respect to respondent's claim that since neither the creditor nor the executor of his estate was made a party to the divorce action, the judgment therein is not binding upon either, it should be pointed out that the executor of the Estate of Arthur Johnson is just an innocent bystander. Such executor is interested in recovering the amount due on the indebtedness represented by the notes in favor of Arthur Johnson; whether this is paid by respondent or appellant is quite immaterial. It was decided by the trial court in the divorce action that said indebtedness was an encumbrance against the property of respondent and that adjudication is binding upon her and also upon appellant, as special administrator of the Estate of A. P. Hughes, deceased.

For the reasons stated, the judgment is reversed with directions to the trial court to enter judgment in accordance with the views herein expressed.

WHITE and DORAN, JJ., concur.






78 Cal.App.2d 638

## PEREZ v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES.

Civ. 15635.

District Court of Appeal, Second District Division 1, California.

March 20, 1947.

Rehearing Denied April 7, 1947.

Hearing Denied May 15, 1947.

**1. Municipal corporations ⇐63(1)**

Where city charter invests the board of police commissioners with power to supervise, control, regulate and manage department and make and enforce all "necessary and desirable" rules and regulations therefor, the question as to whether a rule adopted by the board is "necessary and desirable" is not a judicial question but one for the board itself to determine.

**2. Municipal corporations ⇐181**

City charter provision that the right of an officer or employee to hold his office was a substantial property right of which he should not be deprived arbitrarily or summarily, was not a limitation on provision vesting the board of police commissioners with specific power to supervise, control, regulate and manage the department and to make and enforce all necessary and desirable rules and regulations therefor.

**3. Statutes ⇐181(2)**

Statutes must be given a reasonable construction.

**4. Constitutional law ⇐70(3)**

Courts are not concerned with the wisdom, propriety or practicability of a statute, rule, or regulation, but such questions are addressed to those responsible for their adoption.

**5. Constitutional law ⇐238(1), 275(1)**

Resolution of the Los Angeles Board of Police Commissioners that no police officer should be or become a member of any police officer's organization identified with any trade association, federation or labor union which admits to membership persons who are not members of the Los Angeles Police Department or whose membership is not exclusively made up of employees of the City of Los Angeles was not denial of equal protection or due process of law, in contravention of the Fourteenth Amendment and the State Constitution. U.S.C.A. Const.Amend. 14; Const. art. 1, § 1 et seq.

**6. Constitutional law ⇐90, 91**

Resolution of the Los Angeles Board of Police Commissioners that no police officers of the Los Angeles Department should thereafter be or become a member of any police officer's organization identified with any trade association, federation or labor union which admitted to membership persons not members of Los Angeles Police Department or whose membership was not exclusively made up of employees of the City of Los Angeles was not an unconstitutional impairment of police officer's rights of free speech, assembly, and petition.

**7. Constitutional law ⇐82**

Resolution of the Los Angeles Board of Police Commissioners that no police officers of the Los Angeles Police Department should be, or become a member of any police officer's organization identified with any trade association, federation or labor union which admits to membership persons who are not members of the Los Angeles Police Department or whose membership is not exclusively made up of employees of the City of Los Angeles was not unconstitutional as in effect a bill of attainder.

**8. Constitutional law ⇐102(1), 275(1)**

The right to an office or of employment with the government or any of its agencies is not a vested property right, and removal therefrom will not support the question of due process.

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Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Angel M. Perez, as an individual and on behalf of members of American Federation of State, County and Municipal Employees, Los Angeles Police Department Local Union No. 665, affiliated with American Federation of Labor, and on behalf of all police officers of the Los Angeles Police Department against the Board of Police Commissioners of the City of Los Angeles, E. N. Martin and others members of the said Board of Police Commissioners of the City of Los Angeles, seeking a temporary injunction to restrain the Board of Police Commissioners from enforcing a resolution designed and intended to prevent police officers from being members of a Police Officer Labor Union. Judgment of dismissal and plaintiff appeals.

Affirmed.

Robert W. Gilbert and Allan L. Sapiro, both of Los Angeles, and Joseph A. Padway, of Washington, D. C., for appellant.

Ray L. Chesebro, City Atty., William H. Neal, Asst. City Atty., Bourke Jones, Asst. City Atty., and Roger Arnebergh, Asst. City Atty., all of Los Angeles, for respondents.

DORAN, Justice.

In the within action, plaintiff sought a temporary injunction to restrain the Board of Police Commissioners of the City of Los Angeles from enforcing a resolution of and by said board designed and intended to prevent police officers from being members of a police officer labor union. The trial court issued its order directing said Board of Police Commissioners to appear and show cause why, "they and each of them, should not be enjoined and restrained from attempting to enforce, or taking any steps to, or from giving any order or instruction to

enforce", the above-mentioned resolution. A demurrer was interposed to the complaint; pending the hearing and determination of the order to show cause, a temporary restraining order was granted as prayed for. Following the hearing on the order to show cause, the demurrer was sustained without leave to amend. From the judgment of dismissal that followed, plaintiff appealed. Upon the posting of a bond in the sum of $500, defendants were, "restrained from enforcing or taking any steps to enforce", the above-described resolution of said Board of Police Commissioners pending the appeal.

The complaint, in substance, is based on the contention that said board was without power to adopt such resolution; that said resolution is unconstitutional and therefor void. Damages in the sum of $50,000 also are sought.

More particularly, the complaint alleges that plaintiff is a member of the Police Department of the City of Los Angeles; that as such, has acquired, "and now owns and enjoys certain seniority rights and insurance and pension rights which are of great monetary and other value, to-wit, of the value of many thousands of dollars, all of which said rights are vested property rights belonging to plaintiff. That plaintiff is, and was for a long time prior to March 12, 1946, a member of a labor union, to-wit, Los Angeles Police Department Local Union No. 665 of the American Federation of State, County and Municipal Employees, affiliated with the American Federation of Labor, hereinafter referred to as 'Local 665'; that said labor union is comprised only of members who are police officers of the Los Angeles Police Department, of which plaintiff is a member, as aforesaid; that the American Federation of State, County and Municipal Employees, which, in turn, as a national labor union comprised of public employees, grants charters to local unions having as members, various employees of States, Counties and Municipalities throughout the United States of America, some of which employees are not members of any police force, nor employees of the City of Los Angeles; * * *

"That approximately 800 police officers, members of the Police Department of the City of Los Angeles, are members of said Local 665. * * *"

The above-mentioned resolution of the Board of Police Commissioners is as follows:

"Resolution

"Whereas, police officers are something more than mere employees; they are in fact officers of the city; and

"Whereas, such officers should remain free of all obligations to any union, group or association that might impair their complete freedom and independence in matters of law enforcement where controversies exist between employers and employees, or between or among labor organizations; and

"Whereas, a divided responsibility would occur if police officers of this city should accept membership in a union or association in any manner controlled, governed or influenced by or connected with a parent organization or federation which is not a constituent part of our city government, composed exclusively of city employees, and designed only to serve the interests of this city; and

"Whereas, in the event of controversies between labor and industry, or jurisdictional disputes among labor organizations, resulting in disorder, membership in labor organizations would not be conducive to that freedom on the part of police officers that the public interest demands; and

"Whereas, any provision in the constitution, by-laws, rules or regulations of a labor organization providing that the first duty of a police officer shall be to the city, or that no police officer shall go on strike against the city, would be wholly ineffective to confer protection to the city against either amendment to or violation of such provisions. For a law enforcement officer to strike against government would be intolerable, and membership in any organization rooted in or influenced by any federation from the outside would tend to destroy the fibre of independence and freedom that must be preserved; Therefore,

"Be it resolved by the Police Commission of the City of Los Angeles, California, that:

"1. No police officers of the Los Angeles Police Department shall hereafter be or become a member of any Police Officer's

organization in any manner identified with any trade association, federation or labor union which admits to membership persons who are not members of the Los Angeles Police Department, or whose membership is not exclusively made up of employees of the City of Los Angeles. Any Police Officer now a member of such union shall have thirty (30) days from this date within which to disassociate himself from such organization.

"2. No association of police officers of the City of Los Angeles shall be affiliated with any trade association or labor union which admits to membership persons who are not employees of the City of Los Angeles.

"3. Except as above stated nothing herein shall be deemed to reflect upon labor organizations generally nor shall this rule prevent or preclude members of the Police Department from associating themselves together with or within an organization of employees of the City of Los Angeles or to apply to the Chief of Police, the Police Commission, the City Council or the Mayor, or any other governmental agency of the City of Los Angeles, in person or through representatives of their choice, for redress of grievances.

"Adopted by the Board of Police Commissioners at regular meeting, Tuesday, March 12, 1946.

"/s/ Arthur G. Baraw—Secretary".

Quoting from appellant's opening brief, appellant contends:

"1. The Resolution of March 12, 1946, requiring appellant to renounce his membership in the particular labor organization involved in this case as a condition of continued employment as a city policeman is unreasonable and arbitrary and therefore beyond the limited power of the Board of Police Commissioners to make and enforce 'necessary and desirable rules and regulations' for the management of the Police Department.

"2. The City is forbidden by the 'equal protection' and 'class legislation' provisions in the Federal and State Constitutions to deny equal opportunity of employment to persons qualifying as police officers who desire to belong to such a labor union.

"3. The Resolution is an unconstitutional impairment of Los Angeles police officers' rights of free speech, peaceable assembly, and to petition for redress of grievances, guaranteed by the Federal and State Constitutions.

"4. The Resolution amounts in effect to a bill of attainder.

"5. The Resolution is an unconstitutional deprivation of the property of Los Angeles police officers without due process of law."

Appellant concedes that, "The general authority to control and manage the Police Department of the City of Los Angeles is conferred upon the five-man Board of Police Commissioners, respondent herein. (Los Angeles City Charter, Secs. 70 and 71.) Section 78 of the City Charter invests the board of each department, including the Board of Police Commissioners, with specific power 'to supervise, control, regulate and manage the department and to make and enforce all *necessary and desirable* rules and regulations therefor * * *.'" (Italics included.) It is argued, however, that this power is limited by section 202 of the charter. Section 202, sub. (1) provides: "The right of an officer or employee of the Police Department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided."

In connection with contention No. 1, which refers to the action of the Board of Police Commissioners as "unreasonable and arbitrary", appellant argues that,

"It should be borne in mind that appellant is not complaining of a departmental regulation against striking or even threats of striking, but rather a prohibition against belonging to an organization which is dedicated to bettering the economic status of policemen by constructive methods adapted to their special obligations to the department.

"While the possibility of favoritism or preference being shown within the Department because of union membership was not enumerated in the preamble to the Resolu-

tion as a motivating factor for adoption of this rule, it should be noted that the danger of such abuse is no greater in the case of union membership than in circumstances involving membership in any fraternal or religious organization."

It is also argued in support of the same contention that, "In the present case, the real aim of the Resolution is to prevent policemen from exercising the general right of public employees to form or join bona fide labor organizations or associations of their own choosing as a concomitant of their rights of free speech, free assembly and petition guaranteed by the Federal and State constitutions." And concludes with the proposition that, "The Resolution of March 12, 1946, improperly discriminates against otherwise qualified city employees because of union membership alone without establishing that any rational connection exists between such membership and lack of competency as a police officer."

Respondent concedes, "that the rule-making power of the Board of Police Commissioners may not be exercised arbitrarily and that some rational connection must exist between an act which the Board compels a police officer to refrain from doing and his service as a police officer. However, the rule is firmly established that what is necessary and desirable is for the Board to determine and if there is any substantial basis for upholding the action of the Board it will be sustained". Appellant, on the contrary, takes the following erroneous position, "Thus, to be valid, the rule in question must be found by the court to be *both* 'necessary' *and* 'desirable' * * *, as well as 'reasonable' ". (Italics included.)

[1] The law is well settled that in such circumstances, the question as to whether such a rule is "necessary and desirable" is not a judicial question. The courts are not charged with the responsibility of determining the wisdom of the rule. That question was for the board to determine. And as the trial judge observed, "That the board deemed the rule desirable is evidenced conclusively by its adoption." In a memorandum opinion by the trial judge appear the following pertinent observations:

"In the case of Cleu v. Board of Police Commissioners, 3 Cal.App. 174, 84 P. 672, 673, the court, in upholding a rule of the San Francisco Police Commission which resulted in a police member being dismissed for failure to pay his debts, and after quoting charter provisions similar to those quoted herein, said:

" 'It is from the above provisions of the charter that the board of police commissioners must derive their power to make the rule in question. *If the rule concerns the government and discipline of the police department and is reasonable, it must be held to be valid.* The board has the right to make all reasonable rules to secure efficiency and good service in the department.

" '* * * *A wide discretion must be lodged in the board in determining what conduct on the part of members of the department is injurious to the efficiency of the department.* We cannot say that the rule here is not reasonable, and does not tend to promote the efficiency of the department.' (Emphasis mine.)

"This latter part was later quoted with approval in Donovan v. Board of Police Commissioners, 32 Cal.App. 392, 403, 163 P. 69, and again in Irwin v. City of Los Angeles, 3 Cal.App.2d 495, 498, 39 P.2d 851.

"In Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 679, 62 P.2d 1047, 1049, in considering a question whether the discharge of a civil service employee was in violation of his rights to freedom of speech and of the press, and arbitrary, the court said:

" 'The right which is involved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. Such is not only the right but the duty of the city and its several departments. In the exercise of this duty, they must be allowed a wide dis-

cretion and their acts are not subject to review by the courts until they have reached the point of illegality.'

"The rule adopted by the resolution here in question does not on its face appear unreasonable or arbitrary in the light of the foregoing authorities. Nor is it in violation of any constitutional right of police officers. If the rule is necessary and reasonable it cannot be charged with wrongfully depriving the police members of any constitutional right. All such rights are relative. Nor does the rule amount to a Bill of Attainder, nor does it produce or inflict any of the incidents of such a legislative act. It was the result of a decision by the Board in the exercise of that wide discretion which is accorded to them. Neither this court nor any judge thereof has the power to substitute its or his contrary views as to the propriety, necessity, desirability or reasonableness of the rule. The rule having been created by the Board under and within its charter powers, and no appearance of unreasonableness or arbitrariness or unconstitutionality manifesting itself therein, it must be concluded that such rule cannot have reached the point of illegality and subject to review and annulment by the courts either by direct action or by means of injunction against enforcement thereof." (Italics included.)

It may be assumed, as appellant contends, and noted above among appellant's arguments, that the union in question is, "dedicated to bettering the economic status of policemen by constructive methods adapted to their special obligations to the department", but, the Board of Police Commissioners is not bound to accept such amovement as a valid and feasible function of government. And, with regard to the likelihood of "favoritism or preference", as a possible reason for the adoption of the rule and that, "the danger of such abuse is no greater in the case of union membership than in circumstances involving fraternal or religious organization", it should be noted that such a comparison, for reasoning purposes, proves nothing. There is no resemblance between the things compared. Appellant's contention as noted above that, "the real aim of the resolution is to prevent policemen from exercising the general right of public employees to form or join bona fide labor organizations or associations of their own choosing as a concomitant of their rights of free speech", obviously is an assumed premise hence, any conclusion to be drawn therefrom is of no logical value in the circumstances.

[2] It is also argued in substance, with regard to contention No. 1 that, section 202 of the charter, which provides, "The right of an officer or employee to hold his office * * *" is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided, is a limitation on section 78 which vests the Board of Police Commissioners, "with specific power to supervise, control, regulate and manage the department and to make and enforce all necessary and desirable rules and regulations therefor". There is no merit to the argument. Assuming, but by no means deciding, that the people through the medium of the constitution have vested in municipal corporations the power to define and thereby determine property rights, there is no conflict between these two provisions of the charter. That the Board of Police Commissioners has the power to adopt necessary and desirable rules, there can be no question. The charter further provides for the trial of any one accused of violating such rules and thus prevents arbitrary action that would summarily deprive an employee of the so-called "property right". By no process of reasoning can the provisions of section 202 be construed as a limitation on the provisions of section 78.

It is also argued in support of contention No. 1 that, "No rational connection exists between union membership and lack of competency as a police officer". It is urged that this general ban against membership in any union of police officers affiliated with a federation or labor organization, including non-policemen or non-employees of the City of Los Angeles in its ranks, disregards the extent of local autonomy which exists and brushes aside "any provision in the constitution, by-laws, rules or regulations of a labor organization that the first duty of a police officer should be to the

city, or that no police officer shall go on strike against the city" as "wholly ineffective to confer protection to the city against either *amendment to* or *violation* of such provisions." (Emphasis included.)

Whether a rational connection exists between union membership and lack of competency as a police officer, obviously, is a matter of opinion. And the question was solely one for the Board of Police Commissioners to determine. Regardless of what the constitution and by-laws of any organization might provide for or against, it is idle to argue that such constitution and by-laws cannot be changed by amendment. Moreover, it was for the Board of Police Commissioners, as the representatives, agents and servants of the people, to determine what the first duties, indeed, all of the duties, of a police officer should be. It should be noted also, that the Board of Police Commissioners probably took into account the fact that labor unions are active politically, whereas civil service employees are prevented by law and as a condition of employment from taking an active part in politics while on official duty or during working hours and, that means would be thus provided for doing indirectly and with impunity, that which the law specifically prohibits.

[3, 4] Appellant's argument that the resolution here considered is arbitrary and unreasonable, may be considered only with relation to construction and interpretation. In this connection it is well settled that statutes must be given a reasonable construction. Whether the resolution of the Police Commission is reasonable therefor has reference only to the subject of construction and interpretation. If within reason it can be held to coincide with the constitution, is not in conflict with other legally constituted authority and is free from ambiguity, it is reasonable within the meaning and application of the above-mentioned rule of construction. And it is the duty of the courts, in such circumstances to uphold it. Courts are not concerned with the wisdom, propriety or practicability of a statute, rule, or regulation. Such questions are addressed to those responsible for their adoption.

With regard to contention No. 2, appellant argues that, "The right of persons to seek employment without being subject to arbitrary action and improper discrimination has been frequently upheld by the courts in recent times as against private organizations." And, that, "The fact that the government is the employer does not alter this result." (Citing cases.) It is also argued that, "By singling out members of certain labor organizations, such as appellant, and threatening to deprive them of employment, seniority rights, and insurance and pension benefits without regard to their individual qualifications and capabilities to satisfactorily and faithfully perform the duties of their office, the City of Los Angeles denied them equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States and Article I of our State Constitution."

[5] There is no denial of equal protection of the laws nor is any contravention of the Fourteenth Amendment even suggested, in the action of the Board of Police Commissioners. Nothing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison. The members of the Board of Police Commissioners and the members of the police department are public servants; the basis and conditions of the employment of both are fixed by law and not by private contract. In the case of Miami Water Works, Local No. 654 v. City of Miami, Fla., 26 So.2d 194, 196, 165 A.L.R. 967, substantially the same issues were involved. There the court declared in part: "The charter of the City of Miami contains no provision which even remotely suggests that the duly elected or appointed officials of the City are under an obligation or duty to consult with the plaintiff union, or anyone else, in determining fitness for employment or promotion, or in fixing hours, wages, or conditions of employment of its employees. Indeed, all provisions of the charter are impliedly to the contrary. All employees of the City are under a civil service system established and created by Chapter 19981, Special Acts 1939, as amended by Chapter 21385, Special Acts 1941,

Laws of Florida. * * *" See also National Labor Relations Board v. Jones & Laughlin Steel Corporation, Cir., 154 F.2d 932. Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W.2d 310; City of Jackson v. McLeod, Miss., 24 So.2d 319.

In the case of Congress of Industrial Organizations et al v. City of Dallas, Tex. Civ.App., 198 S.W.2d 143, 148, decided in 1946, the court was concerned with substantially the same questions that are presented in the within appeal. The City of Dallas had adopted an ordinance declaring it to be an offense, "for any officer, agent or employe, or any group of them, of the City of Dallas to organize a labor union, organization, or club of City employes, or to be or become a member thereof", and, as noted by the court, "this without regard to whether such local union is affiliated with any other local, State, national or international body or organization, etc." The court observed, "A review of case law on the subject reveals that courts, the country over, have uniformly sustained all governmental laws and regulations of the nature, intent and purpose of the ordinance of the City of Dallas now under consideration. The cases are so numerous that to do more than make a mere reference or an occasional excerpt would lengthen this opinion out of bounds." (Citing and quoting cases.) "Reported cases reveal many futile attempts by labor unions to organize among governmental employees." (Citing cases.)

As to contention No. 3, it is argued, "The right to discuss and inform people concerning the advantages of union affiliation and to form and join a labor organization is an exercise of the rights of free speech, assembly, and petition guaranteed all citizens"; "The rights of employees of the federal government and of states, counties and municipalities to form or join labor organizations as an exercise of the rights of free speech, assembly, and petition is generally conceded"; and, that, "The surrender of constitutional rights may not lawfully be imposed as a condition precedent to public employment."

[6] A complete answer to the above contention is fully set forth in the following cases: McAuliffe v. Mayor, etc., of City of Bedford, 155 Mass. 216, 29 N.E. 517; Christal v. Police Commission of the City and County of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416; Raycraft v. Harrison, 108 Ill.App. 313, 316; Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047.

The action of the Board of Police Commissioners raises no constitutional questions. However, as noted above, appellant seeks to inject the issue of free speech and free assembly. It is urged, in this connection, that "The State's power to regulate union activity with a view to protecting the public interest must not trespass upon the domain set apart for free assembly and free speech". It should be emphasized that, in no sense, does the resolution even suggest any attempt to "regulate union activity". It relates only to "rules and regulations for the police department", for which, as hereinbefore noted, the city charter provides.

In support of the argument on free speech, appellant cites Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 742, 81 L.Ed. 1066. The case is not in point. The court was therein concerned with the construction of a penal statute of the state of Georgia and determined, with regard to the code section under consideration, that "no reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." Nevertheless, the court adhered to an earlier decision (Gitlow v. People of State of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138), but noted a distinction. Referring to the latter case, the court however made the following comment which is especially pertinent to the situation here considered, "And it was in connection with the statute there involved that the court quoted language relied upon below and in argument here from People v. Lloyd, 304 Ill. 23, 136 N.E. 505, to the effect that a state is not compelled to delay adoption of such preventive measures until the apprehended danger becomes certain". The attempt to raise the issue of free speech and free assembly in the within action is unavailing.

In support of contention No. 4, it is argued in substance that the resolution of the Board of Police Commissioners here considered, contemplates punishment without a trial; that "perpetual exclusion from a chosen vocation is 'punishment' within the meaning of that term as used in defining bills of attainder".

[7] In no sense can the action of the commission be held to be in effect a "bill of attainder". As heretofor pointed out, the city charter provides for a trial, and the rules and regulations here considered constitute no interference with orderly processes of the law.

And finally, with regard to contention No. 5, appellant argues in substance that, as a result of enforcement of the resolution complained of, "Appellant and others stand to lose their positions as police officers with the City of Los Angeles, and accrued benefits such as seniority, insurance and pension rights". And that, "Among the 'fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions' * * * is the concept of 'due process' which requires that condemnation shall be rendered after a fair and impartial trial."

[8] The above argument is without merit. Any attempt to inject "due process", as an issue in the within controversy, is also unavailing. As the court declared in Ludolph v. Board of Police Commissioners, 30 Cal.App.2d 211, 216, 86 P.2d 118, 121: "The right to an office or of employment with the government or any of its agencies is not a vested property right, and removal therefrom will not support the question of due process." (Citing cases.)

A consideration of the briefs herein and of the oral argument as well, reveals that, although appellants over all argument sings the praises of the constitution on the one hand nevertheless, it presages its destruction on the other. Notwithstanding the fact that the named defendants are individuals and make up the Police Commission of the City of Los Angeles, actually, the suit herein is against the people. It disputes the power of the people to establish and conduct the government, for it seeks to control governmental processes by indirection. For example, in the oral argument appellants stated, "It is our contention that the nature of this organization is such that it will promote efficiency and make for better police officers". It is common knowledge that the people have sought no assistance from the labor union referred to herein, or any other organization. And, permission by public officials to establish such an affiliation would be a direct violation of the constitution, the effect of which would, in turn, defeat the will of the people. It should be emphasized that the scheme of government basically is created by the constitution; it is the source of government. Offices and agencies are established; powers are authorized; duties are imposed on individuals and governmental agencies, all for the purpose of carrying out the will of the people. All public officials, whether national or state, executive, administrative or judicial, and all public employees, are public servants. There is but one master, the people. Hence, the common expression that, "This is a government of laws and not of men". The allegiance of all public servants is to the people; obviously there can be neither alienation nor division of this allegiance if constitutional government is to continue. The police commission, therefore, not only had the power but it was a manifest duty to adopt and enforce the resolution herein considered. The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct.

Conditions of public employment are determined and established by the people, either directly through the medium of the constitution, or indirectly, by vesting power and authority in governmental agencies or offices for such purposes. For example, section 18 of Article VI of the state constitution provides that, "The justices of the supreme court, and of the district courts of appeal * * * shall be

ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected or appointed". Manifestly, the acceptance of such a position results in the surrender of certain liberties. The people however are concerned with the public good and not with the ambition or desires of the individual, and conditions of public employment are determined accordingly. In this process of state government there is no conflict with the will of the people as expressed in the federal constitution.

As pointed out in C. I. O. v. City of Dallas, hereto referred to, "Courts, the country over, have uniformly sustained all governmental laws and regulations of the nature, intent and purpose of the ordinance of the City of Dallas". And the same observation applies with equal force to the resolution of the Police Commission of the City of Los Angeles herein considered.

The judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER, J., dissenting.

29 Cal.2d 798

**VON HAMM-YOUNG CO., Limited, v. CITY AND COUNTY OF SAN FRANCISCO.**

**S. F. No. 17257.**

Supreme Court of California, in Bank.
March 14, 1947.

**1. Commerce ⇐72**

The fact that goods stored in warehouses pending shipment by sea had moved in interstate commerce or that further movement thereof was intended did not bar local taxation thereof. U.S.C.A.Const. art. 1, § 8.

**2. Commerce ⇐72**

The fact that interstate rail shipper of goods, stored in warehouses by consignee pending shipment by sea, could have diverted goods from their destination, did not remove them from protection of commerce clause of federal constitution against local taxation after commencement of interstate transit, interruption of which by such storage was only incidental to its continuation. U.S.C.A.Const. art. 1, § 8.

**3. Commerce ⇐72**

The states may not tax property in transit in interstate commerce, but property may come to rest within state by reason of break in transit and become subject to state's power to impose non-discriminatory property tax; crucial question being that of continuity of transit, which is not affected by formalities, such as forms of billing and mere changes in method of transportation, but particular occasion or purpose of interruption in transit must be considered. U.S.C.A.Const. art. 1, § 8.

**4. Commerce ⇐72**

Where break in interstate transit of goods is merely incident to interstate journey, property remains immune from local taxation, but property tax may be imposed thereon, if interruption in transit is not in necessary delay or accommodation to means of transportation, but for taxpayer's business purposes and profit. U.S.C.A.Const. art. 1, § 8.

**5. Commerce ⇐72**

Goods purchased by Hawaiian corporation in other states than California for shipment to and resale in Hawaii did not lose their exemption from local taxation under comerce clause of federal constitution because corporation sent them to San Francisco with knowledge that they would have to be stored there until shipping space became available. U.S.C.A.Const. art. 1, § 8.

**6. Commerce ⇐72**

An Hawaiian corporation's storage in San Francisco warehouses of goods purchased by it in other states than California for shipment to and resale in Hawaii until ships became available for transportation thereof was incidental to their shipment to Hawaii and hence not sufficient break in continuity of interstate transit to justify imposition of tax by city and county of San Francisco on goods. U.S.C.A. Const. art. 1, § 8.

**7. Commerce ⇐72**

Goods purchased by Hawaiian corporation in California at other points than San Francisco and delivered to common carriers for transportation to such city, where they were stored in warehouses pending shipment to Hawaii, were exempt from local taxation as against contention that they were never transported in interstate commerce. U.S.C.A.Const. art. 1, § 8.

**8. Commerce ⇐72**

Goods are not immune from taxation merely because shipper thereof intends to and does ship them in interstate commerce, but when he has done everything possible to deliver goods to common carrier for transportation to their final destination, has never sold them locally, and lacks authority

to divert goods into channels of local trade, they are not taxable because war time emergency regulations prevented him from following normal practice of delivering goods directly to common carriers for carriage to their ultimate destination. U.S.C.A.Const. art. 1, § 8.

**9. Commerce ⇐72**

The federal constitutional amendment, prohibiting importation of intoxicating liquors into state for delivery or use therein in violation of laws thereof, did not authorize local taxation of intoxicating liquors stored in San Francisco warehouses pending shipment thereof to Hawaii as incident to interstate transit thereof. U.S.C.A.Const. Amend. 21.

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Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Von Hamm-Young Company, Ltd., against the City and County of San Francisco for refund of personal property taxes paid on plaintiff's merchandise in warehouses. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, see, Cal.App., 170 P.2d 940.

Robert W. Kenny and Fred N. Howser, Attys. Gen., John L. Nourse and James E. Sabine, Deputy Attys. Gen., and John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Brobeck, Phleger & Harrison and Robert H. Walker, all of San Francisco, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment recovered by plaintiff for the refund of personal property taxes levied on its property warehoused in San Francisco on the first Monday in March, 1943.

Plaintiff is an Hawaiian corporation engaged in wholesale and retail merchandising in Hawaii. It purchases merchandise from manufacturers and dealers in various parts of the United States for resale in Hawaii. The corporation is not qualified to do business in California and has never sold any of its merchandise within this state. Before the outbreak of the war with Japan, goods purchased by plaintiff in the various states were shipped directly to Hawaii, via the Panama Canal, or transported by rail to West Coast ports and trans-shipped to Hawaii. Normally such goods on passing through San Francisco were transferred directly from freight cars to vessels or to the wharves and thence to vessels. Upon the outbreak of war, all shipping to the Hawaiian Islands was halted. Shipping was resumed in March of 1942, under the control of the War Shipping Administration, which operated all American cargo vessels. Commercial shipping to the Islands through the Panama Canal was not resumed, and all goods destined for Hawaii had to be trans-shipped through West Coast ports.

From the time of the resumption of shipping until after the taxes in question were assessed, there was a continuous shortage of vessels for the transportation of merchandise to Hawaii. The War Shipping Administration in cooperation with the government of Hawaii set up a system of shipping permits and allotment of cargo space for shipments from West Coast ports to the Islands.

An importer of goods into Hawaii was required to obtain a permit from an agency of the Hawaiian government before purchasing goods for shipment. These permits were issued on a priority basis, which entitled the importer to cargo space when it became available but did not assure him that such space would be available. The importer also had to obtain an allotment of cargo space from the representative of the War Shipping Administration in San Francisco. Allotments were issued under the direction of a representative of the military governor of Hawaii, and, after control was returned to the civil governor, under the direction of the civil governor's representative. Cargo space was first allotted to food; space that remained was apportioned to other merchandise.

Plaintiff's merchandise consisted of goods other than foods, and during this period there was continuously more of such cargo

than could be taken by the available ships. All of plaintiff's goods in San Francisco on tax day were purchased after shipping permits had been obtained. Approximately 89 per cent of the cost value of this merchandise was purchased from sellers outside of California, about 1 per cent from sellers at points in California other than San Francisco, and about 10 per cent from sellers in San Francisco. The trial court found that,

"All of said goods [in the San Francisco warehouses] (except those purchased in San Francisco) had been shipped by rail to San Francisco prior to the first Monday in March, 1943, en route to the Territory; they were all consigned by the shippers to plaintiff at Honolulu, Hawaii. Upon arrival of the goods in San Francisco the railroad notified plaintiff of their arrival. Cargo space was not available for shipment of the goods when they arrived in San Francisco, and plaintiff therefore caused the goods to be delivered to San Francisco warehouses to be held temporarily until cargo space should become available. (Where cargo space was available when goods arrived in San Francisco, they were immediately loaded on vessels and shipped to the Territory.)

"All of such goods were removed from the warehouses, placed on board vessels, and shipped to the Territory as soon as cargo space was allocated for them by the San Francisco representative of the Military Governor of Hawaii. None of such goods were processed or changed in form subsequent to their purchase by plaintiff and prior to their shipment from San Francisco to the Territory; and none of them were held or detained in San Francisco for any purpose other than to await the allocation of cargo space. Plaintiff had urgent need for the goods in the Territory and had ample warehousing space for them there. * * *"

A few items were in the warehouses in San Francisco for as short a time as 18 days, some for as long as nine months, but most of the goods remained in warehouses for from two to three months. The trial court found that the sole reason for the storage was the shortage of shipping space and the system of controls and that the storage was not for the benefit or convenience of plaintiff. Defendant contends that this finding was not supported by the evidence and that the trial court erred in holding that the tax was levied on personal property in the course of interstate transit in violation of article I, section 8 of the United States Constitution. It is also contended that, in any event, the property purchased in San Francisco had never been in interstate transit and was therefore subject to the tax.

[1-3] The basic issue with respect to the taxability of the goods that were shipped by rail to San Francisco is whether their storage in San Francisco constituted such a break in their interstate transit as to remove them from the protection of the commerce clause. Neither the fact that the goods had moved in interstate commerce nor the fact that further movement was intended is, alone, a bar to the tax. Bacon v. People of State of Illinois, 227 U.S. 504, 515, 33 S.Ct. 299, 57 L.Ed. 615. On the other hand, the fact that the shipper could have diverted the goods from their destination does not remove them from the protection of the commerce clause, if the other facts show that the interstate transit had already begun and the interruption of this transit was only incidental to its continuation. Hughes Bros. Timber Co. v. State of Minnesota, 272 U.S. 469, 476, 47 S.Ct. 170, 71 L.Ed. 359. The rule governing the break in transit is stated in State of Minnesota v. Blasius, 290 U.S. 1, 8, 54 S.Ct. 34, 36, 78 L.Ed. 131, as follows: "* * * the states may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax. * * * The 'crucial question,' in determining whether the state's taxing power may thus be exerted, is that of 'continuity of transit.' Carson Petroleum Co. v. Vial, 279 U. S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626. * * * Formalities, such as the forms of billing, and mere changes in the method of transportation, do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or

purpose of the interruption during which the tax is sought to be levied."

[4] The question therefore is what occasion or purpose will bring the property within the jurisdiction of the local taxing authority. If the break in interstate transit is merely incident to the interstate journey, such as a breakdown in the transportation system (Champlain Realty Co. v. City of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195), or a delay to promote the safe or convenient transit of the property (Champlain Realty Co. v. City of Brattleboro, supra; Kelley v. Rhoads, 188 U.S. 1, 23 S.Ct. 259, 47 L.Ed. 359), to await ships or to permit accumulation of sufficient cargo to load a ship (Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626), the property remains immune from local taxation. A property tax may be imposed on the cargo, however, if the interruption is "not in necessary delay or accommodation to the means of transportation * * * but for the business purposes and profit of the [taxpayer]" (General Oil Co. v. Crain, 209 U.S. 211, 230, 231, 28 S.Ct. 475, 482, 52 L.Ed. 754; Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 668, 33 S.Ct. 712, 57 L.Ed. 1015), such as a halt to process the goods (Bacon v. People of State of Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; Missouri Pacific R. Co. v. Schnipper, 7 Cir., 56 F.2d 30), to accumulate a stock of goods to enable the owner to fill orders more readily (Susquehanna Coal Co. v. City of South Amboy, supra), to separate the goods for distribution to customers, to place the goods in different containers (General Oil Co. v. Crain, supra) or to hold the goods for sale. State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131; American Steel & Wire Co. v. Speed, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538; Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257.

[5] Defendant contends that the storage in San Francisco served the business purposes of plaintiff by enabling it to purchase merchandise as it became available. Defendant relies on the following uncontradicted testimony of plaintiff's district manager of its San Francisco office: "Q. Was there any reason for doing that [warehousing the goods] other than inability to secure shipping space? A. Yes. A lot of this merchandise was critical merchandise; if we didn't take the merchandise we lost it. In other words, it went to other places. Most of it was bought on a priority and if we didn't take it, why, it would go to other customers by the suppliers. Q. Was there any advantage to your keeping the merchandise in warehouses? A. None whatsoever. * * *" The witness also admitted that the fact that cargo space was limited was known, but he explained the action of the company as follows: "Because you never knew when we were going to get an opportunity to ship merchandise, we would go ahead and get quite a bit of merchandise. Q. What do you mean? A. Matson [the agent of the War Shipping Administration] might get an extra boat and they would call for cargo right away; if we didn't have it in this port, why, we wouldn't get it shipped." Defendant contends that it is clear from this testimony that if storage facilities for merchandise purchased had not been available, plaintiff would have had to forego its purchases, that plaintiff knew that the goods had to be stored, that by making San Francisco a depot for the collection of scarce goods, plaintiff gained a special business advantage, and that because of this beneficial use of local facilities there was a sufficient break in the transit of the goods to remove the bar to their taxation.

It is immaterial, however, what goods plaintiff purchased or why it purchased them. The crucial question is not why the goods were bought, but why they were stored in San Francisco. It cannot be seriously questioned that they were stored there solely because of the inadequacy of shipping facilities, a condition completely beyond plaintiff's control. Plaintiff was engaged in business for profit, and its primary purpose was to get as much goods as possible to Hawaii as rapidly as possible. The goods did not lose their exemption because plaintiff sent them to San Francisco knowing that they would have to be stored there until shipping space became available. In Champlain Realty Co. v. City of Brattleboro, supra, the taxpayer floated logs from Vermont to New Hampshire. The

boom at the destination, Hinsdale, New Hampshire, was incapable of holding all the logs when the water was high and the current swift. Logs impounded in Brattleboro, Vermont on tax day to await subsidence of high waters were held immune from taxation during this interruption. The logs were sent on their journey in the knowledge that they would be held at the boom in Brattleboro. " 'In anticipation of the probable high water in the Connecticut, plaintiff had previously placed its boom across West river near its mouth [Brattleboro, Vermont] to hold the wood there until the water in the Connecticut had receded enough to allow it to be held at the mill at Hinsdale.' " 260 U.S. 366, 368 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195. The taxpayer in that case not only prepared for the storage of the logs at Brattleboro before sending them on their journey but it used the Brattleboro boom as a substitute for more costly terminal facilities in New Hampshire, for the logs could have continued their journey without delay had the New Hampshire boom been stronger or other facilities provided to receive the logs. See Powell, Contemporary Commerce Clause Controversies Over State Taxation, 76 U. Pa.L.Rev. 773, 781. Moreover, without the boom facilities at Brattleboro, the taxpayer could not have floated its logs at the time it chose to do so, just as the plaintiff in the present case could not have sent its goods on to San Francisco had there been no storage facilities there.

[6] In the present case, the storage in San Francisco was not a substitute for storage in Hawaii, for the plaintiff had urgent need for the goods in Hawaii and ample storage space for them there. Although it was known at the time of the shipment to San Francisco that all goods could not be shipped on to Hawaii immediately upon arrival in San Francisco, there was no way of knowing, under the dual system of permits and allotment of cargo space, how long the delay would be or what property would be shipped through immediately. Although the delay was for an indefinite period, it arose entirely from the "lack of facilities for immediate transportation" (Kelley v. Rhoads, 188 U.S. 1, 5, 23 S.Ct. 259, 261, 47 L.Ed. 359) and was not longer than necessary to obtain shipping space. In Carson Petroleum Co. v. Vial, supra, the United States Supreme Court held that oil brought into a state and held in storage awaiting ships or the accumulation of enough oil to load a ship was immune from local property taxation on the ground that the storage was incidental to the transit of the oil through the state. Similarly, in the present case, the storage of goods brought into San Francisco was incidental to their shipment to Hawaii. There was not, therefore, sufficient break in the continuity of interstate transit to justify the imposition of the tax upon the goods transported by rail to San Francisco en route to Hawaii.

[7] Defendant contends that in any event the goods purchased locally were subject to the tax on the ground that they had never been transporated in interstate commerce. The merchandise purchased in California at points other than San Francisco had been delivered to common carriers and had begun their interstate journey. Coe v. Town of Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715. The same rules govern this property as govern the property purchased outside the state, for the interruption in transit served the same purposes and arose from the same causes. Champlain Realty Co. v. City of Brattleboro, 260 U.S. 366, 373, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195; Hughes Bros. Timber Co. v. State of Minnesota, 272 U.S. 469, 474, 47 S.Ct. 170, 71 L.Ed. 359.

[8] The only distinction between the goods purchased in San Francisco and the goods obtained elsewhere in California is that the San Francisco goods were not delivered to common carriers. The regulations of the War Shipping Administration prevented delivery to the carriers that were to transport these goods to Hawaii, and there was no showing that the goods were transported from one place in San Francisco to another by common carriers. The issue with respect to these goods is whether the movement from the place of purchase to the warehouses where they were stored to await the allotment of cargo space was part of their interstate transit. The answer turns upon whether there is any reasonable ground for distinguishing the goods pur-

chased a few miles outside of San Francisco and delivered to a common carrier for shipment to Hawaii but diverted to San Francisco warehouses because of the shortage of shipping space, from the goods transported within San Francisco to warehouses because the wartime emergency regulations prohibited immediate delivery to the carriers that would take them to their destination.

Defendant contends that under the rule of Coe v. Town of Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 478, 29 L.Ed. 715, the goods were subject to taxation "until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey." Under this contention, if the regulations of the War Shipping Administration had permitted plaintiff to deliver the goods to a common carrier to be held under the carrier's control until shipping space became available, the goods would have been immune from taxation, but since plaintiff was not allowed to deliver the goods to common carriers that would transport them to their destination, they remained subject to taxation. The goods were purchased only after shipping permits were obtained for their transit to Hawaii and they were in fact shipped as soon as cargo space was allotted for them by the representative of the Governor of Hawaii. The trial court found that "Plaintiff is not and never has been engaged in business or qualified to engage in business of any kind in the State of California." It is true that goods are not immune from taxation merely because the shipper intends to ship, and subsequently does ship, the goods in interstate commerce (State of Minnesota v. Blasius, 290 U.S. 1, 9, 54 S.Ct. 34, 78 L.Ed. 131; Heisler v. Thomas Colliery Co., 260 U.S. 245, 259, 43 S.Ct. 83, 67 L.Ed. 237), but when the shipper has done everything possible to deliver the goods to the common carrier for transportation to their final destination, has never sold the goods locally and lacks the authority to divert the goods into the channels of local trade, he should not be penalized because wartime emergency regulations have prevented him from following the normal practice of the business in delivering the goods directly to the common carriers that will carry them to their ultimate destination. It was recently held in Richfield Oil Corp. v. State Board of Equalization, 67 S.Ct. 156, 163, 91 L.Ed. 80, that insofar as the question of immunity from a state tax on exports under article I, section 10 of the United States Constitution is concerned, delivery to a common carrier is not the sole test of whether the goods involved are subject to a local tax. "The certainty that the goods are headed to sea that and the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." In that case delivery to a vessel furnished by the purchaser was held sufficient to show such certainty of exportation. The court recognized that rules for determining when goods are in the process of exportation under the Export-Import Clause are not always the same as the rules for determining when interstate transit has commenced (67 S.Ct. at page 159, 91 L.Ed. 89) but the basic principle is the same, namely the certainty that the goods have been committed to a movement outside the state and will not be diverted into the channels of local trade. In view of the certainty in the present case that the goods were committed to a movement outside the state and would not be diverted into the channels of local trade, the fact that shipping permits had already been obtained for the goods, and the impossibility under the wartime emergency regulations of delivering the goods directly to the common carriers that were to transport them to Hawaii, the movement of the goods from the place of purchase to the warehouses must be considered a movement in interstate commerce just as it would have been had the goods been delivered directly to the common carriers and held under their control until shipped.

[9] Defendant also contends that the property tax, even if it did not apply to the bulk of the property in transit, applies to plaintiff's intoxicating liquor stored in the San Francisco warehouses on tax day, on the ground that under the twenty-first amendment to the Federal Constitution the state may regulate interstate traffic in

alcoholic beverages. The twenty-first amendment merely prohibits the importation of intoxicating liquors into a state "for delivery or use therein * * * in violation of the laws thereof. * * *" Defendant relies on the concurring opinions in Duckworth v. State of Arkansas, 314 U.S. 390, 397, 62 S.Ct. 311, 86 L.Ed. 294, 138 A.L.R. 1144; and Carter v. Commonwealth of Virginia, 321 U.S. 131, 139, 64 S.Ct. 464, 88 L.Ed. 605. These opinions were concerned, not with the taxation of property in transit, but with the regulation of such transit to prevent evasion of local laws. Moreover, the majority opinion in both cases rejected the view that the twenty-first amendment was applicable to the transportation of alcoholic beverages through a state. See, also, Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386, 64 S.Ct. 622, 88 L.Ed. 814; and cases collected in 84 L. Ed. 137; 55 Yale L.J. 815.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.




29 Cal.2d 808

**BOWMAN v. BOWMAN.**

**L. A. 19671.**

Supreme Court of California, In Bank.

March 21, 1947.

**1. Divorce ⇐243, 308**

Where payments ordered in interlocutory and final judgments of divorce were required to be for the benefit of plaintiff and her child, and such payments would serve to provide plaintiff and the child with unobstructed use of their home and household furniture, requirement for such payments was construed as a provision for support and maintenance. Civ.Code, § 139.

**2. Divorce ⇐235, 240(2)**

The amount of support that husband must pay wife is within discretion of divorce court, and court, in making award, must consider circumstances of parties, needs of wife and ability of husband to pay. Civ.Code, § 139.

**3. Divorce ⇐243, 308**

Where provisions of interlocutory and final judgments of divorce requiring husband to make certain payments required by certain notes and mortgages were provisions for support and maintenance of wife and her child, such provisions were not void because ordering payments to court trustee, since trustee was not an agent of creditors but a trustee for plaintiff and minor child and was not within the rule that orders for payment to person not a party to action are beyond jurisdiction of court.

**4. Divorce ⇐243**

Support, ordered by a divorce judgment, normally should be paid directly to wife, but trial court may order the sums paid to a trustee for benefit of wife. Civ. Code, § 139.

**5. Divorce ⇐286, 312**

Where husband and wife were both liable on certain debts, husband was not injured by order in divorce judgment directing that husband's payments for benefit of wife and child be made to trustee and that trustee apply certain sums to payment of debts, thereby restricting wife's use of such money, and in fact order was a benefit to husband by assuring him that payments would be made to creditors and not otherwise disposed of by wife.

**6. Divorce ⇐203**

Allegation in divorce complaint that plaintiff and defendant were liable for certain debts together with prayer requesting that defendant be ordered to pay debts, although not a formal prayer for alimony, was a sufficient demand for relief to authorize an order requiring defendant to make alimony payments to court trustee and instructing trustee to apply payments to reduction of debts to give plaintiff and her child the unobstructed use of the home and household furniture which were encumbered to secure such debts.

7. Divorce ⇐203

Where relief granted in excess of prayer is alimony, judgment, although erroneous, is not void.

8. Divorce ⇐161

A defendant in divorce action could not be relieved from entry of default when his motion to open default was not made within six months after entry of default. Code Civ.Proc., § 473.

9. Divorce ⇐164

Where interlocutory judgment of divorce was rendered precisely as intended by trial judge, modification of judgment could not be based upon power of trial court to correct clerical errors. Code Civ. Proc., § 473.

10. Judgment ⇐336

The purpose of statute authorizing a trial court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect is to enable trial court to set aside judgment, order or proceeding in order to allow party to proceed on the merits. Code Civ.Proc., § 473.

11. Judgment ⇐294

Trial courts may modify or amend their judgments only as prescribed by statute.

12. Divorce ⇐164

The statute authorizing trial court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, does not authorize the summary modification of judgments to correct errors of law so that a purported change of an interlocutory divorce judgment under the authority of such a statute was void. Code Civ.Proc., §§ 473, 580.

13. Divorce ⇐247

Divorce court has power to terminate payments of support and maintenance in a proper case and upon proper showing. Civ.Code, § 139.

14. Divorce ⇐164

Where purported modification of interlocutory divorce decree was without authority, trial court properly entered final judgment of divorce in accordance with language of interlocutory decree prior to purported modification thereof.

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Appeals from Superior Court, Los Angeles County; Kurtz Kauffman and John Beardsley, Judges.

Action by Muriel G. Bowman against Harry P. Bowman for divorce, custody of the minor child of the parties and other relief. From an order restoring certain provisions which had recently been stricken from an interlocutory decree and from a final judgment of divorce containing the restored provisions defendant appeals.

Order and judgment affirmed.

Prior opinion 172 P.2d 917.

Vincent Scott, of Los Angeles, for appellant.

Nicholas & Davis and Harry R. Roberts, all of Los Angeles, for respondent.

TRAYNOR, Justice.

These appeals are from an order of the superior court restoring certain provisions previously struck from an interlocutory decree of divorce and from a final judgment of divorce containing the restored provisions. Plaintiff brought an action for divorce on April 13, 1944, requesting support for her child. She also alleged that the parties were indebted to a credit union and owed money secured by a mortgage on a house and lot formerly owned by them as joint tenants, which became the separate property of plaintiff by a quitclaim deed executed by the defendant before the divorce action. Plaintiff requested that defendant be required to pay these debts and also that the community property, amounting to about $1,000, be distributed. Defendant, an attorney, was personally served with process but his default was entered on May 17, 1944.

Plaintiff stated at the trial that she did not seek alimony for herself, but that she wished defendant to pay the foregoing debts. The interlocutory judgment of divorce, providing for the distribution of the community property, was granted. The

trial court granted custody of the child to plaintiff and then ordered:

"3. That the defendant pay to the Court Trustee, for the benefit of plaintiff and said minor child, the following amounts each month, to-wit:

"(a) The sum of $50.00 payable $25.00 on the first day of the month, and $25.00 on the fifteenth day of the month, for the support of said minor child, Donald Michael Bowman;

"(b) The sum of $54.05 on the first day of each month for payment to Syndicate Mortgage Company to be applied on the mortgage on the home place of the parties, until said Loan shall have been paid in full;

"(c) The sum of $43.00 on the first day of each month for payment to Los Angeles Teachers Credit Union to be applied on the promissory note payable to said Teachers Credit Union until it has been paid in full."

Defendant did not appeal from this judgment. Within six months after it was entered, but not within six months after the entry of the default, he made a motion to open, vacate or modify the judgment. This motion was granted to the extent that the words "for the benefit of plaintiff and said minor child" were struck from the decree. Plaintiff did not appeal from this modification but later made a motion requesting the restoration of the words struck from the interlocutory decree. This motion was granted and the final judgment of divorce was entered in the same words as the interlocutory decree.

[1-5] The payments in question are declared to be for the benefit of plaintiff and her child and, since they will serve to provide them with the unobstructed use of their home and household furniture, they must be regarded as provisions for support and maintenance. The amount of support that the husband must pay is within the discretion of the trial court (Scheibe v. Scheibe, 57 Cal.App.2d 336, 343, 134 P.2d 835) and the court, in making the award, must consider the circumstances of the parties, the needs of the wife and the ability of the husband to pay. (Civ.Code, § 139.) Defendant contends, however, that the provisions ordering installment payments are void because the payments are to be made to the court trustee. He relies upon cases declaring that orders for payment to a person not a party to the action are beyond the jurisdiction of the court. Keck v. Keck, 219 Cal. 316, 322, 26 P.2d 300; Stevens v. Stevens, 215 Cal. 702, 704, 12 P.2d 432; Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 535, 88 P.2d 250; Overell v. Overell, 18 Cal.App.2d 499, 502, 64 P.2d 483. The court trustee, however, was not an agent of the creditors but a trustee for plaintiff and her minor child. Bohnert v. Bohnert, 91 Cal. 428, 432, 27 P. 732. The sums to be paid to the court trustee were determined by the amounts of the debt installments and are to be paid until the debts are satisfied. Support normally should be paid directly to the wife (Nathan v. Nathan, 102 Neb. 59, 165 N.W. 955; Blair v. Blair, 40 Utah 306, 121 P. 19, Ann.Cas.1914D, 989, 38 L.R.A.,N.S., 269; see 2 Nelson on Divorce, § 14.69), but the trial court may order the sums paid to a trustee for the benefit of the wife. Nemecheck v. Nemecheck, 250 Mich. 641, 231 N.W. 82; Yost v. Yost, 143 Neb. 80, 8 N.W.2d 686; Mosey v. Hiestand, Ohio App., 42 N.E.2d 186; see 2 Nelson on Divorce, § 14.69.) The court directed the trustee to apply the sums to the payment of the debts, thereby restricting plaintiff in the use thereof, but she did not appeal and defendant cannot show that he is injured by the restriction. Bohnert v. Bohnert, supra, 91 Cal. at page 432, 27 P. 732. Defendant is liable for the debts as well as plaintiff and the appointment of a trustee, with directions, constituted a benefit to him also, since he was thereby assured that the payments would be made to the creditors and not otherwise disposed of by plaintiff.

[6, 7] Defendant contends that the parts of the interlocutory decree requiring alimony payments to the trustee are void because plaintiff did not request alimony in her prayer. Plaintiff clearly stated in her complaint that she and defendant were liable for certain debts and in her prayer she requested that defendant be ordered to pay them. Although this was not a formal prayer for alimony, it was manifestly a request for relief that would give her and her

child the unobstructed use of the home and household furniture. Plaintiff did not wish ordinary support for herself but she wanted the debts paid. In the absence of agreement or sufficient community property, it was necessary to award her alimony in order to give her the required relief. The complaint was sufficient notice to defendant that plaintiff might be granted this relief. Plaintiff need not rely solely upon the sufficiency of her complaint and prayer, however, since it is established that if the relief in excess of prayer is alimony, the judgment, although erroneous, is not void. Parker v. Parker, 203 Cal. 787, 792, 266 P. 283; Cohen v. Cohen, 150 Cal. 99, 102, 88 P. 267, 11 Ann.Cas. 520.

Defendant contends that he properly attacked the interlocutory judgment on the ground that the judgment exceeded the relief prayed for and that he was given relief under section 473 of the Code of Civil Procedure, which is now final, since plaintiff did not appeal. Defendant gave notice of a motion to "Open, vacate or modify the default judgment or default" within six months after the entry of the judgment, but not within six months after the entry of the default. He stated therein that the judgment had been taken against him by mistake, inadvertence, surprise or excusable neglect and, further, that the decree was erroneous insofar as it awarded alimony unsupported by appropriate allegations in plaintiff's complaint and prayer. In his affidavit of merits, defendant stated that plaintiff and her attorney had misled him and also that, in defaulting, he had relied upon section 580 of the Code of Civil Procedure, believing that no alimony would be awarded so long as none had been requested. Upon the hearing of the motion, both parties being represented, the trial court ordered "* * * Motion is granted in part as follows: the words 'for the benefit of plaintiff and said minor child' * * * are stricken. Motion is otherwise denied." The trial court did not, however, disturb that part of the decree ordering defendant to pay the installments to the court trustee. Thus, the trial court attempted to change a part of the decree so that instead of awarding alimony it provided for payments to the court trustee, apparently as part of a division of property. This change amounted to an amendment of the judgment in order to correct a supposed error of law.

[8, 9] The trial court could not relieve defendant from the entry of the default because the motion under section 473 was not made within six months after the entry of default. Phillips v. Trusheim, 25 Cal. 2d 913, 917, 156 P.2d 25; Hunt, Mirk & Co., Inc. v. Hesperides Mining Co., 200 Cal. 382, 384, 253 P. 317; Title Ins. & T. Co. v. King, etc., Co., 162 Cal. 44, 46, 120 P. 1066. Defendant states, however, that he was not attacking the entry of default, but was seeking a modification of the judgment to make it correspond to the relief requested by plaintiff in her complaint. Defendant concedes that the interlocutory judgment was rendered precisely as intended by the trial judge. The modification of the judgment, therefore, cannot be based upon the power of the trial court, under section 473 or independent of it, to correct clerical errors made either by the clerk or by the court. Bastajian v. Brown, 19 Cal. 2d 209, 214, 120 P.2d 9.

[10-12] Section 473 also provides that a trial court may relieve a party from "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. * * *" The purpose of this provision, however, is to enable trial courts to set aside the judgment, order or proceeding in order to allow the party to proceed on the merits rather than to allow him to be defeated by a determination or proceeding caused by his mistake, inadvertence, surprise or excusable neglect. Riskin v. Towers, 24 Cal.2d 274, 279, 148 P.2d 611, 153 A.L.R. 442; In re Estate of Simmons, 168 Cal. 390, 396, 143 P. 697. The trial court in the present case did not attempt to vacate the judgment on the ground of surprise or inadvertence, but attempted to grant defendant's request by modifying the interlocutory judgment to correct the supposed error of law. Trial courts can modify or amend their judgments only as prescribed by statute and the summary modification of judgments to correct errors of

law is not authorized by section 473. The purported change in the interlocutory judgment was therefore void. Stevens v. Superior Court, 7 Cal.2d 110, 112, 114, 59 P.2d 988; Lankton v. Superior Court, 5 Cal.2d 694, 696, 55 P.2d 1170; In re Estate of Potter, 141 Cal. 424, 426, 75 P. 850; First Nat. Bank of Fresno v. Dusy, 110 Cal. 69, 78, 42 P. 476; Felton Chemical Co. v. Superior Court, 33 Cal.App.2d 622, 628, 92 P.2d 684; see Glougie v. Glougie, 174 Cal. 126, 130, 162 P. 118; O'Brien v. O'Brien, 124 Cal. 422, 426, 57 P. 225; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 617, 36 P. 928.

[13] Defendant contends that even if a court is without authority to amend its judgment to correct errors of law, it has continuing jurisdiction, under section 139 of the Civil Code, to modify its support decrees. It is no longer seriously questioned that a trial court has power to terminate payments of support and maintenance in a proper case and upon a proper showing. McClure v. McClure, 4 Cal.2d 356, 360, 49 P.2d 584, 100 A.L.R. 1257. In the present case, defendant's notice of motion was based upon the two grounds mentioned above, i. e., surprise and relief in excess of prayer. The notice of motion was accompanied by defendant's affidavit, a proposed answer and an affidavit executed by his attorney. Defendant's affidavit stated facts showing surprise and alleged that the relief afforded plaintiff was contrary to section 580 of the Code of Civil Procedure. He alleged further that his attorney had advised him that he had a valid and substantial defense to the action. His attorney's affidavit was entitled "Affidavit Supporting Motion to Vacate Judgment." The trial court, upon the hearing of the motion, ordered the words "for the benefit of plaintiff and said minor child" struck from the interlocutory decree, but did not disturb that part of the decree ordering defendant to pay the installments to the court trustee. McClure v. McClure, supra, 4 Cal.2d at page 360, 49 P.2d 584, 100 A.L.R. 1257. The trial court apparently attempted to convert a judgment for alimony into a division of property. There is nothing in the record to indicate that the trial judge made his decision after considering the circumstances of the parties. In fact, the order of the court purports to retain, in the interlocutory decree, that part requiring defendant to pay the contested sums. The court decided merely that it would be erroneous to require him to pay the sums as support and maintenance. It is clear that the trial court made an attempt to rectify a supposed error of law on summary motion procedure not allowed by statute. Lankton v. Superior Court, supra, 5 Cal.2d at page 696, 55 P.2d 1170; Stevens v. Superior Court, supra, 7 Cal.2d at page 113, 59 P.2d 988; Holtum v. Grief, 144 Cal. 521, at page 526, 78 P. 11.

[14] Subsequent to the purported amendment of the interlocutory judgment, plaintiff gave notice of a motion to restore the judgment to its original form. Upon hearing, the trial court ordered that the interlocutory decree be restored to its original form, and the final judgment of divorce was then entered in the words of the original interlocutory judgment of divorce. It is from this order and judgment that defendant appealed. The trial court was correct in entering the final judgment in accord with the language of the interlocutory decree since the purported modification of that decree was without authority.

The order appealed from and the final judgment of divorce are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concurred.

SCHAUER, J., did not participate herein.

29 Cal.2d 825

## In re HULTIN'S ESTATE.

## YOULIAN et al. v. WILLIAMS et al.

L. A. 19576.

Supreme Court of California, in Bank.

March 25, 1947.

Rehearing Denied April 21, 1947.

**1. Judgment ⇐316**

An order correcting clerical error in record of judgment may be made by court ex parte without notice and on court's own motion.

**2. Judgment ⇐323**

Notice of motion to correct clerical error in record of judgment is jurisdictional, where trial judge has no connection with asserted error in record, and asserted error does not appear on face of record.

**3. Judgment ⇐323, 325**

The right to notice and hearing on motion to correct clerical error in record and judgment existed where the answer to the substantial question involved required a determination of fact from evidence that might be conflicting.

**4. Wills ⇐337**

An order of presiding judge of superior court that fee for filing notice of motion of intention to move for new trial in proceeding resulting in judgment denying probate of witnessed will was filed within time and that therefor motion for new trial could be heard was void on its face, where such order was granted ex parte, and trial judge had authority to vacate such order as being void on its face.

**5. Wills ⇐386**

The decision, on conflicting evidence, of trial judge that notice of intention to move for new trial in proceeding resulting in judgment admitting holographic will to probate was filed too late, would not be disturbed.

**6. Appeal and error ⇐417(3)**

The words "his attorney", in rule providing that notice of appeal shall be signed by appellant or "his attorney," mean the appellant's attorney, whether or not attorney appears as attorney of record. Rules on Appeal, rule 1(a); Code Civ.Proc. § 940.

See Words and Phrases, Permanent Edition, for all other definitions of "His Attorney".

**7. Wills ⇐367**

An appeal from order admitting holographic will to probate was validly perfected, where attorney signing appeal was attorney for one of the appellants as special administratrix of estate, notwithstanding that another attorney had been substituted in the will contest proceeding the year before the appeal was taken. Rules on Appeal rule 1(a).

**8. Executors and administrators ⇐31**

The powers of special administrator cease on appointment and qualification of general administrator or executor. Probate Code, § 466.

**9. Executors and administrators ⇐20(10), 22(2), 31, 79**

An appeal from an order appointing an executor suspends his powers and stays proceedings in trial court, but does not reinstate special administrator, and another special administrator should be appointed. Probate Code, § 466.

**10. Executors and administrators ⇐20(10), 31**
**Wills ⇐369**

An order admitting holographic will to probate and appointing executor revoked authority of special administratrix, and appeal from such order automatically stayed proceedings in trial court, and hence writ of supersedeas should issue to stay execution of another order compelling special administratrix to deliver assets of estate to executor. Probate Code, § 466.

**11. Appeal and error ⇐477**

Supersedeas is available in a corrective capacity where there is a statutory stay.

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Proceeding in the matter of the estate of Helen La Monte Hultin, deceased, wherein Jack Youlian and Joan Youlian contested a witnessed will presented by Nadia Williams and May Barr for probate, and presented for probate an earlier holo-

graphic will of deceased, which Nadia Williams and May Barr contested. On application for writ of supersedeas and motion to dismiss appeals of Nadia Williams and May Barr. From a judgment and from orders dismissing a will contest, vacating an order declaring that a fee for filing notice of intention to move for new trial was filed in time, and appointing a special administratrix.

Appeals from judgment dismissed; motion to dismiss appeal from first and third orders denied; second order affirmed; and writ of supersedeas granted.

Nadia Williams, in pro. per., and Marion P. Betty, of Los Angeles, for appellants.

William A. Sherwin and Michael F. Brown, both of Los Angeles, for respondents.

CARTER, Justice.

This case has been before this court previously. In re Estate of Hultin, 28 Cal. 2d 340, 170 P.2d 16. Therein we decided that the motion to dismiss the appeals would not be granted on the ground of untimeliness in the preparation and filing of the transcripts for the reason that appellants should be relieved from their default in that respect. We now have before us for disposition the application of appellants Nadia Williams and Mae Barr for a writ of supersedeas, and respondents' motion to dismiss the pending appeals for asserted lateness in the filing of the notices of appeal from the judgment and orders hereinafter mentioned.

The application by appellants Nadia Williams and Mae Barr for the admission to probate of a witnessed will of the deceased, Helen La Monte Hultin, was opposed by Jack Youlian and Joan Youlian, respondents. A holographic will was offered for probate by the Youlians and was opposed by Williams and Barr. Contests of the respective wills were filed by the opposing parties. The two contests were consolidated for trial. On June 5, 1945, a judgment was entered on the verdict of a jury denying admission to probate of the witnessed will. On the same day an order was entered dismissing the Williams and Barr contest of the holographic will, admitting that will to probate and appointing Jack Youlian executor thereof. Said order will be hereinafter referred to as the first order. Notices of entry of the judgment and the first order were served and filed on June 18, 1945. A notice of intention to move for a new trial in the proceeding resulting in the judgment was filed and bears the clerk's filing date of June 29, 1945, making the filing of the notice apparently a day late. See Code Civ.Proc. § 659. The motion for a new trial was heard on August 7, 1945, by Judge Beardsley, the trial judge. On August 14, 1945, Judge Blake, the presiding judge of the Superior Court of Los Angeles County, made ex parte, upon motion of appellants, an order reading in part as follows: "Upon reading and filing the affidavit of Nadia Williams, Marie Antoinette Griffith and Myrven F. Gift, and the evidence of the check dated June 28, 1945, being before the Court, and good cause appearing therefor, It Is Ordered and Declared that the fee of $9.00 for filing the Notice of Motion of Intention to move for a New Trial in the above entitled matter was filed within time and that therefore the Motion for the New Trial may be heard upon authority of [Commercial] Nat. Bank of Ogden v. Schultz [Schlitz], 6 Cal. App. 174 [91 P. 750]." On August 16, 1945, the trial judge denied the motion for a new trial and in the order of denial also ordered (hereinafter referred to as second order) the vacation of Judge Blake's order of August 14, 1945. On November 5, 1945, the trial court ordered (hereinafter referred to as third order) appellant Williams as special administratrix of the estate to deliver the assets of the estate to respondent Youlian as executor.

A notice of appeal from the judgment was filed on August 9, 1945, and a notice of appeal from the first order was filed on July 2, 1945. Manifestly, the latter notice of appeal is timely, it being filed within 60 days from the entry of the order, but the notice of appeal from the judgment was late unless the time was extended by the filing of the notice of intention to move for a new trial. Appeals were also taken from the second and third orders.

Appellants applied to this court in December, 1945, for a writ of supersedeas

staying the execution of the third order pending appeal, and in January, 1946, an order to show cause why the writ should not be granted was issued by this court and all proceedings on the judgment and order appealed from were stayed pending final determination of the matter. Respondents answered the petition for a writ of supersedeas urging that the appeal from the judgment was too late, the notice to prepare the transcript was not timely and the notice of appeal from the first order was not signed by the attorney of record. Respondents also noticed for hearing in March, 1946, a motion to dismiss the appeals on the ground that, as to the judgment, the notice of appeal and request for a transcript were late and the transcript was not filed within the time required by law; that as to the first order the same was true, and in addition, that no request for a transcript was filed and the notice of appeal was not signed by the attorney of record; that as to the second order, it is not an appealable order; and that as to the third order, the matter will become moot on the dismissal of the other appeals.

The issue of the timeliness of the appeal from the judgment involves the question of whether the notice of intention to move for a new trial was filed in time, thus extending the time in which to appeal, and the effect on that question of the order of Judge Blake on August 14, 1945, and the second order vacating the order of August 14th.

The question before us is, therefore, in regard to the appeal from the judgment, whether the trial judge erred in holding that appellants' notice of intention to move for a new trial was not filed until June 29, 1945, which was one day late. Appellants contend that the filing date written on such notice by the clerk was erroneous and that such error was corrected by the order made by Judge Blake on August 14, 1945.

[1] It has been held repeatedly that an order correcting a clerical error in the record of a judgment may be made by the court *ex parte without notice* and on the court's own motion. Carpenter v. Pacific Mut. Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796; In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89, In re Estate of Soboslay, 4 Cal.2d 177, 47 P.2d 714; Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; Homeseekers' Loan Association v. Gleeson, 133 Cal. 312, 65 P. 617; Scamman v. Bonslett, 118 Cal. 93, 50 P. 272, 62 Am.St.Rep. 226; Dickey v. Gibson, 113 Cal. 26, 45 P. 15, 54 Am.St.Rep. 321; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; In re Estate of Remick, 75 Cal.App.2d 24, 170 P.2d 96; Benway v. Benway, 69 Cal.App.2d 574, 159 P.2d 682; Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 74 P.2d 314; Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466; People v. O'Brien, 4 Cal.App. 723, 89 P. 438; see Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 47 P.2d 733; In re Estate of Willard, 139 Cal. 501, 73 P. 240, 64 L.R.A. 554; Wilson v. Nichols, 55 Cal.App.2d 678, 131 P.2d 596. The above cases cited may be classified as follows: (1) Where a clerical error appears *on the face of the record*. In re Estate of Soboslay, supra; In re Estate of Willard, supra; Homeseekers' Loan Association v. Gleeson, supra; Scamman v. Bonslett, supra; Dickey v. Gibson, supra; In re Estate of Rimick, supra; Benway v. Benway, supra; People v. O'Brien, supra. (2) Where the existence of such an error is dependent upon the memory and knowledge of the judge, some cases holding that his declaration on the matter is conclusive. Carpenter v. Pacific Mutual Life Ins. Co., supra; Carter v. J. W. Silver Trucking Co., supra; Lauchere v. Lambert, supra; Crim v. Kessing, supra; In re Estate of Remick, supra; Kohlstedt v. Hauseur, supra. (3) Where the statement on the subject in the decision is dictum. In re Estate of Burnett, supra; Wilson v. Nichols, supra.

On the other hand there are cases indicating that where a clerical error does not appear on the face of the record but must be proved by evidence aliunde, notice of a motion to correct such an error is necessary if substantial rights are involved. People v. O'Brien, supra; see Herd v. Tuohy, 133 Cal. 55, 63, 65 P. 139; McNally v. Mott, 3 Cal. 235; Brush v. Pacific Electric Ry. Co., 58 Cal.App. 501, 506, 208 P. 997; Freeman on Judgments, 5th Ed., § 172.

[2] In any event where, as in the case at bar, the judge has no connection with at

knowledge of the asserted error in the record (the issue here is solely one of the filing date of the notice of intention to move for a new trial, a matter solely in the domain of the clerk of the court) and it does not appear on the face of the record, notice of a motion to correct the alleged error should be a jurisdictional requirement.

[3] Substantial questions are involved, namely, whether the motion for a new trial should be considered on the merits, and the timeliness of the appeal. The ascertainment of whether an error had been committed by the clerk in writing the filing date on the notice requires the determination of a fact from evidence that may be conflicting. In such a situation, the right to a notice and hearing is obvious. See, discussion, Freeman on Judgments, 5th Ed., § 172.

[4] In the instant case the order of Judge Blake of August 14, 1945, was granted ex parte and was therefore void on its face. The trial court (presided over by Judge Beardsley) had authority to vacate that order on the ground that it was void on its face. Olivera v. Grace, 19 Cal.2d 570, 574, 122 P.2d 564, 140 A.L.R. 1328. This it did in its order (second order) which was a part of its order denying the motion for a new trial. The order denying the motion for a new trial was based upon the ground that the court lacked jurisdiction to do otherwise inasmuch as the notice of intention to move for a new trial was filed too late. It therefore necessarily determined the very issue involved in the instant motion to dismiss the appeals, that is, whether the notice of intention was filed in time, thus extending the time in which an appeal could be taken.

When the motion for a new trial came on for hearing on August 16, 1945, all parties were represented. It is recited in the minute order denying the new trial that: "Contestants [appellants] move the Court to have set aside the ex parte order of Aug. 14, 1945, as to payment of fee for filing of said Motion for New Trial; after argument, said motion to set aside is granted. Further argument is made on said Motion for New Trial.

[5] "It is ordered that the ruling heretofore made by this Court that the filing date appearing on the said Motion for new trial be not changed, still stands and that said Motion for New Trial be and the same is hereby denied on the ground of lack of jurisdiction of the Court." Hence the matter of whether or not the notice of intention was filed in time was in issue and decided. Assuming that the affidavits used in obtaining the order of August 14, 1945, were used at the hearing on August 16, 1945, there was nothing more than a conflict in the evidence inasmuch as the filing date stamped on the notice of intention was alone sufficient to create a conflict. (There probably are other conflicts with respect to what transpired but they need not be considered.) Even if it were permissible for us to do so, we are not inclined to disturb the conclusion of the trial court that the notice of intention was filed too late.

By reason of the foregoing the appeal from the judgment must be dismissed. The appeal from the second order, assuming it is appealable, must be affirmed inasmuch as Judge Blake's order was void.

This brings us to the appeal from the first order which, as we have seen, was timely. (Order appointing Youlian executor entered June 5, 1945—notice of appeal therefrom filed July 2, 1945.) Respondents assert however that the notice of appeal was not signed by appellants or their attorney of record and therefore the appeal was not validly perfected.

[6, 7] *Although there was no express provision in the statutes on the subject* (the statute provided merely that "An appeal is taken by filing with the clerk of the court in which the judgment * * * is entered, a notice stating the appeal from the same * * *" (Code Civ.Proc. § 940) ), it has been held or stated that a notice of appeal in order to be effective must be signed by the appellant's *attorney of record* if the party appeared by an attorney. Starkweather v. Eddy, 196 Cal. 73, 235 P. 734; Anglo-California Trust Co. v. Oakland Rys., 191 Cal. 387, 216 P. 578; McMahon v. Thomas, 114 Cal. 588, 46 P. 732; Livermore v. Webb, 56 Cal. 489;

Whittle v. Renner, 55 Cal. 395; Prescott v. Salthouse, 53 Cal. 221; Jackson v. Jackson, 71 Cal.App.2d 837, 163 P.2d 780; Hersh v. Garau, 110 Cal.App. 198, 293 P. 860; Ellis v. Bennet, 2 Cal.Unrep. 302, 3 P. 801; Harrigan v. Bolte, Cal.Sup., 8 P. 184. But it has been intimated that it need not be signed by the attorney of record, and that a new attorney may sign such notice. McDonald v. McConkey, 54 Cal. 143. And slight circumstances are sufficient to constitute a waiver of the objection (Starkweather v. Eddy, supra) such as acknowledgment of receipt of service of notice of appeal. See, cases, 2 Cal.Jur. 319, 320. The doubtful soundness of the rule, as indicated by the facility with which it could be waived, was undoubtedly considered and the matter set at rest by the New Rules on Appeal which abrogate it. Rule 1(a) of the New Rules on Appeal provides: "The notice [notice of appeal] shall be signed by the appellant or by *his attorney* and shall be sufficient if it states in substance that the appellant appeals from a specified judgment or a particular part thereof. A notice of appeal shall be liberally construed in favor of its sufficiency." [Emphasis added.] Nothing is said therein about "attorney of record," a phrase of recognized meaning. The words, "his attorney," must mean the appellant's attorney, whether he appears as such of record or not. The case of Jackson v. Jackson, supra, is contrary to that view but it failed to give effect to the above quoted rule of the New Rules on Appeal and is disapproved. It is conceded that Mr. Chase, when he signed the notice of appeal, was attorney for one of the appellants as special administratrix of the estate, and merely because another attorney was substituted in the contest proceedings alone the year before the appeal was taken, does not establish that Chase was not appellants' counsel. There is sufficient to infer that he was one of appellants' counsel who could sign the notice of appeal. The motion to dismiss the appeal from the first order should therefore be denied.

[8-11] In connection with the petition for a writ of supersedeas and the appeal from the third order, it appears that the latter order is connected with the first order and was made on the basis that no appeal was perfected from the order appointing Youlian as executor (first order), and therefore he and not the special administratrix should have possession of the assets of the estate. But the appeal from the first order was duly perfected and is pending. Hence it has not been finally determined whether respondent Youlian was properly appointed executor. It will be remembered that Nadia Williams was appointed *special administratrix* and as such gained possession of the assets of the estate. However, upon the appointment and qualification of a general administrator or executor the powers of the special administrator cease. Prob.Code, § 466; Security-First Nat. Bk. of Los Angeles v. Superior Court, 100 Cal.App. 702, 280 P. 995; see Miller v. Superior Court, 186 Cal. 453, 456, 199 P. 805; Guardianship of Van Loan, 142 Cal. 429, 433, 76 P. 39. On the other hand, an appeal from an order appointing an executor suspends his powers and stays proceedings in the court below. In re Estate of Stough, 173 Cal. 638, 161 P. 1; Security-First Nat. Bk. of Los Angeles v. Superior Court, supra; 11A Cal.Jur. 225. The appeal does not however reinstate the special administrator. Another special administrator should be appointed. Security-First Nat. Bk. of Los Angeles v. Superior Court, supra. Thus, as there is an automatic stay of proceedings in the court below with reference to the appointment of the executor, respondent Youlian, and the authority of special administratrix Nadia Williams is revoked, a writ of supersedeas should issue to stay the execution of the order compelling the special administratrix to deliver the assets of the state to the executor. Supersedeas is available in a corrective capacity where there is a statutory stay. Smith v. Smith, 18 Cal.2d 462, 116 P.2d 3. Of course, the trial court may and no doubt will appoint another special administrator to hold and manage the assets of the estate pending the disposition of the appeal from the order appointing Youlian executor which is still pending.

The appeal from the judgment is dismissed. The motion to dismiss the appeal from the first and third orders is denied. The second order is affirmed. Let a writ

of supersedeas issue restraining the court from compelling compliance with the third order.

SHENK, SCHAUER, and SPENCE, JJ., concurred.

GIBSON, C. J., and EDMONDS, and TRAYNOR, JJ., concurred in the judgment.




29 Cal.2d 815

**PEOPLE v. CHESSER.**

Cr. 4756.

Supreme Court of California, In Bank.
March 21, 1947.

**1. Criminal law ⇐641(1)**

An accused charged with capital offense is not afforded constitutional right to "assistance of counsel" for his defense where appearance on his behalf is made by attorney who acts at request of prosecuting officer solely for purpose of waiving preliminary hearing and who has no knowledge of facts and does not counsel or advise accused with respect to the charge against him. U.S.C.A.Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Assistance of Counsel".

**2. Criminal law ⇐641(1)**

An accused's constitutional right to assistance of counsel may be waived by accused having intelligent understanding of nature and effect of waiver. U.S.C.A. Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

**3. Criminal law ⇐641(1)**

One purpose of constitutional guaranty of assistance of counsel for defense of accused is to protect accused from his own ignorance of his legal and constitutional rights. U.S.C.A.Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

**4. Criminal law ⇐641(1)**

The determination of whether there has been an intelligent waiver of counsel by accused involves consideration of nature of charge, facts and circumstances of case, and education, experience, mental competence and conduct of accused. U.S.C.A. Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

**5. Criminal law ⇐641(3)**

In a capital case against defendant not having benefit of advice of counsel, and not understanding nature of charge, elements of offense, pleas and defenses which may be available, or punishments which may be exacted, trial judge does not sufficiently perform his duty in respect to informing defendant of constitutional right to counsel by merely advising defendant that he has right to counsel and that death penalty may be imposed. U.S.C.A.Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

**6. Criminal law ⇐641(1)**

A defendant accused of murder did not competently and intelligently waive constitutional right to be represented by counsel, notwithstanding that defendant pleaded guilty and elected to proceed without counsel, where defendant did not have slightest conception of elements of different offenses including in the charge, available defenses or different points involved, and guiding hand of counsel was needed lest defendant, through ignorance and bewilderment, suffer a penalty greater than law exacts for offense committed, and defendant was itinerant farm hand of limited education and intelligence. U.S.C.A.Const. Amends. 6, 14; Const.Cal. art. 1, § 13.

Appeal from Superior Court, Merced County; Ranse R. Sischo, Judge.

Howard Herbert Chesser pleaded guilty to a charge of murder, and the death sentence was imposed, and an appeal was taken automatically under Penal Code, § 1239.

Reversed and remanded for trial.

Leo R. Friedman, of San Francisco, for appellant, under appointment by the Supreme Court.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

This appeal was taken automatically under the provisions of section 1239 of the Penal Code from a judgment imposing the death penalty.

Defendant and his wife were charged with the murder of their infant daughter in a complaint filed by the district attorney of Merced County. On the morning of September 30, 1946, defendant appeared before a committing magistrate without counsel. At the request of the district attorney, an attorney practicing in Merced consented to appear for defendant "solely for the purpose of waiving the preliminary examination." The attorney making the appearance was not acquainted with defendant, knew nothing about the case, and did not discuss the facts with defendant or undertake to advise him as to what course he should pursue. Defendant was informed by the attorney concerning the purpose of the hearing and the effect of a waiver, and thereupon at the request of defendant, the attorney waived a preliminary hearing in his behalf.

At 11 o'clock on the same morning defendant was arraigned before the superior court without counsel. The information was read to him and he was informed by the court that he was entitled to a jury trial, to a lawyer to represent him, and to the process of the court to bring any witnesses he wanted. In response to inquiries by the court, the defendant stated he did not want a lawyer or a jury trial and that he was ready to enter his plea. The court asked the defendant if he had talked to any lawyer relative to the case, and defendant replied that he had not. The court then expressed a doubt as to "whether or not we should proceed in this matter without appointing a lawyer in view of the seriousness of this charge." The district attorney said that the appointment of counsel was not required if the defendant waived his right in open court but that there would be no objection to such an appointment if the court felt "in view of the nature of this charge," that it should be made. He added: "However, I think the defendant has been fully apprised of his rights here and he knows the nature of the charge. * * *" Whereupon the following occurred:

"The Court: You understand there is a possibility of the death penalty being invoked in this charge?

"The Defendant: Yes sir.

"The Court: I will take your plea at this time. What is your plea to this Information, guilty or not guilty?

"The Defendant: Guilty, your Honor."

The matter was continued until 2 o'clock of the same day for the purpose of taking evidence to determine the degree of the offense.

Mrs. Chesser testified at the hearing that in August, 1944, she was living with her husband on a ranch where he was employed by Mr. and Mrs. Court as a farm hand. On the afternoon of August 7, defendant and his wife went to a nearby town with their ten months old daughter to get some groceries. Defendant "started drinking" while in town and brought some beer home with him. Upon arriving home Mrs. Chesser put the baby in a crib in the bedroom and went into the kitchen to prepare some food. She heard a sound as if the baby were choking, and returning to the bedroom she saw defendant "holding the baby up" and "he had his fingers in the baby's mouth." He put the baby back in the crib and told his wife he would kill her if she told anyone what he had done. Later in the evening she asked Mrs. Court to come in to see the baby. There was blood on the child's mouth and its rectum was bruised. The baby died during the night and the next morning defendant hid the body in some weeds near the river. They left shortly afterward for Colorado. Mrs. Chesser was asked if defendant had ever told her "that he might kill that baby or threaten it." She answered, "Yes sir, he didn't like the baby."

Mrs. Court testified that about 5 o'clock on the evening of August 7, 1944, Mrs. Chesser said that her husband was being mean to her baby but not to tell him she had mentioned it. A few minutes later, under the pretext of returning some clothespins, Mrs. Court went to the Chesser house and examined the baby. It appeared to be

restless and its mouth was bruised and its rectum was red. Defendant told Mrs. Court that the baby was sick and had been crying and he had "paddled" her but that he had not hurt her. Later in the evening Mrs. Court, looking in the bedroom window, saw defendant with the baby on his lap and he was trying to feed her some liquid with a spoon from a cup which Mrs. Chesser was holding.

John Lattorraca, undersheriff of Merced County, testified that, accompanied by defendant, he went to the place where defendant said he had hidden the child's body. The witness did not find the body, but he found part of the blanket in which it had been wrapped, and the can in which it had been placed by defendant.

The defendant did not ask any questions of the witnesses or take the stand in his own behalf although he was informed by the court of his right to do so. When he was asked if he wished to testify he replied, "There is nothing I would like to say, your Honor, except I would like to be punished to the full extent. I don't feel that the President of the United States would want me to live for what I have done, or even the people, and I would like to be sent to the gas chamber and executed and give justice as I gave unjustice."

The district attorney suggested to the court that he thought "it would be proper at this time to make an order that the defendant be examined under section 1368 of the Penal Code in order that the Court may determine that issue." It was ordered that the defendant "be examined by two expert witnesses on the question of sanity," and the hearing was set for Tuesday, October 1, 1946.

The doctors appointed by the court testified that they had examined defendant for more than an hour and that it was their opinion that he was presently sane and "probably was sane at the time in 1944 * * * of this alleged crime." Defendant told the doctors that he was in the Army from 1941 to 1943, and that while in the service he spent much of his time in the guardhouse for absences without leave and drinking. Defendant was discharged from the Army at Torney General Hospital where he had undergone observation in a "lock ward." One of the doctors testified that when questioned concerning the cause of the baby's death, defendant said that he had been drinking that afternoon and that he could not recall anything that happened.

On Thursday, October 3, defendant was brought before the court for sentence. The court stated it found defendant was now sane and was sane when the offense was committed, that defendant killed his child, that the killing was willful, deliberate and premeditated, and that the homicide was murder of the first degree. The court reviewed the proceedings had up to that time and then said to the defendant:

"The Court: * * * before rendering judgment I will ask you if you have any legal cause to show why judgment should not be pronounced against you at this time?

"The Defendant: No, sir, your Honor.

"The Court: You have nothing to say one way or the other in this matter at this time?

"The Defendant: Yes, I would like to know whether I am to be prosecuted by Mr. District Attorney Adams or not. I would like to have my say after he finishes.

"The Court: Well, I am only asking you relative to this case, not some other case. Have you any legal reason to show why sentence shouldn't be passed upon you now in this case. That is all I am asking you.

"The Defendant: No, sir."

The court then pronounced the death sentence.

Our state and federal Constitutions guarantee an accused in a criminal case the right to the assistance of counsel for his defense (Cal.Const., art. I, § 13; U.S. Const., 6th Amend.), and it has been held that a violation of the right secured by the 6th amendment may under some circumstances amount to a denial of due process under the 14th amendment. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Tomkins v. State of Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407; People v. Napthaly, 105 Cal. 641, 39 P. 29. The vital importance of the right to assistance of counsel was stated in Powell v. Alabama, supra, at pages 68, 69 of 287

U.S., at pages 64 of 53 S.Ct., 77 L.Ed. 158, 84 A.L.R. 527, as follows: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

[1] An accused charged with a capital offense is not afforded this basic right where the appearance on his behalf is made by an attorney who acts at the request of the prosecuting officer solely for the purpose of waiving the preliminary hearing, and who has no knowledge of the facts of the case and does not counsel or advise the accused with respect to the charge against him. See Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92. The service performed by an attorney under like conditions for such a limited purpose has been characterized as a mere "token" or "pro forma" appearance which does not give an accused the protection guaranteed by the Constitution. Powell v. Alabama, supra; People v. McGarvy, supra. And as stated in the McGarvy case, "Such a perfunctory appearance at the request of the district attorney is a practice not to be commended," since an accused is thereby precluded from receiving the effective aid guaranteed by the Constitution. 61 Cal.App.2d at page 562, 142 P.2d 92, 94.

[2] It is contended, however, that since defendant subsequently elected to proceed without counsel and pleaded guilty to the charge, he cannot now complain that he was denied his constitutional rights. The fact that defendant pleaded guilty is not conclusive. As stated in Williams v. Kaiser, 323 U.S. 471, 474, 65 S.Ct. 363, 366, 89 L.Ed. 398, "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. [Citation.] Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate." Nor is it conclusive that defendant elected to proceed without counsel. It is true that the right of an accused to the assistance of counsel may be waived (In re Connor, 16 Cal.2d 701, 706, 108 P.2d 10), but before there can be an effective waiver the defendant must have an intelligent understanding of his act. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Tomkins v. State of Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407.

[3] One purpose of the constitutional guaranty is to protect an accused from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified if it were held that a waiver made in ignorance of its consequences would remove the protection of the Constitution. As stated in Johnson v. Zerbst, supra, the constitutional right of an accused to be represented by counsel of itself invokes the protection of the court when the accused is without counsel, and "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. *While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.*" (Italics added.) 304 U.S. at page 465, 58 S.Ct. at page 1023, 82 L.Ed. 1461, 146 A.L.R. 357.

[4] The determination of whether there has been an intelligent waiver of counsel involves a consideration of the nature of the charge, the facts and circumstances of the case, and the education, experience,

mental competence and conduct of the accused. See In re Connor, 16 Cal.2d 701, 710, 108 P.2d 10; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; see, also, Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; Tomkins v. State of Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

[5] In order for a trial judge to determine whether there has been a competent and intelligent waiver of counsel, he must first ascertain whether the defendant clearly understands the nature and effect of his waiver. In a capital case where the defendant has not had the benefit of advice of counsel, and there is nothing to indicate that he understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted, the trial judge does not sufficiently perform his duty if he merely advises the defendant that he has a right to counsel and that the death penalty may be imposed.

In Tomkins v. State of Missouri, 323 U.S. at page 488, 65 S.Ct. at page 372, 89 L.Ed. 407, the defendant without the advice of counsel had pleaded guilty to murder. The court pointed out that one charged with murder could be found guilty of murder in the first or second degree or of manslaughter, and that *"The nature of the charge emphasizes the need for counsel.* * * * The punishments for the offenses are different. * * * The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." (Italics added.) The elements of murder and manslaughter and the distinctions between the degrees of murder have received careful consideration and exhaustive treatment in several cases recently decided by this court. See People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698. The discussion in those opinions of the conflicting interpretations of the statutes defining manslaughter and the degrees of murder shows the difficulties experienced by our courts in stating the applicable rules in instructions to juries.

There is nothing in the record which indicates that defendant had the slightest conception of the elements of the different offenses included in the charge, the available defenses, or the different punishments involved. Apparently all he knew was that the death sentence could be invoked and that he felt he should pay the extreme penalty for what he had done. He obviously did not understand that he could not be found guilty of murder of the second degree unless he caused the death of his baby "with malice aforethought," and that under the circumstances of this case he would not be guilty of murder of the first degree unless the killing were "willful, deliberate and premeditated." Paraphrasing the language quoted above from Tomkins v. State of Missouri, 323 U.S. at page 488, 65 S.Ct. at page 372, 89 L.Ed. 407, the guiding hand of counsel was needed lest defendant, through ignorance and bewilderment, suffer a penalty greater than the law exacts for the offense he in fact committed.

The need of this defendant for the advice and assistance of counsel becomes even more apparent when we consider the legal definitions of the offenses included in the charge in relation to the facts of the case as disclosed by the evidence produced at the hearing. The only evidence bearing upon the essential element of premeditation was the statement of Mrs. Chesser that defendant had threatened the baby. No effort was made to develop this testimony and it does not appear what was said, or when, where and under what circumstances the asserted threats were made. As pointed out in People v. Holt, 25 Cal.2d 59, 70, 153 P.2d 21, 27, "proof of malicious intent without the fur-

ther proof that it was 'willful, deliberate, and premeditated' would establish second degree murder but not first degree murder." Here the evidence as to intent was at least equivocal and subject to conflicting inferences. In addition, there was evidence which would indicate that defendant may have been so deeply under the influence of intoxicating liquor that he was incapable of forming in his mind that malice aforethought which is an essential element of the crime of murder in either degree. See People v. Holt, supra, 25 Cal.2d at page 82, 153 P.2d 21. Defendant told the doctors who examined him that he was so intoxicated on the afternoon of August 7, that he could not remember anything that happened. Mrs. Chesser testified that defendant had "started drinking" in town that afternoon and brought some beer home with him, but she was not asked any questions designed to ascertain the extent of his intoxication.

It is clear from what has been said that "the nature of the charge emphasizes the need for counsel" in this case, not only because it includes a capital offense, but also because, when the charge is considered in connection with its factual background and the lesser offenses embraced within it, questions of vital import to defendant are presented, the significance of which he was apparently wholly unaware.

The trial judge should also take into account the education, experience, mental capacity, and conduct of the accused in determining whether his willingness to waive counsel may be due to lack of ability to comprehend his situation. These factors were considered by this court in the Connor case (16 Cal.2d 701, 108 P.2d 10) in deciding whether there had been an intelligent and competent waiver of counsel by the accused. Connor had a good education and due to previous encounters with the law he was familiar with legal procedure in criminal cases. His conduct at the trial revealed a clever criminal who had feigned ignorance and stupidity in an effort to mislead the trial judge. The court concluded that he had "intelligently and competently waived the right to counsel with full understanding of the consequences of his act."

The record in this case presents a very different picture. Defendant was an itinerant farm hand who evidently had not had any previous experience with courts. There is no direct evidence as to the extent of his education but his answers to questions would indicate that it was very limited. With reference to his mental competency it appears that before his discharge from the service he had undergone observation in a "lock ward" of an Army hospital. And the district attorney, as a result of his contact with defendant, felt impelled to suggest that he be examined pursuant to section 1368 of the Penal Code because a doubt had arisen as to his sanity. Defendant's conduct at the hearing shows he was contrite, confused and bewildered, and had little, if any, conception of the nature of the proceedings or of the elements of the charge against him. His statement when called before the court for sentence at the conclusion of the hearing shows that he did not realize what had taken place.

[6] In view of the seriousness of the charge, the surrounding facts and circumstances, and defendant's evident lack of understanding of his rights and the consequences of his acts, we are of the opinion that there was not a competent, intelligent waiver of counsel.

The judgment is reversed and the cause remanded for trial. It is further ordered that if defendant is unable to employ counsel the trial court shall appoint counsel to defend him, and shall permit defendant to change his plea if he be so advised.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

78 Cal.App.2d 885

**KAMPER et al. v. MARK HOPKINS, Inc., et al.**

**Civ. 13426.**

**District Court of Appeal, First District, Division 2, California.**

**April 3, 1947.**

**1. Judgment ⇐304, 306**

The trial court may correct clerical errors and misprisons in its judgment, but normally cannot amend judgment by correcting "judicial error", that is, one embodying intentional action of court.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Error".

**2. Costs ⇐2**

Allowance of costs is mere incident of judgment on merits. Code Civ.Proc. § 1033.

**3. Appeal and error ⇐347(1)**

Filing of notice of appeal within sixty days after entry of trial court's order correcting judgment for defendants on merits by reducing amount of costs and counsel fees allowed them, but more than sixty days after entry of such judgment, was too late, as real judgment was one on merits and order amending it did not amount to entry of new judgment on merits. Code Civ.Proc. § 1033; St. 1871–72, p. 533, § 7; Rules on Appeal, rule 2.

**4. Appeal and error ⇐347(1)**

Notice of appeal must be filed within sixty days after entry of judgment appealed from. Rules on Appeal, rule 2.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by Margarita Kamper and others against Mark Hopkins, Inc., and others. Judgment for defendants, and plaintiffs appeal. On respondents' motion to dismiss the appeal.

Appeal dismissed.

Burns & McKeever, of San Francisco, for plaintiffs and appellants.

Webster V. Clark, Bruce F. Allen and Rogers and Clark, all of San Francisco, for defendants and respondents.

DOOLING, Justice.

Respondents have moved to dismiss an appeal by plaintiffs from a judgment entered after sustaining a demurrer to plaintiffs' complaint. The ground of the motion is that the appeal was not taken within sixty days after the entry of judgment. Rule 2, Rules on Appeal.

Judgment was entered in favor of defendants on November 25, 1946. Included in this judgment as signed and entered was a provision for the recovery of costs in the aggregate amount of $857.20. Defendants had filed a cost bill and plaintiffs made a timely motion to have the costs taxed in compliance with section 1033, Code of Civil Procedure. The trial judge taxed the costs in the aggregate amount of $257.20 by an order dated December 5, 1946. On December 6, 1946 pursuant to the order of the previous day an order amending the judgment of November 25, 1946 was signed and entered. This order recited that the judgment previously entered "erroneously contained provisions for costs and counsel fees in excess of the amount allowed by law; and whereas, this court duly made its order on December 5, 1946 granting in part and denying in part plaintiffs' motion to tax costs and allowing defendants costs and counsel fees in the total sum of $257.20; therefore said judgment is hereby modified and corrected to read as follows, towit:"

Thereafter was copied the original judgment deciding the case on the merits in favor of defendants with a modification of the portion thereof relating to costs to conform to the order taxing costs. It may be explained that the provision for counsel fees as a part of the costs results from the fact that the case admittedly fell under section 7 of the act of 1871. Stats. 1871–72, p. 533.

Notice of appeal was filed on January 29, 1947, within sixty days of the time of entry of the order correcting judgment but more than sixty days after the entry of judgment on November 25, 1946. The ques-

tion presented is whether the order correcting judgment was in fact a new judgment superseding for purposes of appeal the judgment originally entered.

[1] Normally while a trial court may correct clerical errors and misprisions in a judgment (14 Cal.Jur. 995) it cannot amend a judgment once entered if the error sought to be corrected is a judicial one, i.e. if it embodies an intentional action of the court even though legally erroneous. 14 Cal.Jur. 999. The only power reserved to the court in this case to correct its error in including costs in the judgment prior to the expiration of the time within which plaintiffs were entitled to have the costs taxed pursuant to sec. 1033, Code of Civil Procedure, is to be found in that section of the code itself. That section contemplates and specifically provides for the taxing of the costs after the entry of the judgment. The true inquiry is whether the taxing of the costs and the correction of the judgment already entered to set forth the costs so taxed can amount to the entry of a new judgment on the merits so as to start the time within which a notice of appeal may be filed running afresh.

[2] It has been repeatedly held that the allowance of costs is a mere incident of the judgment on the merits. Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 44, 152 P.2d 625; Whitaker v. Title Ins. etc. Co., 179 Cal. 111, 113, 114, 175 P. 460; McCallion v. Hibernia etc. Society 98 Cal. 442, 445, 33 P. 329; 7 Cal.Jur. 255.

In Whitaker v. Title Ins. Co., supra, 179 Cal. at page 113, 175 P. at page 461, the court said: "It is, of course, well settled that the right to recover costs exists solely by virtue of statutory provisions, and that when allowed by statute they are allowed solely as an incident of the judgment given upon the issues in the action."

On page 114 of 179 Cal., on page 461 of 175 P., the court in discussing McCallion v. Hibernia etc. Society, supra, said further that: "it was substantially said in the opinion in that case that 'the real judgment' in that case was that the plaintiff was the owner of certain money which had been deposited in court to await the determination of the question as to its ownership, and that the costs taxed against the defendant were incidental to the judgment, and as to a stay of execution inseparably connected therewith. It was also said: 'A judgment for costs is not the judgment directing the payment of money contemplated by section 942. * * * The judgment referred to in the foregoing sections, sections 942, 943, 944 and 945 Code Civ.Proc. is the decree passing upon the matter directly involved in the litigation.'"

[3, 4] The "real judgment" here, the one "passing upon the matter directly involved in the litigation", was the judgment in favor of defendants on the merits of the action entered on November 25, 1946. The order amending judgment of December 6 did not, and could not, change or amend this real judgment or amount to the entry of a new judgment on the merits of the case. Its only purpose and effect was to correctly set out the true amount of costs as taxed, as a mere incident to the judgment already entered.

We conclude that the notice of appeal from the judgment was filed too late. The hardship upon appellants is regrettable but the courts have admitted no exceptions to the jurisdictional requirement that a notice of appeal must be filed within the time prescribed. Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250.

Since the appeal must be dismissed appellants' application for relief from default in the preparation of their transcript is now moot and is denied.

The appeal is ordered dismissed.

NOURSE, P. J., and GOODELL, J., concur.

79 Cal.App.2d 81

**STUTSMAN v. STUTSMAN.**

**Civ. 3557.**

**District Court of Appeal, Fourth District, California.**

**April 11, 1947.**

**1. Venue ⇐71**

In separate maintenance action trial court had jurisdiction under statute to award plaintiff wife temporary support money for parties' minor children, counsel fees and costs and temporary custody of parties' minor children, notwithstanding defendant filed a motion for change of venue, where order was made prior to the determination of defendant's motion. Code Civ. Proc. §§ 395, 396b.

**2. Husband and wife ⇐300**

An order granting plaintiff wife in her separate maintenance action temporary custody of the parties' minor children was not reviewable on appeal from order denying a motion for change of venue and awarding attorneys' fees and court costs and restraining husband from removing the children, since the custody order was a subject of a separate appeal. Code Civ.Proc. § 396b.

**3. Venue ⇐46**

In wife's separate maintenance action brought in Kern county, denying husband's motion for a change of venue, was an abuse of discretion where husband was a resident of Los Angeles county and husband had not filed an answer, and it was not shown that it would be for the convenience of witnesses to retain the action in Kern county or that the ends of justice would thereby be promoted. Code Civ.Proc. §§ 395, 396b.

**4. Appeal and error ⇐1166**

In wife's separate maintenance action where it was held that trial court abused its discretion in not granting husband's motion for a change of venue on ground that husband was resident of another county, order, thereafter made awarding wife attorneys' fees and costs on appeal, was required to be reversed. Code Civ.Proc. §§ 395, 396b.

**5. Venue ⇐71**

In wife's separate maintenance action, ruling sustaining husband's demurrer to complaint was nullity for lack of jurisdiction notwithstanding wife could not claim prejudicial error in such ruling, where ruling was made prior to determination of husband's motion for change of venue. Code Civ.Proc. § 396b.

**6. Appeal and error ⇐78(3)**

Order sustaining husband's demurrer to complaint in wife's separate maintenance action was not appealable.

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Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Oneida Stutsman against Earl L. Stutsman for separate maintenance. Defendant's demurrer to plaintiff's complaint was sustained. From an order awarding plaintiff temporary support money for the maintenance of parties' minor children, attorneys' fees and costs and awarding the plaintiff temporary custody of the children, from an order denying defendant's motion for change of venue and from an order allowing plaintiff additional attorneys' fees and costs on appeal, defendant appeals.

Affirmed in part and reversed in part in accordance with opinion.

Wilbert C. Hamilton, of Los Angeles, for appellant.

Morris B. Chain, of Bakersfield, for respondent.

GRIFFIN, Justice.

On June 20, 1946, plaintiff and respondent wife filed a complaint against defendant and appellant husband for separate maintenance. He was ordered to show cause, on July 2, 1946, why he should not pay for maintenance and support of two minor children, attorney's fees, and costs. The order was issued on June 20, 1946, and served on defendant. He filed a demurrer on June 28, 1946, together with an affidavit of merits and demand for change of venue to Los Angeles County, the place of his claimed residence. On July 2, 1946, an order was made, after hearing on the order to show cause, awarding support money for the children and for attorney's fees and costs. On July 9, 1946, an order, duly motioned, was made restraining defendant from removing the minor children from the possession of plaintiff and restraining the issuance of any order on motion for

change of venue until certain orders made respecting costs, attorneys' fees, and maintenance had been complied with. On July 22, 1946, after hearing, the motion for change of venue was denied. The demurrer to the complaint was sustained. Defendant appeals from the order of July 2, 1946, awarding attorneys' fees, maintenance and court costs, from the order of July 9, 1946, restraining him from removing the children, and from the order of July 22, 1946, denying his motion for change of venue. On August 27, 1946, the court ordered, after motion duly made, that defendant pay plaintiff $250 as costs and attorneys' fees on appeal. On August 29, 1946, defendant filed a separate notice of appeal from this order.

It is now argued by defendant and appellant, in his opening brief, that the motion for change of venue should have been heard and determined before any other matter and before the demurrer was considered; that the order to show cause was void and the court was without jurisdiction to hear and determine the application for support money, attorneys' fees and costs; and that the motion for change of venue should have been granted.

[1, 2] Section 395 of the Code of Civil Procedure provides, with certain exceptions, that the proper court for the trial of an action is in the county in which the defendant resides. Section 396b provides that if the court in which the action is filed has jurisdiction of the subject matter, the action may be, notwithstanding it is not the proper court, tried in the court where it was commenced, unless the defendant, at the time he answers or demurs, files an affidavit of merits and notice of motion to transfer the action to the proper court. The court, if it determines that it was not brought *in the proper court, shall* order it transferred to that court. However, in a separate maintenance or divorce action, the court may, *prior to the determination of the motion,* consider and determine motions for allowance of temporary alimony, support of children, counsel fees and costs, and may make all necessary and proper orders in connection therewith. By the terms of that section, as amended (Stats. 1939, Chap. 149, p. 1263), the trial court had jurisdiction to hear and determine the motion for allowance and temporary support of the children, counsel fees and costs, since such motion was made and determined before the determination of the motion for change of venue. This section is broad enough to authorize the placing of the minor children in plaintiff's temporary custody under the order providing for their support, and such order cannot be questioned on this appeal. McNett v. McNett, 44 Cal.App. 778, 187 P. 447. That order must, therefore, be affirmed.

The motion for change of venue was finally heard and denied. It was based upon verified affidavits in the record. One made by the defendant alleged that he was not at the time the complaint was filed a resident of Kern County, but was then and is now a resident of the County of Los Angeles. Another one signed by Dorothy Avery averred that she had known defendant for over 20 years; that he lived in Los Angeles County all of that period except for a short time when he lived in Bakersfield; that for more than two years last past he resided at 123 W. 93rd Street, Los Angeles. Plaintiff did not allege that defendant was a resident of Kern County. She filed no counter-affidavits showing defendant's residence to be other than Los Angeles County at the time the complaint was filed in Kern County. There is an affidavit on file indicating that plaintiff went with the process servers to defendant's home in Los Angeles to serve him with summons and complaint and the order to show cause; and that defendant had actual possession of the children at that time in Los Angeles County. It further shows that defendant later went to Kern County only for the purpose of accepting service. Whether plaintiff or defendant has actual custody of the children at the present time is not shown by the record.

[3] Section 396b, supra, authorizes the trial court, when the action is not commenced in the proper county, to retain the action in the county where commenced only where an *answer* has been filed and on the grounds of convenience of witnesses, or where the ends of justice will thereby be promoted. Counsel for respondent has filed no brief in this court, and after due notice

has failed to appear when the cause was set for hearing. We can only assume that he is in accord with our conclusion that there is no ground upon which this order of the trial court denying the motion for change of venue can be sustained. Under the evidence produced the trial court abused its discretion in not granting the motion for change of venue. Mercantile Acceptance Corporation v. Willett, 125 Cal.App. 778, 14 P.2d 121; Woods v. Berry, 111 Cal.App. 675, 296 P. 332; Sheeley v. Jones, 192 Cal. 256, 219 P. 744. The order denying the motion for change of venue should be reversed.

[4] Since it was an abuse of discretion for the trial court not to grant the motion for change of venue when it should have been granted, any order thereafter made awarding attorneys' fees and costs on appeal should likewise be reversed. Newlands v. Superior Court, 171 Cal. 741, 154 P 829; Sec. 396b, Code Civ.Proc.

[5, 6] In Beard v. Superior Court, 39 Cal.App.2d 284, 102 P.2d 1087, it was held as the established law of California, prior to the amendment of section 396b of the Code of Civil Procedure, that the filing of a motion for change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined. This general provision has been modified as to actions for divorce and separate maintenance, but only to the extent set forth in said section. Accordingly, the trial court had no jurisdiction to rule upon defendant's demurrer to the complaint even though plaintiff could not claim prejudicial error in such ruling. Nolan v. McDuffie, 125 Cal. 334, 58 P. 4; Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 P. 495. The order sustaining the demurrer is not an appealable order. Percy v. Allen, 119 Cal.App. 106, 6 P.2d 88.

The order of July 2, 1946, awarding support money for the maintenance of the children, attorneys' fees and costs, and the order providing for their temporary custody is affirmed. That portion of the order denying the motion for change of venue, and the order of August 27, 1946, allowing additional attorneys' fees and costs on appeal, are reversed. Each party to bear his or her own costs on appeal.

BARNARD, P. J., and MARKS, J., concur.




78 Cal.App.2d 726

**PEOPLE v. WALLACE et al.**

**Cr. 2434.**

District Court of Appeal, First District, Division 1, California.

March 25, 1947.

**Rehearing Denied April 9, 1947.**

**Hearing Denied April 21, 1947.**

**1. False pretenses ⇐49(1)**

Evidence sustained conviction of attempted grand theft of $20,000 from motorist and her insurance carrier by means of an action to collect damages for injuries allegedly sustained in a spurious automobile accident.

**2. False pretenses ⇐21**

Generally, offense of attempting to obtain money or property under false pretenses may be committed although the prosecuting witness knew that the pretenses were false or, irrespective of whether they were true or false, did not rely on them.

**3. Criminal law ⇐44**

In order to constitute an "attempt" there must be a specific intent to commit a particular crime and a direct ineffectual act towards its commission after preparations have been made, and the act must be one that would naturally result in the accomplishment of the completed offense unless frustrated by extraneous circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempt".

**4. False pretenses ⇐21**

The filing of civil action to collect $20,000 damages for a spurious accident and the giving of depositions by person supposed to have sustained injury and his physician to be used in the action and the

giving of various statements by both defendants, knowing that they were to be used in the action, constituted an attempt to commit grand theft.

5. Criminal law ⇐878(4)

Inconsistent verdict of acquittal on one count and conviction on another do not compel a holding that conviction is a nullity.

6. Criminal law ⇐878(4)

Where defendants were acquitted of conspiracy to commit a crime, such acquittal did not nullify conviction of attempt to commit grand theft by means of an action to collect $20,000 for a spurious automobile accident. Pen.Code, § 182, subds. 1, 3; § 954.

7. Criminal law ⇐110

Where physician gave false testimony in his deposition after the filing of an action by alleged patient to collect $20,000 for a spurious automobile accident, and also communicated with alleged patient and his attorney regarding the action the physician was a "principal" in the attempt to commit grand theft and was properly tried in the county where his alleged patient was tried, although physician had never been in such county. Pen.Code, §§ 31, 781, 791, 792.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

8. Criminal law ⇐110

The statute relating to venue of prosecution against accessories is applicable only to accessories after the fact because accessories before the fact are not known to the law of California and accessories after the fact are triable and punishable as principals. Pen.Code, § 791.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Henry Clay Wallace and Barry Thomas were convicted of attempted grand theft, and, from such conviction and from an order denying motions for a new trial, they appeal.

Judgment and order affirmed.

Clyde E. Cate, of Fresno, for appellant Wallace.

J. G. Crichton, of Fresno, for appellant Thomas.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., Richard H. Chamberlain, Chief Asst. Dist. Atty., and Cecil Mosbacher, Asst. Dist. Atty., all of Oakland, for respondent.

PETERS, Presiding Justice.

Barry Thomas and Henry Clay Wallace were found guilty of attempted grand theft. From the judgment of conviction and from the order denying the motions for a new trial they prosecute this appeal.

The two defendants were indicted on two counts. The first count charged them with conspiracy to commit grand theft. By this count the defendants were charged with having conspired between April 22, 1944, and October 30, 1944, to take unlawfully the property of Evelyn Fong and the National Casualty Company of the value of $20,000. Nineteen overt acts are set forth in the indictment. The second count charged both men with an attempt to commit grand theft, in that from April 22, 1944, to October 27, 1944, they attempted to take unlawfully the property of Evelyn Fong and the National Casualty Company of the value of $20,000. The jury acquitted both defendants of the conspiracy charge, but found both guilty of attempted grand theft.

The defendants have filed joint briefs. Both are negroes. The defendant Wallace, a doctor, bases his appeal on two grounds: (1) Lack of jurisdiction of the Alameda County Superior Court over this defendant, and (2) that there was no crime committed as charged in count two of the indictment. The defendant Thomas bases his appeal solely upon the second ground mentioned above.

[1] The record amply supports the trial court's determination that defendants are guilty of attempted grand theft. It discloses a clever and cunning attempt, bunglingly executed, to defraud Evelyn Fong and her insurance carrier of damages for a spurious automobile accident.

The scene opens in the early morning hours of April 22, 1944. At approximately 1:50 a. m. of that day the police department of Oakland received a telephone call notifying them that a man who had been injured in an automobile accident was in front of the telephone building on Franklin Street between 15th and 16th Streets. Two police officers connected with the accident detail responded, and there found Thomas. He told the police officers that he had been struck about an hour before by a light-colored convertible sedan, with its top down, at 13th and Franklin Streets while he was in the west crosswalk proceeding in a northerly direction. Thomas produced and delivered to one of the officers a piece of paper on which was written in pencil the license number "39B582," and he told the officers that it had been written by a truck driver for a paper company and delivered to him, and that this truck driver told Thomas that he saw the accident, that he had taken the license number of the offending car, and that the number on the paper was the number of that car. At the trial a handwriting expert testified that after comparing the letters and numbers on this paper with known exemplars of Thomas' handwriting he was of the opinion that the license number had been written by Thomas. There was no contrary expert testimony. The exhibits attached to respondent's brief demonstrate, almost to a certainty, the correctness of the opinion of the expert.

Thomas further told the officers that he had been hit on the left side of his body and that he was in great pain. The officers thereupon sent Thomas to the emergency hospital for examination and treatment. After Thomas had been placed in the ambulance the police officers proceeded to the scene of the alleged accident. About two hundred feet west of Franklin Street, parked in front of a Chinese restaurant on the north side of 13th Street, they found a light-colored convertible sedan with its top down with the license number given them by Thomas. The officers waited in the vicinity for the occupants of the car to return. Within a short time Evelyn Fong, a Chinese girl, and her three companions, appeared and got into the car. The police officers then appeared, told the occupants not to talk to each other, and one of the officers drove the occupants and the Fong car to the police station. There the occupants were interviewed separately. Miss Fong and the others denied having hit any pedestrian on the night in question. On the trial Miss Fong and one of her companions were called as witnesses—the other two not being called. They told on the witness stand the same story they had told the police officers, namely, that on the night in question they had not passed the intersection of 13th and Franklin Streets; that they had proceeded out Broadway in a northerly direction, Miss Fong driving; that they had turned easterly on 13th Street and proceeded to the middle of the block where there was a parking lot on the south side; that they drove into the parking lot and found it closed; that they then backed out into 13th Street, made a "U" turn and parked in front of the restaurant where the car was found. If this story is true, and it evidently was believed by the jury, the Fong car on the night in question never reached the intersection of 13th and Franklin Streets where the accident is supposed to have occurred.

The officers at the police station carefully examined the Fong car. They found that it had been polished recently and was covered with a fine film of dust. They found that this film of dust was undisturbed and that there were no brush marks of any kind on the car as would probably be present had the car hit a pedestrian.

Thomas was admitted to the emergency hospital at 2 a. m. Shortly after his admission the two officers who had first interviewed him arrived at the hospital. They made an examination of his clothing and found no dust or dirt or other indications that he had fallen in the street. Thomas was then lying on the examination table and the officers examined his body and were unable to find any visible bruises or abrasions, or other visible indications of injury. The officers then again interviewed Thomas, and he reiterated substantially the same story he had first told. He was most positive in his statement that just prior to the accident he had been down to 8th and Franklin Streets where he had

eaten, and was proceeding northerly on Franklin Street when hit. He also stated that he was picked up by an unidentified sailor, and then crawled from 13th and Franklin Streets to the telephone building looking for a policeman or telephone. When asked by the officer how he could have been hit on his left side if the automobile was coming from his right, he began to cry and accused the officer of race prejudice. He then stated that he had been thrown by the impact against a telephone pole on the corner.

The emergency hospital record shows that Thomas was admitted at 2 a. m. and was examined by a doctor. The record shows that "police states patient struck by car. Apparently injured back—capable to move." On the back of the card was written: "Hurt back. There is marked pain in left post. chest. Evidence of fracture of 3-4 ribs in post. axillary line—no evidence of other damages. Pt. not knocked unconscious. No evidence of pneumothorax. Chest clear. Treatment and progress; chest strapped over rib area * * * discharged to private physician." The card also shows that Thomas was given a sedative and sent home at 2:45 a. m.

Later that same morning—April 22nd—between 10 a.m. and noon, Thomas visited the traffic division of the police department and conversed with the officer in charge. He asked if the driver had been found that had hit him, and also asked the officer to return the sheet of paper on which the license number had been written. This the officer refused to do.

On the afternoon of the same day Thomas visited an Oakland attorney, Maurice J. Bleuel. This attorney testified that he had never seen Thomas before, and had no previous appointment with him, but that Thomas told him that a police officer had recommended him. He told Bleuel substantially the same story he had told the police officers. He appeared then to be in considerable pain. The attorney agreed to represent Thomas on a contingency basis.

During this, or one of the subsequent conferences with Thomas, he told Bleuel he knew someone in Fresno who knew the fellow who had given him the license number. The attorney suggested that Thomas see a doctor and have X rays taken, but Thomas replied that he wanted to see his wife and family in Fresno, and that he had a family doctor by the name of Wallace in that city. The attorney advised Thomas to have Wallace examine him, and when informed that Wallace was also a negro, suggested that Thomas secure an examination by a white doctor. Bleuel also testified that he questioned Thomas about the condition of his health prior to the accident and Thomas replied that he had always been in perfect health and never had been in a prior accident of any kind except for a minor injury suffered in Texas many years before. Thomas also told Bleuel, in response to a direct question, that he had been working full time at the Kaiser Shipyards in Richmond up to the day before the alleged accident, at a wage of $1 per hour. This last statement was demonstrated to be false. The official records of the Kaiser Shipyards in Richmond show that Thomas started to work there in the week of March 5, 1944, and that he worked intermittently until March 30, 1944, when he quit. The evidence also shows that from April 4, 1944, to April 15, 1944, Thomas worked for a title insurance company in Oakland as a janitor.

On April 23, 1944, the officers again visited the scene of the accident. On one of the corners of the intersection in question is a newspaper publishing house. The officers interviewed various truck drivers of the newspaper company in an attempt to discover the driver who Thomas said had given him the license number. They were unable to find that driver, and were unable to find any witness to the accident.

On April 24, 1944, a police officer took Thomas to the home of Miss Fong. Thomas identified her car as the one that had struck him. Miss Fong, in Thomas' presence, denied having struck him or anyone else on the night in question. She also told the officer and Thomas that she had liability insurance on the car. The evidence shows that she then carried, with the National Casualty Company, a $25,000 to $50,000 public liability policy.

On April 25, 1944, one of the officers again saw Thomas. The officer testified

that Thomas told him that he was going home to Fresno, and that he told Thomas to leave his address with the police department. Thomas agreed to do so. On this same day Thomas also saw his lawyer and told him that he was going to Fresno at once to see his family and doctor. He told Bleuel he needed some money to pay for his room rent and to get to Fresno and Bleuel loaned him $15.

On April 26, 1944, Thomas again visited Bleuel. When the attorney expressed surprise that Thomas was still in Oakland, Thomas stated that his landlord had driven him down to Fresno and back the night before, and that they had driven all night. The landlord testified that this was false, and that he had never driven Thomas any place outside of Alameda County. Bleuel again asked Thomas for the name of the witness who had seen the accident. Thomas replied that he knew the witness; that he was in Fresno; that the witness did not want to come to Oakland; that he, Thomas, did not want to give the name to the police. Thomas also told Bleuel he was broke, and the attorney gave him a dollar to get some food.

On April 27, 1944, Thomas returned to Bleuel's office and signed a verified complaint charging Evelyn Fong with negligence. The complaint alleged the facts of the accident; charged that as a result thereof Thomas suffered injuries to his back and spine; that he fractured four ribs; that he suffered various internal injuries and nervous shock; that said injuries were permanent in character; that he suffered damages in the amount of $20,000. This complaint was filed on the day it was signed and shortly thereafter the summons and a copy were served on Miss Fong.

At this time Bleuel advanced $35 to Thomas and also asked him the name of the eyewitness. Thomas told his attorney that the witness was demanding $100 to come to Oakland to testify. He refused at this time to identify the witness. A few days later Thomas again visited Bleuel and this time gave Bleuel a card with a name printed thereon, and told him that was the name of the eyewitness. Thomas requested Bleuel not to give the name to the police. Bleuel so agreed, but nevertheless did give the name to the police. About a week later Bleuel telephoned to Thomas in Fresno and told him that the police were giving him one more chance to produce the eyewitness; that the man whose name had been given to Bleuel had been interviewed by the Fresno police and had stated that he had not been in Oakland for two years and knew nothing about the accident, and that he was the brother-in-law of Thomas. Thomas told Bleuel that he would come right up to Oakland to explain, but he failed to keep the promise. Later he told Bleuel he had mixed up the names and would produce the witness, but he never did.

Before discussing the balance of the facts, and particularly those that tend to connect defendant Wallace with the attempted grand theft, the dates about mentioned should be emphasized. The records demonstrate that Thomas did not work for Kaiser after March 30, 1944. The records demonstrate that from April 4th to 15th Thomas was in Oakland working for the title company. The evidence of many witnesses demonstrates that Thomas was in Oakland every day from April 22, 1944, to and including April 27th. It would have been practically impossible for Thomas to have been in Fresno before the night of the 27th or the morning of the 28th. The significance of these dates will become apparent when the facts tending to connect Dr. Wallace with the crime are reviewed.

Bleuel testified that when Thomas told him about Dr. Wallace in Fresno, he, Bleuel, told Thomas to have Wallace telephone him. In apparent answer to this request Bleuel testified that Wallace telephoned to him sometime in April or early in May, 1944; that they discussed the facts involved in the pending action; that Wallace told Bleuel that he had examined Thomas and retaped his back; that he found that Thomas was suffering from "possible radiatory pain from spinal cord around to the sternum"; that he requested Wallace to send him a regular doctor's report. About June 20, 1944, Bleuel received a letter postmarked June 19, 1944, and dated June 14, 1944, from Wallace with a statement enclosed. They read as follows:

"Dear Sir:

"Inclosed finicial [sic] statement for Barry Thomas, 1439–F–Street, Fresno, California, for medical service from April 8, 1944 to June 12, 1944.

"Prognosis: Good, has fully recovered from his injury.

"I have this day, released said, Barry Thomas.

"Respectfully,

"/s/ H. C. Wallace, M.D.
H. C. Wallace, M.D."

To the foregoing letter was attached the following statement:

"Statement

Mr. Barry Thomas

1439–F–Str; Fresno, Calif;

In Account With

Dr. H. C. Wallace

| | Amount |
|---|---|
| Service Rendered | |
| For injury of back, | |
| hand and neck. | |
| From April 8th to June | |
| 12, 1944. Treatments 3 | |
| times weekly. | |

Total ..... $138.00

/s/ H. C. Wallace, M.D.

Signed H. C. Wallace, M.D.

1149–F–Street."

It was stipulated that the signatures on the letter and statement were those of Dr. Wallace. It should be noted that by the letter and statement Dr. Wallace claimed to have treated Thomas three times weekly from April 8, 1944, to June 12, 1944, for injuries purportedly received in an accident which did not occur until April 22, 1944. At the trial the doctor claimed that this was an error in bookkeeping, and that the treatment on April 8, 1944, was for an industrial injury hereafter discussed. He was quite positive that he first saw Thomas in Fresno on April 24th—a date when Thomas was in Oakland. Thomas could not have come to Fresno until April 27th at the earliest. The doctor's records introduced into evidence had obviously been altered, and his explanation of these alterations was confused and unconvincing.

On May 17, 1944, another chapter in this strange tale opens. On that date Thomas consulted a Fresno attorney by the name of Julius Hansen, and told him that he had received an industrial injury to his hand and back at the Kaiser Shipyards in Richmond on April 5, 1944. It is to be noted that the last day Thomas worked for that company was March 30, 1944, and that he was working for the title company in Oakland from April 4, 1944, to April 15, 1944, and, therefore, could not have been in Fresno during those dates. Thomas did not tell attorney Hansen about the alleged automobile accident or about his pending suit against Miss Fong. It should be here mentioned that Thomas did not tell Bleuel about the industrial accident proceeding until Bleuel discovered it for himself in October of 1944.

In regard to the shipyard injury, Thomas told Hansen that he had been injured on April 5, 1944, while shoveling hot asphalt from a truck; that the tail gate fell down and hit his left hand and broke a finger; that he was knocked against the truck and injured his back; that until April 8, 1944, he received medical attention at the shipyards; that his left hand was permanently disabled and that his back was still injured. Hansen filed an application with the Industrial Accident Commission for adjustment of the claim in accordance with the information furnished by Thomas.

The medical reports of the shipyards do show that Thomas received an industrial injury while working for Kaiser, but at a date and under circumstances different from those recounted to Hansen. The surgeon's report at Kaiser Shipyards shows that on March 30, 1944, Thomas reported to the doctor that he had suffered an injury to his hand while pulling a cable, and that he told the doctor that two weeks before March 30th he had also hurt his hand and had been hit by a truck. Two reports from the first-aid station at the shipyards somewhat corroborated these statements. One dated March 11, 1944, shows that Thomas reported that he had hurt his hand while shoveling, and that on March 30, 1944, he claimed to have hurt his arm while pulling a cable, and was referred to the regular doctor. None of these injuries appeared to be serious and only casual treat-

ment was given. Thomas failed to tell Hansen about these prior injuries.

Hansen requested Thomas to secure a medical report from his doctor. Thomas secured from Dr. Wallace a statement reading: "Service Rendered. Medical attention for injury—$90.00." Attached to this statement was a letter admittedly signed by Dr. Wallace and addressed "To Whom it may concern." This letter reads as follows:

"This will certify that Barry Thomas, 1439–F–Street, Fresno, California, has been under observation and treatment for injury, beginning April 8th to June 12 1944.

"Namely: Sprained muscles of back and Lumbar Region, also 8–9 and 10th ribs fracture, hand fracture, articulation hand and small Diget.

"Prognosis: Good.

"Recommendation: Released, June 12, 1944."

This statement and letter were prepared on June 20, 1944, six days after Dr. Wallace had prepared, and one day after he had mailed, the letter and statement to Bleuel showing treatment over the same period for substantially the same injuries and submitting a bill for $138.00.

A hearing was had before a referee of the Industrial Accident Commission in Fresno, June 20, 1944. Thomas appeared and testified and became very confused as to the time, nature, number and causes of his accident at the shipyards. He submitted the statement and letter of Dr. Wallace to the referee and the referee asked for a more detailed statement from Dr. Wallace. Thomas obtained such a statement and submitted it to the referee that same afternoon. It reads as follows:

| | Amount |
|---|---|
| "Injury—Left Hand | |
| Fracture Palm Digit Small | |
| finger | |
| Articulation— | |
| Side. 9 & 10 Rib. Fracture | |
| Muscles back, Sprain— | |
| April 8th—To June 12th | |
| 1944—3 times week— | |
| Total .....$90.00" | |

This was signed by Dr. Wallace. Thus on June 14, 1944, we find Dr. Wallace writing to Bleuel stating that he had treated Thomas three times weekly from April 8, 1944, to June 12, 1944, for injury of "back, hand and neck"; that such services were worth $138, and that by June 12, 1944, Thomas had fully recovered. On June 20, 1944, we find Dr. Wallace preparing statements submitted to the Industrial Accident Commission in which he claims to have treated Thomas for identically the same period, three times weekly, for an injury and fracture of a finger on the left hand, for fractures of the eighth and ninth ribs and for a back muscle strain. The value of these services was set forth as $90. At the trial Dr. Wallace sought to explain this most damaging evidence by the statements that Thomas never told him about the pending industrial accident case; that he never talked with or knew of Hansen; that when Thomas asked for the statements on June 20th he, Wallace, thought they were for Bleuel to be used in the personal injury case. He also sought to explain the difference in amounts in the statements by the explanation that when he prepared the Bleuel statement he anticipated future treatments for Thomas while the "To Whom it may concern" statement was only for treatments up to June 12th. He so testified even though in the letter to Bleuel he had stated: "Prognosis: Good, has fully recovered from his injury. I have this day, released said, Barry Thomas." The sufficiency of this explanation was for the jury. It, quite evidently, disbelieved this story. It was certainly justified in doing so.

A second hearing before the referee was held in San Francisco, but neither Hansen nor Thomas then appeared. Dr. Franklin of the shipyard medical staff testified that he had examined Thomas on March 30, 1944, and had found no injury to his back or ribs, and that according to the X ray there was no evidence of any recent fracture to the hand, but only evidence of an old injury or change due to a disease. On the trial of the present action his testimony was substantially the same.

Subsequent to this hearing Hansen learned of the personal injury suit against

Fong, and when the Commission disallowed Thomas' claim, he, Hansen, refused to proceed further in the case. Nothing further was done by Thomas in the Industrial Accident Commission proceeding.

Nothing of any great importance happened in the Fong action until September 8, 1944, when Thomas' deposition was taken in Bleuel's office in Oakland. In the deposition he testified that he had eaten dinner at 8th and Franklin Streets and was proceeding north on the west side of Franklin Street when hit on the right hip and was thrown against a pole. At the trial he was most positive that the accident occurred while he was on the way to the restaurant while he was proceeding south on Franklin Street. He told this same story to the District Attorney when arrested October 26, 1945.

In his deposition he reiterated his story about the license number and his trip to the emergency hospital. When asked if he had ever suffered any prior injuries he stated that many years before a "little piece of wood fell out of a car and hit me on the shoulder." He was most positive that other than this one injury he had never before been injured in any way, and that he had never claimed damages or compensation for past injuries. On the trial this testimony was demonstrated to be false. It was shown that he had been injured while working at a pickle factory, for which he made a claim to the Industrial Accident Commission and received a small award; that on February 11, 1942, he claimed to have been injured while working for a cotton compress company. The claimed injury was to his hand. The insurance carrier paid him $83. He was also shown to have received an industrial injury to his stomach, and one to his back, sometime in 1943. Apparently only medical care and no compensation was paid for these. On December 18, 1943, while working for a Bakersfield concern, he claimed an industrial injury to his back for which the insurance carrier of the employer paid him $359.21. He did not mention the claimed shipyard injuries in his deposition.

The next important date is October 17, 1944. On that date Bleuel wrote to Dr. Wallace telling him that he had arranged to have Wallace's deposition taken in Fresno in the Fong action in order not to require the doctor to come to Oakland. In the letter Bleuel recounted for the doctor's information the facts of the case as recounted to him by Thomas and as testified to by Thomas in his deposition, including the statements made to Bleuel and in the deposition to the effect that Thomas had stated that he had never had any prior accidents.

The deposition was taken in Fresno on October 21, 1944. Before the deposition was taken Bleuel called at Dr. Wallace's office and asked him about Thomas' injuries. Dr. Wallace told him that he had never treated Thomas before for any sickness or injury, but that he had known Thomas and his family for some time prior to the accident and that Thomas always, prior to that time, had appeared to be alert and in good condition—that "as far as he knew he had never had any prior injuries or been in any prior accidents."

In his deposition taken, as he knew, for use in the Fong action, Dr. Wallace testified that prior to April 22, 1944, he had never treated Thomas before; that he was first called to the Thomas home in Fresno on April 24, 1944, and found Thomas in bed and in considerable pain, particularly in his chest; that he was told that Thomas had been hurt in an automobile accident in Oakland; that he examined him and found "a palpitation, a swelling along the third, fourth and fifth ribs on the left side under the scapula"; that he had a cough and the sputum was tinged with blood; that his diagnosis was that the third and fourth ribs were fractured; that there was a stiffness in the joints of his left arm and also left shoulder, although these were not fractured; that his hip was bruised and swollen; that on April 25, 1944, Thomas came to his office for a more complete examination and that his original diagnosis was verified; that he treated the man's left lung because he felt sure that there had been an internal injury to that lung; that he treated Thomas daily from May 1st to May 10, 1944, and thereafter every two or three days until August 1, 1944; that Wallace was then out of town until early in September, and that he treated Thomas on September 10th and 15th, 1944, and a couple

of times thereafter; that he took no X rays; that Thomas' condition on the date of the deposition was fair; that he could, however, only do light work and that he doubted if he could do heavy work; that Thomas still suffered considerable pain in his spine if he did too much stooping or lifting; that there was a possibility that Thomas would suffer permanent pain from the injury; that the reasonable value of his services to date was $250. It should be mentioned that, although he purportedly was testifying from a summary made by him from his records, he clearly falsified the date treatment commenced. Thomas, as several times pointed out, could not have been in Fresno before April 27, 1944. Moreover, this statement as to dates was directly contrary to the prior statements made to Bleuel and Hansen, and directly contradicted these statements in that in those statements Wallace had represented that Thomas was completely recovered by June 12, 1944.

The action of Thomas v. Fong was set for trial on October 27, 1944. Shortly before the trial date Bleuel first learned of Thomas' alleged industrial injury and his attempt to collect compensation for it. Bleuel also learned at this time that medical reports prepared by Wallace covering the same treatments as those Wallace had sent him, had been submitted to the Industrial Accident Commission. Bleuel telephoned Thomas in Fresno and left a message that Thomas should be in his, Bleuel's, office, at 9:30 a.m. on October 27th. On that date, when Thomas failed to appear, Bleuel filed a dismissal of the action against Fong. Thomas did appear at Bleuel's office October 30, 1944. At this time Bleuel talked to Thomas in the presence of a stenographer who took down the conversasion in shorthand. This conversation was admitted in evidence at the trial. Bleuel first went over the details of the alleged accident with Thomas, and then told him that he knew of the industrial accident case. Thomas told him that involved only his left hand and no other part of his body. Some acrimonious words were exchanged and Bleuel told Thomas of the seriousness of the thing he had done in falsely accusing Miss Fong of a felony. He got Thomas to sign a dismissal of the action and then told him to get out of the office. Thomas started to cry and left.

It should be here noted that Bleuel at no time talked to Dr. Wallace about the Fong action before it was filed, and that Hansen at no time talked to the doctor about the industrial accident case.

The two defendants were arrested in October of 1945, and both gave statements to the district attorney that were read into evidence. The statements of both defendants materially varied from their prior statements and from their testimony on the trial. Thomas' various statements, in both minor and major details, were hopelessly inconsistent, while the statements made by Dr. Wallace in his deposition, to the district attorney, and on the trial, varied in material matters. Many of his statements were contradicted by Bleuel and other witnesses. These conflicts were for the jury.

So much for the facts. The record amply shows an attempt by both defendants to procure money from Miss Fong or her insurance carrier by means of false and fraudulent representations. But, say defendants, the evidence does not show an attempt, but, at most, shows mere preparation. Defendants argue that all that was shown was the filing of the civil action, the denial of liability, the taking of depositions, and the dismissal. This, they say, falls short of an attempt. In support of their contention the case of State v. Block, 333 Mo. 127, 62 S.W.2d 428, is cited. That case involved a charge against one Block that he had attempted to obtain money from an insurance company by means of trick and pretense—substantially the charge here involved. The indictment in the Block case charged Block with driving his car on a certain day and having a pretended collision with another automobile; with pretending that Lanigan was the driver of the other car; with pretending that he, Block, had as his passenger, one Oleatha Jones; with pretending that Oleatha Jones was injured in the pretended collision; with pretending that a named doctor had examined and treated Oleatha Jones; with pretending that Block then tried to settle

the suit with an insurance company. The indictment was quashed on the ground that it failed to charge any indictable offense. On appeal the judgment quashing was affirmed, one of the holdings of the appellate court being that the indictment at most alleged mere preparation and not an attempt. In this connection the court stated (333 Mo. 127, 62 S.W.2d at page 431): "In other words, unless Oleatha Jones agreed to participate in the fraud, there can be no crime charged against this respondent, because Oleatha Jones had a right to abandon the criminal attempt originated by this respondent. There is no allegation in the indictment that Oleatha Jones had agreed upon the plan to defraud this insurance company. It would certainly be necessary for her to participate in the plan leading towards its commission. Respondent had no authority to settle this claim for Oleatha Jones or to do anything on her behalf in the settlement of this claim. The indictment further fails to allege that the agents of the insurance company had agreed to the settlement of the claim for the amount asked by respondent, or in fact for any amount. All the indictment alleges is the mere presentation of the claim with an offer or demand of settlement for a sum certain, and, even with a criminal intent, that would not constitute a crime. At best, the indictment alleges a mere preparation to commit a crime where no overt act is alleged to have been done in the consummation after such preparations."

It is apparent that the facts of the Block case differ materially from those in the instant case. In the Block case the person injured—Oleatha Jones—was not a party to the fraud. Her participation was indispensable if the attempt was to be successful. Until she consented, no attempt could get beyond the preparatory state. But in our case, Thomas, the person allegedly injured, was an active participant in the plan to defraud Fong and her insurance carrier.

Insofar as the Block case may intimate that no attempt to secure money by false pretenses can be complete unless the victim relies upon or is deceived by the false pretenses, it is clearly contrary to the California law and to the overwhelming weight of authority elsewhere.

One of the latest cases in California on this subject is People v. Grossman, 28 Cal. App.2d 193, 82 P.2d 76, where an attorney attempted to defraud an insurance company after that company had full knowledge of his plan. Among other things he was indicted for an attempt to commit grand theft, and was convicted of that offense. He urged, on appeal, that no attempt was committed because the insurance company was not deceived by his false representations. The court, at page 204 of 28 Cal. App.2d, at page 82 of 82 P.2d, summarily dismissed the contention with the following statement: "The defendant also contends it was necessary for the prosecution to prove, under the counts pleading attempts to obtain money by false pretenses, that the victim relied upon the alleged false pretenses. But the law is well settled to the contrary," citing in support an annotation in 89 A.L.R. 342; People v. Arberry, 13 Cal.App. 749, 114 P. 411 and In re Harper, 17 Cal.App.2d 446, 62 P.2d 390.

[2] The general rule in effect in most American jurisdictions, amply supported by citation of authorities, is stated as follows in 22 Am.Jur. p. 487, § 80: "While it may be said to be the general rule that the completed crime of obtaining money or property under false pretenses cannot be established unless it appears that the person alleged to have been defrauded believed the false pretense to be true and was deceived, a distinction is drawn between the completed crime and the attempt to commit it, the rule being established that the offense of attempting to obtain money or property under false pretenses may be committed although the prosecuting witness knew that the pretenses were false or, irrespective of whether they were true or false, did not rely on them." The fact that the victim is or is not deceived is a false factor in such cases.

[3] In order to constitute an attempt there must be a specific intent to commit a particular crime and a direct ineffectual act done toward its commission after preparations have been made. The acts must be such as would naturally result in the accom-

plishment of the completed offense unless frustrated by extraneous circumstances. (See People v. Werner, 16 Cal.2d 216, 105 P.2d 927; People v. Miller, 2 Cal. 2d 527, 42 P.2d 308, 98 A.L.R. 913; People v. Lanzit, 70 Cal.App. 498, 233 P. 816; see cases collected 7 Cal.Juris. p. 875, § 31, et seq.; 135 A.L.R. 1157.)

[4] The filing of the civil action by Thomas; the giving of the depositions by Thomas and Wallace to be used in that suit; and the giving of the various statements by both defendants knowing they were to be used in that suit, amply meet the tests above stated.

Both defendants also claim that because they were acquitted of the conspiracy count that they were necessarily acquitted on the attempt to commit grand theft count. Defendants' contentions in this regard lack merit. They point out that § 182 of the Penal Code defines criminal conspiracy, and that subd. 1 of that section prohibits conspiracies to commit any crime, while subd. 3 prohibits conspiracies to falsely maintain any action. They urge that, although they were indicted under subd. 1 of § 182, their acquittal of that count, since the only crime proved was the false maintenance of a civil action, necessarily included an acquittal of the crime prohibited by subd. 3. Based on this somewhat doubtful premise it is urged that an acquittal of the crime defined in subd. 3 of § 182 necessarily amounted to an acquittal of attempted grand theft, because such attempt was proved only by the filing of the civil action.

[5] Even if the verdicts here involved were inconsistent a reversal would not be required. The Supreme Court in Rodriguez v. Superior Court, 27 Cal.2d 500, 165 P.2d 1, has recently reviewed the authorities dealing with the effect of inconsistent verdicts, and particularly with the case interpreting § 954 of the Penal Code, and has held that inconsistent verdicts of acquittal on one count and conviction on another do not compel a holding that the judgment of conviction is a nullity.

[6] Moreover, the specific point now raised has been heretofore decided adversely to appellants. In People v. Talbot, 220 Cal. 3, 28 P.2d 1057, the defendants were charged with conspiracy to commit grand theft and with grand theft. One appellant was found not guilty on the conspiracy count and guilty of grand theft. He urged on appeal that the conspiracy count, as defendants urge in the instant case, involved the same overt acts of which he was found guilty on the grand theft count, and for that reason he should have been found not guilty of the substantive offense, because such verdicts were inconsistent. The court correctly disposed of the contention by the observation that the verdicts were not inconsistent because a conspiracy involves a criminal agreement, which element is not involved in the substantive charge. In People v. Martin, 114 Cal.App. 392, 300 P. 130, it was directly held that the crime of conspiracy is a distinct offense from the actual commission of the crime forming the object of the conspiracy. In addition § 954 of the Penal Code provides that: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." See, also, People v. Guerrero, 22 Cal.2d 183, 137 P.2d 21; People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80; People v. Amick, 20 Cal.2d 247, 125 P.2d 25; People v. Kearney, 20 Cal.2d 435, 126 P.2d 612. The point lacks merit.

Both defendants urge that no crime was committed because, so it is claimed, the filing of a civil suit cannot constitute the overt act necessary for the crime of attempt to commit grand theft. In support of this contention defendants cite Hunter v. State, 46 Tex.Cr.R. 498, 81 S.W. 730; Commonwealth v. Harkins, 128 Mass. 79, and In re Nichols, 82 Cal.App. 73, 255 P. 244. None of these cases stands for the broad proposition asserted.

In the Hunter case the defendant, after procuring an insurance policy upon his life, falsely made it appear that he had drowned, thereby enabling the beneficiary, who was unaware of the pretense, to collect the amount due under the policy, after a successful resort to the courts, the insurance company having refused to make voluntary payment, contending that the insured was not actually dead. A final judgment was entered in favor of the beneficiary. After the discovery that the insured was alive, he was charged and convicted with the crime

of swindling. Upon appeal it was held that the indictment should have been quashed since it did not contain any allegation as to whom the false pretenses were made, and that even if it be assumed that the insured's conduct was equivalent to making false representations to the insurance company, this did not have the desired effect, as the company refused to believe that the insured was dead and therefore did not rely on the false representation. The court also rejected the contention of the state that the insured had caused the fraudulent representations to be made to the court and the insurance company through the innocent agency of the beneficiary, and that his acts were intended for that purpose, saying (46 Tex.Cr.R. 498, 81 S.W. at page 732): "It will be observed there is no consent judgment here, and, if the court can be considered as the agent of the insurance company at all, it became so over its protest, and was its involuntary agent, because the company refused to believe in the death of the insured, which is the gravamen of the alleged swindle. If the principle of agency here contended for shall come to be the law, it may, as a result, deter much litigation, as an honest man with a good cause might hesitate to invoke the action of a court, for, although successful, he might find himself imperiled in the toils of a criminal prosecution. The doctrine contended for would in a measure destroy the integrity of judgments in civil cases when they could thus be attacked by a criminal prosecution. We do not believe the doctrine of agency here contended for accords with sound legal principle. The courts of the country are not to be thus involved in private prosecutions, nor can the integrity of their judgments be jeopardized by characterizing them as a part of the machinery in the consummation of a fraud. The courts of the country are independent agencies of the government, and their judgments are presumed to speak the truth. Nor will it be permitted that their judgments be assailed as the instruments of fraud, or as an agency in the perpetration of a swindle. In the very nature of things, they must stand aloof from any connection with the parties as their agent, save as a function of government—as the final arbiter between all parties, for the determination of the right and the truth as between them. *We hold that, whenever their power is invoked between the attempt and the execution of the purpose to swindle, it is the intervention of an independent moral agent, which cuts off any criminal prosecution assumed to be consummated in the judgment.* Wharton, Cr.Law, Vol. 1, §§ 177, 178; Commonwealth v. Harkins, 128 Mass. 79." (Italics added.)

It will be noted that the Harkins case, supra, is cited to support this conclusion. An examination of that case shows that the majority of the court did adopt a rule similar to that announced in the Hunter case.

The rule of these cases is not here applicable. The basic fact in those two cases was that a final judgment had been secured based on the fraudulent representation of the accused, and it was held that in the criminal trial the court could not go beyond that final judgment. The implications of such a holding are somewhat startling, and the conclusion that the securing of a civil judgment is conclusive in the criminal trial is probably wrong. Be that as it may, even if that rule did apply in this state, which we doubt, it would have no application here. In the instant case no judgment was ever secured—the complaint was dismissed before trial.

The California case cited—In re Nichols, 82 Cal.App. 73, 255 P. 244—is obviously not in point. The language relied upon by defendants was not used in discussing whether the filing of a civil suit could constitute part of the overt act necessary to constitute an attempt, but was used in defining the meaning of the terms "unlawful injury" as those terms are used in § 519 of the Penal Code providing that the "fear" that will constitute extortion may be induced by a threat to do "an unlawful injury" to the property of the person threatened. The case has no application here.

A case more nearly in point, and which supports the theory advanced by the prosecution, is People v. Burnett, 21 Cal.App.2d 613, 69 P.2d 1028. In this case the defendants were charged with attempted grand

theft of $500 from an insurance company. The defendants were husband and wife. They represented to an adjuster of the insurance company covering the liability of a market that the wife had fallen in said market and had received certain injuries, including a broken collarbone, for which a settlement of $500 plus all expenses was demanded. The evidence showed that the collarbone had been broken at least several months prior to the date of the alleged accident, and that the claimant's collarbone had not been broken, nor had she been otherwise injured, in her alleged fall, and that such claim was false and that her injury was falsely claimed for the sole purpose of collecting damages from the owner of the market or its insurance carrier. The appellate court upheld the conviction of the claimants of attempted grand theft as those words are defined in § 484 of the Penal Code. That section provides: "Every person * * * who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, * * * is guilty of theft." The court held that the gravamen of that offense is (at page 618 of 21 Cal. App.2d., at page 1031 of 69 P.2d) "that defendants knowingly and designedly attempted to defraud the Massachusetts Bonding & Insurance Company by means of false or fraudulent representations or pretenses." It was held that under facts above mentioned the prosecution had sufficiently proved an attempt to commit grand theft. The number of acts committed in the Burnett case were far less than those here shown by the evidence. Even if the filing of the civil suit alone could not constitute an attempt, a point we do not decide, the giving of the various depositions by the defendants with the knowledge that they were to be used in the civil action alone is sufficient to sustain the finding of the jury that there was an attempt. Certainly, if making false representations to an adjuster for an insurance company with intent to defraud can constitute an attempt, a fortiori, the making of such representations with such intent, under oath, to the attorney for Miss Fong and the insurance company constitutes an attempt.

The last point necessary to discuss is the contention made by defendant Wallace that the trial court in Alameda County had no jurisdiction to try him on the attempt charge. In this respect Wallace contends, contrary to his contention on other points, that the attempt, if one existed, was complete upon the filing of the civil action, and that his connection with the offense, if any, occurred thereafter. He therefore contends that at most, so far as the attempt is concerned, he was an accessory after the fact, and that the proper county of trial for such offense was Fresno County. In this connection he relies upon the rule that an accessory must be tried in the county where the offense of the accessory was committed, notwithstanding that the principal offense was committed in another county. Penal Code, § 791.

It is true that the evidence shows that the civil action against Fong was filed before Wallace was in any way connected with the transaction. He did not give his deposition in that action until several months after the answer had been filed. It is also true that Wallace was never in Alameda County during the year 1944, and that every act performed by him—treating or purporting to treat Thomas, writing letters about Thomas' condition, giving sworn testimony in his deposition, etc.—was performed in Fresno County.

[7] The basic premise upon which this argument is predicated is that the attempt was completed and ended upon the filing of the civil action, and that all acts performed thereafter were merely in furtherance of the already committed crime. This premise is unsound in fact as well as in law. It is unsound in law because for the accessory rule set forth in § 791 of the Penal Code to apply Wallace would have to be an accessory after the fact and not one before the fact. Section 32 of the Penal Code defines the only kind of accessory known to our law as: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony

or has been charged with such felony or convicted thereof, is an accessory to such felony." Of course Wallace does not come within this definition because what he did did not amount to harboring or concealing Thomas nor to aiding him to avoid arrest. What Wallace did in giving the statements, giving false testimony on his deposition, etc., constituted him a principal within the meaning of § 31 of the Penal Code which provides that: "All persons concerned in the commission of a crime * * * and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

[8] Section 791 of the Penal Code can only apply to accessories after the fact because the offense at common law known as "accessory before the fact" is not known to the law of California, such persons being triable and punishable as principals. That being so, the offense is triable in the county where the principal offense is committed. Section 792 of the Penal Code provides that: "The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein." See People v. King, 30 Cal. App.2d 185, 85 P.2d 928; cases collected 7 Cal.Juris. p. 915, § 61.

Under the facts the contention of Wallace is unsound because the evidence shows a continuous chain of acts starting, so far as Thomas is concerned, on April 22, 1944, the date of the alleged accident, and, so far as Wallace is concerned, on April 24th or 27th, when he first started to treat Thomas, down to October 27, 1944, when the civil action was dismissed. The evidence shows that Wallace communicated both orally and in writing with Bleuel after suit was filed in regard to Thomas' condition. The evidence also shows that he gave a deposition knowing it was to be used by Thomas in the civil action. Wallace knew that the impact of such acts would be felt in Alameda County and he knew that such acts were intended to culminate in a trial or settlement in Alameda County. These acts by Wallace were indispensable to the success of Thomas' scheme. Medical information concerning Thomas was an essential requirement for the successful culmination of the damage action. Certainly these acts bring Wallace within the definition of a principal as that term is defined in § 31 of the Penal Code, supra. Certainly these acts aided or abetted or encouraged the commission of the offense. See People v. Menne, 4 Cal. App.2d 91, 41 P.2d 383; People v. Descant, 51 Cal.App.2d 343, 124 P.2d 864.

It must be remembered that in order to find that Alameda County had jurisdiction it is only necessary to find that some act of Wallace constituting an attempt had its effect in Alameda County. Section 781 of the Penal Code provides: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." Under this section either Alameda or Fresno Counties were proper counties to try the charged offense.

It is no answer to contend, as does Wallace, that an attempt was completed before he became a participant. If that be assumed, it will be noted that § 781, supra, is not limited to those acts or effects of acts occurring prior to the instant the offense became sufficiently complete to warrant prosecution—it likewise applies to acts "requisite to the consummation of the offense." This precise point was involved in People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84. In the quotation that follows the word "respondent" refers to the defendant, while the word "appellant" refers to the People—the state being the appellant in that case. At page 775 of 40 Cal.App.2d at page 98 of 106 P.2d, this court declared: "By his second contention respondent would limit the essential or necessary elements of an offense or its effects to those acts or effects of acts occurring prior to the instant that the offense becomes sufficiently complete to warrant prosecution. Under the interpretation we have already given to the section, this con-

struction cannot be sustained. That the interpretation contended for by the appellant is the correct one is demonstrated by a reference to the cases. In People v. Graves, 137 Cal.App. 1, 29 P.2d 807, 30 P.2d 508, defendant was charged, in Los Angeles county with the crime of *receiving* and *agreeing to receive* a bribe to vote as a supervisor of that county in favor of a certain proposal then pending before the board. The evidence showed that the bribe money was paid to the defendant in San Francisco. Apparently there was no evidence where the agreement to accept the bribe was made. The appellate court held that since the evidence showed the money was given for the vote of appellant, and since that vote was given in Los Angeles, that was sufficient to give Los Angeles jurisdiction. In other words, the dishonest vote was not an essential part of the crimes charged, and the crime was complete before the vote was given, but, nevertheless, it was held, and properly so, that Los Angeles had jurisdiction—the vote was a legal effect of the corrupt agreement, and that gave Los Angeles jurisdiction. This case completely refutes the arguments of respondent on this point." See, also, People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Anderson, 3 Cal.App.2d 521, 40 P.2d 270; People v. Grubb, 24 Cal.App. 604, 141 P. 1051, and the other cases cited in the Megladdery opinion 40 Cal.App.2d at page 777, 106 P.2d 84. The court concluded its discussion as follows (at page 777 of 40 Cal. App.2d., at page 99 of 106 P.2d): "Under the rule announced by these cases we must hold that if any portion of the crimes charged was committed in Alameda county, or if any act requisite to the completion of the offenses or requisite to the achievement or end of the unlawful purpose occurred in Alameda county, that county has jurisdiction." That statement is equally applicable here.

The other points raised do not warrant discussion.

The judgment and order appealed from are affirmed.

WARD and BRAY, JJ., concur.



78 Cal.App.2d 750

## SOUTHERN CALIFORNIA ENTERPRISES, Inc., v. D. N. & E. WALTER & CO.

Civ. 15385.

District Court of Appeal, Second District, Division 2, California.

March 25, 1947.

Hearing Denied May 22, 1947.

**1. Limitation of actions ⇐46(9)**

An amended complaint, which alleged that manufacturer warranted that carpet when installed in buyer's ballroom would last for a period of six to eight years following its installation, and that carpet failed to last for period warranted, stated a cause of action on a warranty of a future happening on which statute of limitations did not begin to run until future event failed to materialize. Code Civil Procedure, § 339, subd. 1.

**2. Limitation of actions ⇐104½**

Regardless of whether a cause of action for breach of warranty arises at date of sale or when defect is discovered, the statute of limitations is tolled as long as seller claims that defect in the article can be remedied and he is attempting to correct the error. Code Civil Procedure, § 339, subd. 1.

**3. Limitation of actions ⇐104½**

Even if cause of action, for breach of manufacturer's warranty that carpet when installed in buyer's ballroom would last for a period of six to eight years, arose at date of sale or at date of installation, the statute of limitations was tolled as long as manufacturer attempted to repair the imperfections in the carpet by removing and replacing portions and re-cementing other portions but without success. Code Civil Procedure, § 339, subd. 1.

**4. Limitation of actions ⇐46(9)**

If seller promises that something will happen or shall not happen to goods within a specified future time, the promise, though it may be called a warranty, cannot be broken until that time has elapsed and until then the statutes of limitation will not begin to run.

5. Sales ⇐257

A warranty of manufacturer that carpet when installed in buyer's ballroom would last for a period of six to eight years following its installation, which induced buyer to purchase the carpet from manufacturer's dealer, was a valid contract based on good and sufficient consideration. Civ.Code, §§ 1731, 1732, 1735.

6. Contracts ⇐51, 52

A contract is supported by adequate consideration if there is some benefit to promisor or detriment to promisee.

7. Sales ⇐434

An amended complaint, which alleged that manufacturer warranted that carpet when installed in buyer's ballroom would, by reason of its quality and manner in which it would be assembled and installed, last for a period of six to eight years following its installation, alleged a warranty of fact, and not a statement of opinion referred to as "sales talk" or "puffing".

8. Frauds, statute of ⇐23(1)

An amended complaint, which alleged that manufacturer warranted that carpet when installed in buyer's ballroom would last for a period of six to eight years following its installation, and that buyer as result of manufacturer's warranty was induced to purchase the carpet from manufacturer's dealer, did not allege an agreement by manufacturer to answer for debt or obligation of another which was required by statute to be in writing. Civ. Code, § 2794(4).

9. Frauds, statute of ⇐23(1)

A promise to answer for obligation of another is deemed to be an original obligation of promisor and need not be in writing, where promise is upon consideration of performance of services by promisee or employment of a person at suggestion of promisor to render assistance, to promisee. Civ.Code, § 2794(4).

10. Sales ⇐434

An amended complaint seeking to recover for breach of warranty upon sale of carpet, which alleged that carpet, in its ragged condition, constituted a hazard to plaintiff's customers, was unfit for use, and was of no value, was sufficient as an allegation of damages alleged to have been suffered by plaintiff.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Southern California Enterprises, Inc., against D. N. & E. Walter & Company for breach of a warranty made by defendant upon sale of a carpet. From a judgment for defendant following an order sustaining a demurrer to the amended complaint without leave to amend further, the plaintiff appeals.

Reversed with directions.

Zagon, Aaron & Sandler, Jacob Paull, and Ralph A. Harper, all of Los Angeles, for appellant.

Ben C. Cohen and Leo Shapiro, both of Los Angeles, for respondent.

WILSON, Justice.

To adopt the theory advanced by respondent and accepted by the trial court relative to the purpose of the statute of limitations would be to ordain the statute as an instrument for the protection of fraud instead of for its prevention. The action is upon a breach of a warranty made by respondent upon the sale of carpet. If it should be held that the statute began to run at the date of the sale of the carpet and not when it had been ascertained and established as a fact that the warranty had been breached, not only would appellant be deprived of its right to present its cause of action on the merits but respondent would be invited to continue the making of similar warranties to others secure in the knowledge that it would not be required to answer in damages for their breach.

The judgment appealed from followed an order sustaining a demurrer to the amended complaint without leave to amend further. The facts alleged are as follows: Appellant at all times mentioned in the pleadings was the owner and operator of a ballroom and cafe; respondent was engaged in the business of fabricating, assembling and selling carpet throughout the

United States; in April or May, 1943, appellant and respondent entered into an oral agreement whereby the latter agreed that if appellant would purchase the carpet required for its place of business from one Jack Freeman, who in turn would purchase the same from respondent, such carpet when installed in appellant's place of business would, by reason of its quality and the manner in which it would be assembled and installed, last for a period of six to eight years following its installation; pursuant to and relying on said agreement appellant on or about August 18, 1943, purchased the carpet required for its place of business from Freeman and he purchased it from respondent; the latter fabricated and assembled the carpet, delivered it to appellant's place of business and through its own employees laid and installed it in September, 1943; appellant paid Freeman the purchase price; within two years prior to the commencement of the action the seams of the carpet began to open and the edges began to ravel; respondent was notified and it attempted to remedy the condition by removing and replacing portions of the carpet and by recementing other portions without charge to appellant; in spite of the attempted replacement and repair the carpet continued to open at the seams and to ravel at the edges; it became so frayed and ragged that it detracted from the appearance of appellant's place of business and constituted a hazard to its customers; ever since January, 1944, the carpet has been unfit for appellant's use, is of no value or service, and did not last for the time nor serve the purpose warranted by respondent.

1. *The statute of limitations.* The action was commenced on December 13, 1945, more than two years after the purchase of the carpet and more than two years after it was installed in appellant's place of business but less than two years after the appearance of the only defects complained of, to wit, the opening of the seams and the raveling of the edges.

The question is when the two-year statute of limitations (Code Civ.Proc., sec. 339, subd. 1) began to run, whether (1) at the date of the contract or, at the latest, the date of the installation of the carpet, in which event the action is barred; or (2) when the defects complained of appeared, in which case it is not barred. Was the warranty in its nature present or prospective?

The allegations of the amended complaint are clear and definite that respondent warranted that the carpet would, by reason of (a) its quality and (b) *the manner in which it would be assembled and installed,* last for a period of from six to eight years following its installation.

The trial court erred in sustaining the demurrer without leave to amend. There is no allegation in the amended complaint that the *body* of the carpet, its *quality,* was defective, or that it suffered even the slightest amount of wear. The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself.

[1] The cause of action is on a warranty of a future happening and it did not arise and the statute of limitations did not begin to run at the date of sale but was postponed until the future event failed to materialize. In Crawford v. Duncan, 61 Cal.App. 647, 215 P. 573, a doctor warranted that his radium treatments would not leave a permanent scar on the plaintiff's skin. The court held (61 Cal.App. at page 651, 215 P. 573) that the warranty related to a future event by which it would be ascertained whether or not it would be breached, and that the statute of limitations did not begin to run at the date of the contract of warranty since the cause of action did not accrue until the happening of the future event that the defendant had warranted. Where a vendor of carpet warranted that it would remain free from spots and discoloration caused by grease left in it in the process of manufacture, and no spots existed at the time of sale but developed later, the right of action on the warranty was held to begin to run at the date of the appearance of the spots. J.

Kennard & Sons Carpet Co. v. Dornan, 64 Mo.App. 17, 25. A cause of action for breach of warranty on a heating plant accrues, not at the date of the warranty, but on the date when it is finally determined that the plant would not satisfy the terms of the warranty, after attempts are made to remedy the defects. Heath v. Moncrieff Furnace Co., 200 N.C. 377, 156 S.E. 920, 922, 75 A.L.R. 1082, 1085. Where a machine is warranted to perform in a specified manner an action for damages for its failure does not accrue on delivery of the machine nor on its first failure where the vendor is endeavoring to perfect it. Felt v. Reynold's Fruit Evap. Co., 52 Mich. 602, 18 N.W. 378, 379. Where roofing was warranted for 10 years the purchaser had no cause of action for breach of the warranty until discovery of the worthlessness of the roofing. Cunningham v. Frontier Lumber Co., Tex.Civ.App., 245 S.W. 270. Likewise an action against a manufacturer of paint does not arise on his warranty until the failure of the paint to measure up to the warranty appears. Sewall Paint & Glass Co. v. Booth Lumber & Loan Co., Tex.Civ.App., 34 S.W.2d 650, 654. The statute does not begin to run on a breach of warranty on the sale of canned goods until the breach is discovered or should have been discovered, where it is not practicable to open the cans for inspection. P. H. Sheehy Co. v. Eastern Importing & Mfg. Co., 44 App.D.C. 107, L.R.A.1916F, 810, 812. A cause of action does not accrue on a warranty that an animal is a breeder until there is satisfactory proof that the animal is barren. Williamson v. Heath, 49 Tex.Civ.App. 254, 108 S.W. 983.

The rule stated in the Restatement of the Law is in accord with the cases cited. Under a contract for the sale of goods the failure of the buyer, after acceptance of the goods, to give notice to the seller of the latter's breach of warranty "within a reasonable time after the buyer knows *or has reason to know* of such breach, discharges the seller's duty to make compensation." (Emphasis added.) 2 Restatement, Contracts, sec. 412, p. 777. Illustration 2 under that section is that where a horse is sold with a warranty of soundness, and owing to a latent defect it is unsound and the unsoundness does not become obvious until after delivery, the purchaser can recover if he makes demand on the seller immediately after discovery of the defect. Absent a defect there could be no cause of action; absent the purchaser's knowledge or means of knowledge of a defect the cause of action would not accrue.

If "the warranty as to kind or quality of the article is construed as prospective, and its truth cannot be ascertained until the happening of a future event to which the warranty relates, then it is not broken until the happening of that event, and the statute of limitations does not begin to run until that date." 75 A.L.R. 1086, note, and cases cited.

[2, 3] Whether a cause of action for breach of a warranty arises (1) at the date of the sale or (2) when the defect is discovered, the statute of limitations is tolled as long as the vendor claims that the defect in the article can be remedied and he is attempting to correct the error. Louisville Silo & Tank Co. v. Thweatt, 174 Ark. 437, 295 S.W. 710, 712; Woodward-Wight & Co. v. Engel Land & Lumber Co., 123 La. 1093, 49 So. 719, 724; Felt v. Reynold's Fruit Evap. Co., supra; Heath v. Moncrieff Furnace Co., supra. See also Kester v. Miller, 119 N.C. 475, 26 S.E. 115, 116. In this case it is alleged that respondent attempted to repair the imperfections in the carpet by removing and replacing portions and recementing other portions but without success. How long these activities continued does not appear from the amended complaint. The length of time is immaterial since the action was commenced within six years after the date of sale which was the minimum period of the warranty. If it were material the point is not available on the general demurrer. It is an uncertainty that can be cured by an amendment to the pleading.

There was no defect in the quality of the workmanship in assembling the carpet, which is the only failure of the warranty of which appellant complains, that could have been determined by observation at the time of sale or installation. If respondent had warranted that the carpet was all wool, or that the warp consisted of a stated num-

ber of threads to the inch, or that the color would not be affected by the application of water, the truth of such statements could have been ascertained by inspection and test. If untrue the cause of action would have accrued when the carpet was made available for appellant's examination, either when it was delivered to its place of business or when it was installed. Since the warranty was not restricted to a fact ascertainable at the date of the contract but related also to a future event, to wit, that the carpet would last for the time warranted, only by the happening of such future event could the truth of the entire warranty be ascertained. Until then the cause of action did not accrue and the statute of limitations did not begin to run. 1 Williston on Sales, 2d Ed., sec. 212a, p. 411.

Since appellant does not allege that a failure to fulfill the warranty was in a particular that could have been made the subject of an action at the time the carpet was laid on the floor the statute of limitations is not available as a defense. If prior to the appearance of the imperfections appellant had commenced an action for damages based on defective workmanship in assembling the carpet, it is not to be presumed that respondent would have failed to present the defense that since no flaw had appeared there was no cause of action.

The cases relied on by respondent do not support its contention that appellant's cause of action for breach of the warranty arose at the time of the sale and that the statute of limitations began to run at that time. The inapplicability of the case of Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am.St. Rep. 115, is manifest. No sale was involved. The action was for the recovery of damages suffered by reason of a defective certificate of title to real property issued by the defendants. A certificate of title is not merchandise; there was no warranty of the quality of anything—merely a warranty that the public records showed a clear title in the person named; furthermore the incorrectness of the statements in the certificate could have been discovered by an examination of the public records at any time on and after the date of the certificate. The case of Mary Pickford Co. v. Bayly Brothers, Inc., 12 Cal.2d 501, 86 P.2d 102, concerned the sale of securities without a permit from the corporation commissioner. The permit, if issued, would have been a matter of public record and inquiry at any time before, on, or after the date of sale would have disclosed the failure to procure it. Like the Lattin case there was not a warranty of quality, but only of the genuineness and validity of the securities, and the facts warranted were untrue.

The Lattin and Pickford cases are further distinguishable from the instant case in that the warranty in each case was that the facts stated were true at the time the warranty was made. There was no warranty in those cases of a future event or that any change would or would not occur, whereas in this case respondent warranted that the carpet would last at least four years longer than the two-year period of the statute of limitations, to which respondent contends appellant was restricted in commencing its action for breach of the warranty.

In the Pickford case (12 Cal.2d at page 521, 86 P.2d at page 112) the court quoted from 1 Williston on Sales (2d Ed. sec. 212a, p. 411) as follows: "The typical warranty, being an undertaking regarding the *quality of goods* at the time of their sale must, if ever broken, be broken at that time; and the statute of limitations, therefore begins to run immediately." (Emphasis added.)

A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and those in the case under consideration. An extract from an opinion must be read in the light of the subject there under discussion and with reference to the facts in that case, and rules applicable to the decision in which they appear cannot be repeated in exemplification of a theory different from that to which they were applied in the case wherein the opinion was rendered. Principles that may serve to illustrate a point are considered by the court in relation to the case decided but are not necessarily announced as universally applicable. So it is with quotations from text books. For the purpose of

illustrating a point the writer may state a principle that is sound and sustained by the authorities but it may have no bearing upon the concrete facts involved when an attempt is made to apply it to a specific case.

The quotation in the Pickford case from Williston on Sales refers to a warranty of the quality of *goods* and it is apt in that case only by reason of the facts (a) that the warranty was of a fact stated to be true at the time of the sale which was not true, and (b) that the truth of the matter there warranted could have been readily ascertained from the public records on the day the warranty was made. The quotation is inapt in the instant case because (a) the warranty was that the good condition of the carpet as to the manner of assembling and installation would continue over a period of years, a future contingency, and (b) the truth of the warranty could not be determined at the time it was made but was ascertainable only through a subsequent occurrence.

The quotation bears no relevancy to the question involved in the case at bar, since (a) the breach complained of by appellant was the inadequate sewing and binding of the carpet, not that the quality of the carpet was poor; and (b) the warranty here breached was not concerning a matter that could have been determined by an immediate examination of the seams and binding of the carpet but was in respect to a condition that would continue into the future, the verity of the warranty not being ascertainable at the time it was made and possibly not until the expiration of the period covered by it.

[4] The rule governing the instant case is stated by Mr. Williston immediately following the above quotation, and in the same section, where he says concerning a warranty of a future event: "On the other hand, if the seller promises that something shall happen or shall not happen to the goods within a specified future time, the promise though it may be called a warranty cannot be broken until that time has elapsed and until then the statute will not begin to run. As shown in the preceding section what is in terms a promise for the future may also involve a representation as to the present. This should not deprive the buyer, however, of the full statutory period after the promise is actually broken in the future." This statement of the law clearly exhibits the important feature distinguishing a warranty of present quality (the structure of the body of the carpet) from a warranty of a future event (that the seams would not open nor the edges ravel), and reveals the proper effect to be given to a warranty that includes both present and future events.

Respondent says that the warranty was only of a present nature, notwithstanding the allegation of facts to the effect that it was prospective. Moreover, even if the warranty were concerning the present quality or condition of the carpet, referring to the time of sale, it was in its terms a promise also for the future. By reason of a combination warranty of both present and future events the buyer, says Mr. Williston, is allowed the full statutory period "after the promise is actually broken *in the future*" in which to commence his action on the warranty.

There is no lack of harmony between the decisions of the Supreme Court of California and those of other jurisdictions. The distinction between the two groups of cases is that the California cases, as we have pointed out, relate to warranties of the genuineness and validity of matters stated to have been actualities when the warranties were made and therefore are not applicable to the facts in the instant case and do not guide our decision, while the decisions of other courts that we have cited pertain to situations parallel with the circumstances here under consideration in which not present but future events must determine the truth of the warranty. Until the warranty is broken the cause of action does not arise, and until the cause arises there is no occasion to consider what proof is necessary to establish appellant's right of recovery.

In support of its demurrer and of the judgment respondent cites Brackett v. Martens, 4 Cal.App. 249, 256, 87 P. 410, in which it is held that the statute of limitations on a parol warranty in reference to the variety of fruit trees began to run

from the date of sale of the trees and not from the discovery that they were not of the kind warranted. This decision has been overruled by later cases holding that the statute does not commence to run until it can be ascertained whether the trees comply with the warranty. Sweet v. Watson's Nursery, 23 Cal.App.2d 379, 381, 73 P.2d 284; Ackerman v. A. Levy & J. Zentner Co., 7 Cal.App.2d 23, 26, 45 P.2d 386; Firth v. Richter, 49 Cal.App. 545, 549, 196 P. 277. Neither the briefs nor independent research have disclosed any authority supporting respondent's contention that the action is barred by the statute of limitations.

To sustain respondent's theory would be to hold that the action was barred before the falsity of the warranty could be ascertained.

[5, 6] 2. *Respondent's liability on the warranty.* The warranty induced appellant to purchase carpet fabricated by respondent, thus contributing to the latter's immediate benefit and profit. It was a valid contract based on a good and sufficient consideration. Woods Lumber Co. v. Moore, 183 Cal. 497, 504, 191 P. 905, 11 A.L.R. 549. A contract is supported by an adequate consideration if there is some benefit to the promisor or detriment to the promisee. Booth v. Bond, 56 Cal.App.2d 153, 157, 132 P.2d 520; Brownfield v. McFadden, 21 Cal.App.2d 208, 214, 68 P.2d 993. Respondent relies on sections 1731, 1732 and 1735 of the Civil Code relating to warranties by a seller to a buyer. There is no implication in those sections that an express warranty by a manufacturer of merchandise to a user on condition that he purchase the manufacturer's goods from an intermediate party is not valid. Cases such as Binion v. Sasaki, 5 Cal.App.2d 15, 41 P. 2d 585, to the effect that an implied warranty of the fitness of food goes only to the purchaser and not to a third party who may chance to eat the food, are obviously not relevant to this case.

[7] What facts the evidence will bring forth we do not know. We are concerned only with the allegations in the amended complaint that respondent made an express agreement with appellant. Respondent is presumed to have known the character of appellant's place of business and the approximate amount of traffic that would pass over the carpet during the term of the warranty. It was necessary for it to have had that knowledge in order to prepare the carpet for installation. Respondent acknowledged the warranty and its responsibility thereunder by its attempts to repair the defects of which appellant now complains.

There is nothing in the pleading from which it may be inferred that the agreement that the carpet would last for a period of six to eight years was merely an expression of opinion or what is sometimes referred to as "sales talk" or "puffing." The amended complaint alleges a warranty of a fact, not a statement of opinion.

[8, 9] Respondent's agreement was not to answer for the debt or obligation of another and therefore was not required to be in writing. There is no allegation that any person other than respondent became obligated to appellant in connection with the sale. Moreover, a promise to answer for the obligation of another is deemed to be an original obligation of the promisor and need not be in writing where the promise is upon the consideration of the performance of services by the promisee or the employment of a person at the suggestion of the promisor to render assistance to the promisee. Civ. Code, sec. 2794(4); Meyers v. McKillop, 37 Cal.App. 144, 145, 173 P. 773; Simons Brick Co. v. Wiglesworth, 184 Cal. 390, 393, 193 P. 947, 19 A.L.R. 1029.

[10] 3. *Allegations of the amount of damages suffered by appellant.* It is alleged that appellant paid $5,181.65 for the carpet; that in spite of respondent's attempt to replace and repair the carpet it became frayed and ragged, "constituted a hazard to plaintiff's customers on the premises," "is unfit for the use of the plaintiff," "is of no value or service to the plaintiff," and as a result thereof plaintiff has been damaged in the sum of $5,181.65. The allegation that the carpet, in its ragged condition, constituted a hazard to plaintiff's customers, was unfit for use, and was of no

value, is sufficient as an allegation of the damages alleged to have been suffered by appellant.

Since appellant is entitled to amend its pleading it may supply all of the uncertainties complained of by respondent and it is not necessary for us to take note of them.

Judgment reversed with directions to the trial court to allow appellant to amend its pleading further if it so desires.

MOORE, P. J., concurs.

McCOMB, Justice (dissenting).

I dissent. It will be assumed for the purposes of this opinion, without deciding, that the complaint as amended alleged an oral agreement by defendant warranting that if plaintiff purchased certain carpeting from Jack Freeman, its quality, the manner in which it would be assembled and installed would cause it to last for a period of from six to eight years following its installation; that such agreement was made in May, 1943; that in September, 1943, the carpeting, pursuant to such agreement, was installed in plaintiff's place of business; and that since January, 1944, the carpeting has been unfit for use by plaintiff.

The present action was commenced December 13, 1945. Defendant filed a demurrer on the ground, among others, that the purported cause of action was barred by the statute of limitations. (Sec. 339, subd. 1, Code of Civil Procedure.) This demurrer was sustained without leave to amend.

This is the only question necessary to be determined:

*Did the statute of limitations commence to run at the time of the sale of the carpeting or at the time plaintiff discovered that the carpeting was defective?*

It is the general rule in this state that a cause of action for breach of a warranty of the quality of merchandise arises at the time of the sale, and the statute of limitations commences to run at that time. (Mary Pickford Co. v. Bayly Bros., Inc., [1939] 12 Cal.2d 501, 521, 86 P.2d 102; Lattin v. Gillette, [1892] 95 Cal. 317, 319, 30 P. 545, 29 Am.St.Rep. 115.) Our Supreme Court in Mary Pickford Co. v. Bayly Bros., Inc., supra, at page 521 of 12 Cal. 2d at page 111 of 86 P.2d, thus states the rule: "The allegations of the first and fourth cause of action in the present case present facts showing a sale of securities upon an implied warranty which was untrue. That warranty was broken at the time of the sale and the statute of limitations commenced to run at that time. 'The typical warranty, being an undertaking regarding the quality of goods at the time of their sale must, if ever broken, be broken at that time; and the statute of limitations, therefore begins to run immediately.' Williston on Sales, 2d ed., vol. 1 sec. 212a, p. 411. See note, 75 A.L.R. 1086. The causes of action for breach of warranty were, therefore, barred long prior to the commencement of the action."

Applying the foregoing rule to the facts of the present case, since the agreement was not in writing, plaintiff had two years after its cause of action arose within which to file suit for breach of the alleged warranty. (Code of Civil Procedure, sec. 339, subd. 1.) It is alleged that the carpeting was delivered in September, 1943, and the complaint was not filed in the instant case until December 13, 1945. Thus more than two years had elapsed from the time plaintiff's cause of action arose before the present suit was commenced, therefore the alleged cause of action was barred by the statute of limitations.

Sweet v. Watson's Nursery, (1937) 23 Cal.App.2d 379, 73 P.2d 284; Ackerman v. A. Levy & J. Zentner Co., (1935) 7 Cal. App.2d 23, 45 P.2d 386; and Firth v. Richter, (1920) 49 Cal.App. 545, 196 P. 277,* are exceptions to the general rule above stated and hold that in the case of a warranty with respect to seeds, fruit trees and nursery stock, a cause of action for breach of warranty as to their productivity does not arise until the seeds, fruit trees or nursery stock fail to comply with the terms of the warranty. Clearly the instant case does not fall within this exception but within the general rule above stated.

In my view the majority opinion fails to recognize that there is a distinction be-

* These decisions overrule a contrary rule announced in the earlier case of Brackett v. Martens (1906), 4 Cal.App. 249, 256, 87 P. 410.

tween the time that a cause of action arises and the proof necessary to establish such cause of action. Decisions from other states cited in the majority opinion are, of course, inapplicable in view of the contrary decisions of our Supreme Court. I am therefore of the opinion that the judgment should be affirmed.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.




78 Cal.App.2d 796

## GRIFFITH v. CITY OF LOS ANGELES et al.

Civ. 15473.

District Court of Appeal, Second District, Division 3, California.

March 27, 1947.

**1. Pleading ⇐34(4)**

A complaint must be construed most strongly against plaintiff.

**2. Pleading ⇐37**

It would be presumed that, if plan of city to use park property for housing purposes contemplated anything more than a temporary use of the land, it would have been so alleged in the complaint seeking to enjoin such use.

**3. Evidence ⇐83(2)**
**Injunction ⇐118(3)**

The presumption was in favor of lawfulness of city's action in using park property for temporary housing purposes, and in order to overcome such presumption it was necessary for plaintiff, seeking to enjoin such use, to allege facts from which invalidity of the action would appear, such as violations of charter provisions, general law, or established rights of public to use the park solely for recreational purposes. Code Civ.Proc. § 1963, subd. 15.

**4. Municipal corporations ⇐721(1)**

The use by city of Los Angeles of park property for temporary housing purposes to help meet the housing shortage caused by necessities of war having retarded construction of sufficient houses was a use for "park purposes", and was not violative of city charter. Gen.Laws, Act 3484, and § 4.5 as added by St.1946, 2d Ex.Sess., c. —.

See Words and Phrases, Permanent Edition, for all other definitions of "Park Purposes".

**5. Municipal corporations ⇐996**

The possible interference with recreational uses of park property for duration of emergency as result of use of the park property for temporary housing purposes to help meet the emergency housing shortage caused by necessities of war having retarded construction of sufficient housing would be too inconsequential to justify interference therewith by the courts by issuance of an injunction upon a taxpayer's application.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Van M. Griffith against City of Los Angeles and others for an injunction restraining defendants from permitting use of park property for housing purposes. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Loren A. Butts, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Leon Thomas David and Bourke Jones, Asst. City Attys., all of Los Angeles, for respondent City, its officers and boards.

Faries and McDowell, McIntyre Faries, C. E. McDowell, and Allan M. Carson, all of Los Angeles, for respondent Housing Authority of City of Los Angeles.

Milton N. Sherman, of Los Angeles, for Veterans Advisory Committee, amicus curiae on behalf of respondents.

James M. Carter, U. S. Atty., of Los Angeles, and Frank Wickhem, Sp. Asst. to Atty. Gen., for United States of America, amicus curiae on behalf of respondents.

SHINN, Acting Presiding Justice.

Plaintiff brought this action against the City of Los Angeles, the Housing Authority of the city, the Department of Parks, and the individuals who constitute the Board of Park Commissioners of the

city, for an injunction restraining the defendants from permitting the use of park property for housing purposes. An order to show cause why a preliminary injunction should not be granted was issued, defendants appeared by demurrer, a preliminary injunction was denied, demurrers were sustained with leave to amend, plaintiff declined to amend, and judgment of dismissal was thereupon entered. Plaintiff appeals.

[1, 2] The complaint alleged that on or about March 5, 1898, Griffith Jenkins Griffith and Mary Agnes Griffith gave and granted to the city certain lands particularly described in the complaint, having an area of some 3800 acres, to be used as a public park and to be named Griffith Park. The grant was made upon condition that title would revert to the grantors or their heirs if the land should cease to be used as a park or if the name of the park should be changed. The city's housing project is not located upon this land and the conditions of the deed are not material to the present controversy. The complaint further alleged that on or about April 29, 1921, the city acquired by purchase from the estate of Griffith Jenkins Griffith another parcel of land comprising an area of approximately 350 acres "for the use of said city as a part of a plan for the development of Griffith Park." The second parcel was granted by the executor of the Griffith estate unconditionally and without covenant as to the uses to be made of it. The two parcels have since constituted Griffith Park. It was alleged that after acquiring the second parcel the City Council, by resolution, set apart and dedicated the land for use as a public park and placed the same under the supervision and control of the Department of Parks, but that the defendants intend to and will, unless restrained, devote approximately 160 acres of said parcel to "a purely commercial, revenue-producing enterprise," which is referred to in the complaint as a "project," by dividing it into lots and blocks, erecting dwellings thereon equipped with public utility services and sewers, to be rented to families, and also to erect thereon buildings to be used for retail merchandising in supplying the needs of the tenants of said dwellings. It was alleged that the threatened actions of the city would be in violation of certain provisions of the city charter, and that said lands are not necessary for the establishment of the housing project, since there are other vacant and available lands more suitable and convenient for that purpose. It was alleged that at the time of the filing of the complaint defendants had commenced construction work upon said project, and the prayer of the complaint was for injunction requiring the removal of the structures and forbidding the contemplated use of the land. It was not alleged whether buildings were to be maintained on the land temporarily or permanently, nor was it alleged that it was the purpose of the city to permanently abandon or discontinue the use of the land as park property. The case was presented to the trial court upon the theory that it is the plan of the city to permit the erection and use of dwellings only during the current housing emergency. In the memorandum opinion of the trial judge the use to which the land is to be devoted was regarded as a temporary one, and from the briefs on appeal it appears that no question of permanent use of the property for housing is involved. The complaint is to be construed most strongly against plaintiff (Frace v. Long Beach etc. School Dist., 58 Cal.App. 2d 566, 568, 137 P.2d 60; Royal Ins. Co. v. Mazzei, 50 Cal.App.2d 549, 555, 123 P.2d 586), and it must be presumed that if the plan of the city contemplated anything more than a temporary use of the land for housing purposes, it would have been so alleged in the complaint. In our decision we shall consider the use of the land to be of an emergency or temporary character, without intention or plan to make it permanent.

Briefs have been filed in support of the position of respondents by the United States of America and the Veterans' Advisory Committee to the Housing Authority of the City of Los Angeles, as well as by the Housing Authority and the City itself. The history of federal legislation on the subject of veterans' housing is reviewed and it is emphasized that the plans of the City of Los Angeles which are in question here are but supplementary of the broad national program. The other briefs filed by and on behalf of respondents review

state legislation pertaining to emergency housing. The provisions of the charter upon which respondents rely for authority to use the land in question for temporary housing, and which appellant contends do not extend the claimed authority, are fully discussed in the briefs. The question to which the principal arguments are directed is whether the city, having acquired by purchase land for park purposes, and having designated it as such and placed it under the control of the Park Commission, may afterward devote it in whole or in part to other public uses. It is the position of the respondents that the charter provisions do not forbid the abandonment of the use of land for park purposes so long as it is devoted to some other public use. But the arguments upon this point go far beyond the primary question, namely, whether the use of the land for temporary housing in the existing emergency is other than a legitimate use for park purposes. The trial judge in a memorandum opinion placed emphasis upon the fact that it has long been the custom and practice to make temporary use of park lands for the shelter and accommodation of citizens of the community who have been rendered homeless by public catastrophe. His conclusion was that emergency use of park land for temporary housing is a use for park purposes. We are in complete agreement with that conclusion.

[3, 4] Plaintiff concedes that the land may be used for all legitimate park purposes. His claim is that the use for temporary housing is not one of these. He could not state a cause of action for injunction except by alleging facts which would substantiate this claim. The presumption is in favor of the lawfulness of the actions which the city has taken. Code of Civ. Proc., sec. 1963, subd. 15; Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 430, 17 P.2d 1061; Ritzman v. City of Los Angeles, 38 Cal.App.2d 470, 473, 101 P.2d 541. In order to overcome this presumption it was necessary for plaintiff to allege facts from which the invalidity of the actions would appear, as violations of charter provisions, general law, or established rights of the public to use the park solely for recreational purposes. The city charter does not specify the particular purposes for which park lands may be used. We are aware of no general law enumerating uses which are or those which are not proper ones to be made of park property. We must therefore look to common usage and custom to ascertain the uses to which parks may be, and commonly are put, without interfering with or destroying their character as park property. Plaintiff is asking the court to hold, upon the basis of facts which are of common knowledge, that the use of suitable park land for emergency temporary housing is not a customary, legitimate, and proper use. He has cited no precedent which supports his claim and we are satisfied that none may be found. Experience, reason and logic, and all decisions of courts of which we are advised are against his contention. San Francisco experienced a crisis when the homes of some 200,000 of her citizens were destroyed by action of the elements. Park lands were extensively used as sites for temporary housing structures. Photographs of these districts, taken from the "San Francisco Relief Survey" by the Russell Sage Foundation (Los Angeles Public Library reference No. 361.51–S–195) are found in an appendix to the brief of the city. Seventeen camps were established in public squares or parks, in which more than 18,000 people were housed. Appellant says that what was done in San Francisco is of no significance for the reason that it does not appear that anyone questioned the right of the city to use the parks for emergency housing. This argument misses the point. The San Francisco experience gave rise to no legal precedent, but it proves that the citizens of San Francisco were willing to surrender the priviledge of using the parks for recreation while they were needed for emergency housing. They recognized their duty to allow the parks to be used to the best advantage of the community. The sentiments which dictated their consent would be expected of any generous, public-minded, and right-thinking community. The City of Columbus recently allowed temporary veterans' housing in public parks although a taxpayer objected. City of Columbus v. Columbus Metropolitan Housing Authority, Ohio App., 68 N.E.2d 108.

The parks of a community belong to its people and there is no better evidence as to what is a proper use of park property in an emergency than is furnished by the uses to which it is devoted with the approval of the community.

The people of the State of California have approved the use of park property in the manner in which a portion of Griffith Park is being used by the city. The legislature on February 15, 1946 (Statutes Extra Session 1946, Chap. 29), passed an act providing for the acquisition of temporary emergency housing facilities for veterans and families of servicemen by joint action of the state and local agency, and appropriated $7,500,000 for that purpose, which amount was later increased by $2,500,000. It authorized local agencies, which included counties and cities, to cooperate with the Housing Authority, in accordance with the Housing Cooperation Law (Statutes Extra Session 1938, Chap. 2, p. 2, Deering's General Laws, Act 3484) for the purpose of carrying out the provisions of the act. At the second extra session, July, 1946, the act was amended by adding section 4.5, which authorizes cities, counties and other agencies to use park or recreation property for the purpose of erecting temporary and emergency housing facilities for veterans and families of servicemen, and the leasing of such property to another public agency for such purpose, such uses being subject to the control and management of the Park Board, Commission, or other authorized local authority. The act also confirmed, validated, and declared legally effective all acts theretofore taken for the use of public park or recreation property for such housing. It was passed as an emergency measure, with the following statement constituting the necessity therefor: "Due to the extreme shortage of housing in this State it is imperative that temporary and emergency housing facilities for veterans be erected with the greatest of dispatch and as quickly as possible to alleviate the hardship and suffering now common in this State. Public park and recreation property of local agencies furnish one of the best and most accessible sites for such temporary and emergency housing facilities and many local agencies have either commenced to utilize such property or contemplate doing so within the immediate future. To eliminate all question concerning the power of such local agencies to so utilize such public park and recreation property it is necessary that their power to do so may be affirmatively stated by legislative enactment and it is therefore necessary that this act take effect immediately."

Respondents cite these statutes, contending that they have the effect of validating the acts of the city in question, if for any reason they were invalid when done. They contend that the questions on the appeal have been rendered moot. We find it unnecessary to decide whether the legislation provided authority for the actions which have been taken by defendants, or effected a ratification of what had already been done. The city had general authority under the charter to use the land for all proper park purposes. The acts are, however, quite significant. They show the sentiment of the people of the state and are a declaration that the use of public parks for temporary veterans' housing is within the legitimate and proper purposes for which park lands may be used.

The question whether suitable park property could properly be used for temporary veterans' housing was considered in Hyland v. City of Eugene, Or., 1946, 173 P.2d 464, 467. In holding that the use was not improper, it was said: "It is not unusual during public emergencies temporarily to use parks to relieve distress and suffering." The court cited Hessin v. City of Manhattan, 81 Kan. 153, 105 P. 44, 25 L.R.A.,N.S., 1141, in which the court upheld the temporary maintenance of a pesthouse in a public park on the occasion of a threatened smallpox epidemic. We have found but few reported cases on the subject and none which supports the contentions of plaintiff. The scarcity of authority may be due to the fact that few citizens have raised objection to such meritorious use of park property. The great number of authorities cited in the briefs, which considered questions relating to permanent changes in the character of park property, are not in point.

Even if the case were one of first impression, we would be unable to find in it any ground or reason for the issuance of an injunction. The situation in Los Angeles does not differ from that of many other communities, except in degree, and is due to the war. Tens of thousands of returned veterans and their families, as well as countless others in Los Angeles County, are practically homeless. Providentially, the homes of the citizens have not been destroyed. The necessities of war have only retarded the construction of sufficient housing to meet the needs of the increasing and shifting populations. This is the extent of the dilemma in Los Angeles County. It is the imperative duty of the State and municipal governments to provide them with temporary homes for the time that will be required to meet the pressing demand for permanent homes. There are vast areas in the old country where no homes remain, and others where few have survived the ravages of war. Is it conceivable that there could be any rule of law or equity, or any argument that bears the semblance of reasonableness, which would bar a municipality in such a situation from devoting park lands to the temporary housing of its homeless citizens? We can imagine none and we think the question furnishes its own answer.

[5] Furthermore, the possible interference with recreational uses for the duration of the emergency, of which plaintiff complains, would be too insignificant and inconsequential to justify interference therewith by the courts. The detriment which plaintiff claims the citizens of Los Angeles are due to suffer is not measurable. Plaintiff says in his brief that if the structures can be maintained for three years, they can be maintained for six years. This may be granted. But how could such a brief interruption be measured against the maintenance of the park in perpetuity? The city's plan requires the use of about 160 acres out of a total area of 4,000 acres. To what extent are the recreational facilities of the park interfered with? No facts are stated in the complaint from which it may even be inferred that there will be a noticeable interference. It is not alleged that playground or other recreational facilities were located upon or adjacent to the 160 acres or that their use will be interrupted. The facts alleged in the complaint are insufficient to show that the acts of the city sought to be enjoined will infringe upon the legal rights of the public in the use of the park, and are devoid of grounds for equitable relief.

Defendants challenge plaintiff's right to maintain this action as a citizen and taxpayer, and urge other grounds for affirmance of the judgment. It is unnecessary to decide these points. The briefs discuss provisions of the city charter which, in view of our decision, do not require interpretation. The question whether under the charter park lands acquired by purchase may be devoted to other public uses will be for decision in the future if, when the present emergency is ended, the city undertakes to devote the land to permanent residential or business use.

The judgment is affirmed.

WOOD, J., and KINCAID, Justice pro tem., concur.




79 Cal.App.2d 90

**PEOPLE v. BOYD.**

**Cr. 702.**

District Court of Appeal, Fourth District, California.

April 11, 1947.

**1. Weapons ⇐8**

The statute making the possession by an exconvict of a firearm capable of being concealed upon the person an offense is inapplicable to firearms having a barrel 12 inches or more in length. Gen.Laws, Act 1970, § 2.

**2. Weapons ⇐17(4)**

Evidence was insufficient to support conviction of violation of statute making possession by an exconvict of a firearm capable of being concealed upon the person an offense Gen.Laws, Act 1970, § 2.

**3. Criminal law ⇐560**

In a criminal case, a judgment of conviction should rest upon some substantial evidence proving required facts, and jury should not be allowed to decide such facts upon mere surmise and conjecture.

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Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Robert Boyd was convicted of violation of General Laws, Act 1970, § 2, making possession of an exconvict of a firearm capable of being concealed on the person an offense, and he appeals.

Reversed.

Edgar G. Langford, of San Diego, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of possession by an exconvict of a firearm capable of being concealed upon the person, in violation of Act 1970, section 2, of the General Laws of this state. The information alleged that on July 6, 1946, the defendant had in his possession and control a firearm having a barrel less than 12 inches in length, and that in 1938 he had been convicted of a felony in the state of Ohio and had served a term in the Ohio State Reformatory. After pleading not guilty, the defendant was tried by a jury and he has appealed from the judgment of conviction.

There is no dispute as to the facts of the case. The defendant's wife owned a photographic studio in San Diego and was in the business of taking snapshot photographs of patrons in various night clubs and selling pictures which were quickly developed. The defendant did the developing work at the studio. On the night of July 6, 1946, the defendant's wife was twice molested by a group of sailors, being knocked down on one of the occasions. She reported the matter to the Navy Shore Patrol. After the second incident she returned to the studio where her husband was working.

The defendant finished developing some pictures which were to be delivered, and as his wife was afraid to return to the night club alone he agreed to accompany her. The wife owned some sort of a gun, whether a pistol or revolver does not clearly appear, which she had purchased in Cleveland at a time when her husband was working at night. Before returning to the night club she put this gun in her bag, in which she carried her photographic slides and flash bulbs. The gun was so long that the butt end hung outside the bag and it was impossible for her to close the zipper. When the defendant and his wife left the night club they were followed by two of the sailors who started an altercation with them on a street corner. The defendant finally took the gun out of his wife's bag and shot one of the sailors, apparently in the defense of his wife and himself. The defendant and his wife then fled from the scene and the defendant threw the gun into the bay. They returned to their home and the defendant at once telephoned to the police, advising them of what had occurred and then awaited the arrival of the officers.

So far as indicated by the record before us, the defendant was justified in shooting the sailor. It does not appear whether or not he was prosecuted for any offense in that connection and we are involved here only with the charge that he was thus temporarily in possession and control of a firearm in violation of Act 1970, section 2, of the General Laws. That he was an exconvict, and that he took the gun from his wife's bag and shot the sailor, is admitted. The sole ground of appeal is that the evidence is insufficient to sustain the judgment in that it is not sufficient to sustain the implied finding of the jury that the gun in question had a barrel less than 12 inches in length.

The gun was never recovered and the People put on no direct evidence as to the length of its barrel. The sailor who was shot testified twice that it was a pistol and, later, that he could not tell whether it was a pistol or a revolver. A police officer testified that when he responded to the call made by the defendant the defendant told him the general facts as to

what had occurred, and that the defendant told him he took a revolver with him, "a 32-20 revolver". When asked whether anything had been said as to how or why he carried the revolver, he replied, "In a pocket. I don't recall whether it was the coat or pants pocket." A deputy sheriff, who had held the national shooting championship, testified as to his familiarity with pistols and revolvers; that a 32-20 revolver with a target barrel generally has a barrel around six or six and a half inches; that while models are specially made up in many instances they usually come with barrels two, four, six or eight inches long; that in saying this he was referring to two particular makes; that he did not know the length of barrel of another make of 32-20; that he had seen revolvers and single shot pistols with barrels up to 12 inches; and that these were usually made to the specification of the person who ordered it. On cross-examination, he testified that the various manufacturers of firearms have continually experimented over the years and manufactured revolvers and other guns according to individual desires or specifications; that he had seen revolvers with barrels 12 inches in length; and that he had shot such guns with barrels about 14 or 16 inches long.

The defendant and his wife both testified that the barrel of this gun was more than 12 inches long. The defendant testified that he called this gun a "horse pistol" and that the entire gun was 17 or 18 inches in length; that the gun was in a bag which his wife carried over her shoulder; that the gun was placed in this bag with the muzzle down in the corner; that the butt of the gun was hanging out of the bag and that the handle of the gun was on the outside of the bag; and that when he took the gun from the bag he did not have to feel for it, he just put his hand on it. The defendant's wife testified that the barrel of the gun was longer than 12 inches; that it was "a little bit longer than" 12 inches; that she put the gun in her bag; that the gun was so big she could not close the bag; and that the butt end of the gun extended out from the bag. During the examination of these witnesses a 15 inch ruler was placed in this bag in the general position of the gun, as described by these witnesses, and one and a quarter inches of the ruler extended over the top of the bag.

[1] While there is no direct evidence that the barrel of this gun was less than 12 inches in length the respondent makes two contentions in support of the judgment. It is first contended that it is not necessary in such a case to prove that the gun in question has a barrel less than 12 inches in length. It is argued that the real purpose of this law, as material here, is to prohibit the carrying by an exconvict of a firearm which is capable of being concealed on the person; that the portion of the statute which reads "the terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length" was not meant to exclude firearms with barrels longer than 12 inches; and that it follows that the length of the barrel of the gun need not be proved. This contention is without merit. The wording of the statute, in defining these terms for the purpose of the statute as applying to and including all firearms having a barrel less than 12 inches in length, was clearly intended to make the statute inapplicable to firearms having a barrel 12 inches or more in length.

[2, 3] The respondent further contends that the evidence that when a 15 inch ruler was placed in this bag only one and a quarter inches showed outside of the bag is sufficient to establish beyond a reasonable doubt that the barrel of this gun was less than 12 inches in length. It is argued that since only 13¾ inches of the ruler remained in the bag and all of the chamber and operating mechanism of the revolver, which could well have been more than an inch and three-quarters in length, were within the bag, the length of the barrel must, of necessity, have been less than 12 inches in length. However, there is no evidence as to the length of the "chamber and operating mechanism"; none as to the distance between the handle and the barrel of the gun, and no definite evidence as to how much of the gun protruded

from the bag. Two witnesses testified that the butt end of the gun hung over the top of the bag, and one of them testified that the handle of the gun was on the outside of the bag and that he did not feel for it but could just pick it up. It was incumbent upon the prosecution to prove beyond a reasonable doubt that the barrel of this gun was less than 12 inches in length. While the evidence here relied on may be sufficient to raise a suspicion it is not, in our opinion, sufficient to establish the required fact beyond a reasonable doubt. In a criminal case, the judgment should rest upon some substantial evidence proving the required facts, and the jury should not be allowed to decide such facts upon mere surmise and conjecture.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.




78 Cal.App.2d 763

**In re COLLINS' ESTATE.**

**NELSON v. WHITE et al.**

**Civ. 3541.**

District Court of Appeal, Fourth District, California.

March 25, 1947.

**1. Descent and distribution ⇐71(6)**

In proceeding to determine heirship of intestate, evidence sustained finding that claimant was not a son of the intestate and that intestate died without issue.

**2. Descent and distribution ⇐71(5)**

In proceeding to determine heirship, admitting testimony of collateral heirs of intestate in opposition to claim of intestate's alleged son was not error on ground that statute provides that presumption of legitimacy may be disputed only by husband or wife, or the descendant of them, where legitimacy of alleged son was not attacked by collateral heirs, and the question was whether alleged son's mother was the same person as the intestate's wife. Civ.Code, § 195.

**3. Evidence ⇐215(1)**
**Witnesses ⇐392(1)**

In proceeding to determine heirship, wherein alleged son's conduct as shown by delayed birth certificate was inconsistent with his contentions in litigation, certificate was admissible both as an admission made by alleged son and as tending to impeach him. Vernon's Ann.Civ.St.Tex. art. 4477, rule 51a.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding in the matter of the estate of John Hunter Collins, also known as John H. Collins, also known as J. H. Collins, deceased, wherein Jack Estabueno Nelson, formerly Jack Estabueno Collins, claimant, filed a petition to determine heirship, opposed by Virginia T. White and others, claimants. From a judgment that Jack Estabueno Nelson was not an heir at law of the deceased, and that deceased died without issue, Jack Estabueno Nelson appeals.

Judgment affirmed.

Frederick E. Hoar, of Bakersfield, for appellant.

Dorsey & Campbell and Wagy & Hulsy, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to determine heirship. John Hunter Collins died intestate on October 13, 1943, leaving no surviving spouse. He had lived in Bakersfield since 1910. Most of that time he was married to Hannah Dodson Collins. They separated in 1938 and she died at an earlier date in 1943. According to a certified copy of a marriage certificate introduced in evidence the deceased had previously married one Minnie Jefferson at Galveston, Texas, on October 1, 1900.

The appellant, claiming to be the sole and legitimate issue of the marriage last referred to, filed a petition in the estate of the deceased to establish his heirship and his right to receive the whole of the estate. He alleged that he was born at Bryan, Texas, on July 11, 1905, as the lawful issue

of the deceased and the Minnie Collins who were married in Galveston on October 1, 1900. This petition was opposed by the brothers and sisters of the deceased, and also by two children of Hannah Dodson Collins by a former marriage. The respective claims of heirship were tried before the court without a jury. The respondents made no effort to prove the parentage of the appellant but rely upon their contention that he is not the child of the deceased. The trial was largely upon issues of identity as to whether the Minnie Collins whom the deceased apparently married on October 1, 1900, was the same person as the Mittie Collins who was the mother of the appellant, and whether the deceased was the same John Collins as the one who had apparently married the mother of the appellant. The court entered an order that the appellant take nothing and later made findings and entered judgment to the effect that he was not an heir at law of the deceased, and that the deceased died without issue. This appeal followed.

Some things appear in the evidence with little or no conflict. The mother of appellant was commonly known to her family and friends as "Mittie" Jefferson, and later as Mittie Collins, although there is evidence that she was sometimes called "Minnie". She was raised at Bryan, Texas, and later lived for a time in Galveston. The date she left Bryan for Galveston does not appear. There is evidence that in Galveston she lived for a time, as husband and wife, with a man named John Collins, who was employed as a longshoremen foreman; that sometime in 1905 she gave birth to a son, who is the appellant; that this John Collins deserted her when the son was about a year old; that she returned to Bryan, Texas, when the appellant was about a year and a half old; that she was then in poor health; that she then lived with a Mr. and Mrs. Nelson, Mrs. Nelson being her cousin; that she died of tuberculosis about a year after she returned to Bryan; that Mr. and Mrs. Nelson raised the appellant although they never adopted him; that the John Collins who was supposedly married to appellant's mother was never known to have been in Bryan, or to have communicated with her, after she returned there; and that the appellant lived with the Nelsons until after he was grown.

On September 2, 1943, for the purpose of obtaining employment as a Pullman porter, the appellant secured the entry of a delayed certificate of birth in the county in which Bryan, Texas, is located. In this certificate the county judge certifies that the truth of the statements therein contained was established to his satisfaction, as required by statute. Vernon's Ann.Civ.St. art. 4477, rule 51a. This certificate gives the appellant's name as Jack Estabueno Collins and recites that he was born on July 11, 1905; that his father, John Collins, was then a resident of Bryan, Texas, was 24 years old, was a farmer and was born at Calvert, Texas; that his mother's maiden name was Mittie Jefferson; that at the time of the birth she resided in Bryan, Texas; that she was a housewife; that she had herself been born in Bryan, Texas; and that his father and mother were negroes. The certificate has attached to it two affidavits of persons who swear that these facts are true and that they were acquainted with the facts at the time of the event. On January 10, 1944, the appellant secured a decree of a Texas court changing his name to Jack Estabueno Nelson. Shortly thereafter, having, as he said, learned that John Collins had come to California and might be residing at Bakersfield, he came to Bakersfield to see him. He then learned for the first time that this John Collins was dead.

It also appears that the deceased, who was born in Alabama in 1876, was 29 years old in 1905, when the appellant was born, and lived in Galveston from 1900 to 1904; that he came to California in September or October, 1904, his father, mother, brothers and sisters having previously come to this state. He resided for a time in San Diego, in Los Angeles and in or near San Francisco, and finally settled in Bakersfield about 1910. The evidence indicates that he resided in California continuously from September, 1904, until his death. Although it is not conclusively shown that he did not return to Galveston during the year 1905, there is no affirmative evidence that he did. It also appears that after Hannah Dodson

Collins left the deceased in 1938, he lived for the five years preceding his death with a woman named Diana Smallwood, without benefit of clergy.

Appellant's main contention is that the finding that he is not the son of the deceased is unsupported by, and is contrary to, the evidence. It is argued that the uncontradicted evidence proves the marriage between the deceased and "Minnie" or "Mittie" Jefferson, a cohabitation between them subsequent to such marriage, and that the appellant was the child of this union. It is further argued that the evidence to the effect that the deceased was not the father of the appellant is insufficient to overcome the statutory presumption of legitimacy, and that the parenthood of the deceased was affirmatively established by the delayed birth certificate which was introduced by the respondents. While the uncontradicted evidence shows a marriage between the deceased and a "Minnie" Jefferson in 1900 and that the deceased lived with that woman as his wife for a year or two in Galveston, and while it also shows that the appellant was the son of a "Mittie" Jefferson, who was sometimes called "Minnie", the evidence is conflicting as to the identity of these women or as to whether the mother of the appellant was the one that married the deceased in 1900. The question is, and was, entirely one of identity and no question with respect to the presumption of legitimacy is involved.

The appellant introduced in evidence six letters written by the deceased's brother, Lawson Collins, to the woman the deceased married in 1900 and two letters written to her by the father and mother of the deceased. These letters were all dated between September 13, 1901 and December 15, 1902. He also introduced two letters written to this woman by the deceased, both dated in February, 1901. The appellant testified that he found these letters tied in a bundle in an old trunk belonging to his foster mother, Mrs. Nelson, and that this occurred after he visited Bakersfield. While this evidence, if true, would tend to connect the mother of the appellant with the woman married by the deceased in 1900, the value and effect of this evidence is seriously affected by other evidence to the effect that these letters were in the possession of the deceased at the time of his death.

Lawson Collins testified that he visited the deceased and his wife "Minnie" for a week in 1901 and spent several months with them in the summer of 1902, that they then lived at 2312 Winnie St. in Galveston, and that he wrote the above-mentioned letters to the woman his brother had introduced as his wife. Jerome Collins, another brother of the deceased, testified that he visited the deceased and his wife "Minnie" at the same address in Galveston in 1902. Diana Smallwood testified that while she was living with the deceased he told her that he had a wife before Hannah called Minnie or Mittie; that he married her in Galveston; that they had a baby; that he didn't say whether it was a boy or girl; and that he left this wife and baby when he came to California. A half brother of the appellant's mother testified that she returned to Bryan with a child a year or a year and a half old, which child is the appellant; that she told him she had married a man named John Collins, but he left her while in Galveston; and that his sister's husband was never seen in Bryan. Three witnesses testified to the same effect, that appellant was brought to Bryan when he was a year or a year and a half old by his mother "Mittie" Jefferson; that she said her husband's name was John Collins; and that Collins was never seen there. The appellant testified that after he became older his foster mother told him many times about who his parents were and that she gave him a tintype picture of his mother. A sister-in-law of appellant's mother testified that she lived in Galveston; that she knew John Hunter Collins; that she knew that a boy was born to a marriage between John Hunter Collins and "Mittie" Jefferson; and that petitioner is that boy. A Mrs. Taylor testified that she knew appellant's mother about 1900 or 1902 in Galveston; that she knew her casually at church; that Mittie Jefferson "was supposed to have been (married to) this man Collins"; that this was "along about the year 1903 or 1904"; that she did not know Collins but knew that

he worked on the water front; that she knew one child was born of this marriage although the child was a year old before she knew anything about it; and that the parties separated and the mother of the appellant, who was in poor health, left with the child. A W. J. Christian testified that he knew John Collins in Galveston from 1904 to 1907, that a part of the time both he and this Collins were foremen working on the wharves, and that he knew positively that John Collins was in Galveston "in 1905–'06–'07." This witness made no attempt to identify the John Collins he referred to with the deceased and there is a great deal of evidence that the deceased was not in Galveston, for much of the time at least, in those years.

While the appellant claims that he was born sometime during 1905, and while he claims that there is positive testimony that the deceased was then living in Galveston with his wife "Minnie" and that they did not separate until the child was born and at least a year old, a significant piece of evidence appears in a letter admittedly written by appellant's mother, which was introduced in evidence by him. This letter, dated July 14, 1905, and signed "Minnie Collins," was written to a Brother Profet. It was assumed at the trial that this was her brother, but her half brother gave a list of her brothers in which no such name appears. In this letter she says that she is "in the family way and I thought I should tell you about it. I want to see you so bad just as soon as I can see you I will." She then speaks of her "truble". She then tells him not to answer the letter under two weeks because "I am in Galveston now on bisniss but soon I will be back to dickerson." Why she felt she should tell this man of her pregnancy does not appear except by possible inference, and the letter not only discloses that she was not then living in Galveston but the tone of the entire letter strongly indicates that she was not then living with a husband.

In addition to the apparent weakness in much of the evidence relied on to show that appellant's mother was the person whom the deceased married in Galveston in 1900 and lived with for two or three years thereafter, there is considerable evidence which throws more doubt on that fact. Two brothers of the deceased testified that the deceased and his wife were living on Winnie St. in Galveston when they visited them in 1901 and 1902. Mrs. Taylor testified that the appellant's mother, when she knew her, lived on Church Street in Galveston. There was evidence that appellant's mother was a hair dresser or beauty operator and that the woman the deceased married in Galveston ran a rooming house. Two brothers of the deceased testified that the tintype picture of appellant's mother which was given to him by his foster mother was not the picture of the woman they had known as the wife of the deceased. While it may be of small value there is evidence, admitted without objection, that the deceased had told several people that he never had any children. While there is evidence that appellant's mother, who had no children other than the appellant, was pregnant in July, 1905, five brothers and sisters of the deceased testified that he came to California in the fall of 1904, and as early as September of that year, with statements as to where he was in California covering most of the the time over the next two or three years. While it does not conclusively appear that he did not return to Texas for a short time during this period the evidence sufficiently justifies an inference that he did not, and that he remained in this state continuously from 1904 until his death.

The appellant testified that as he grew older his foster mother, Mrs. Nelson, told him about his father and mother, and that all he knew about them was what she told him. In obtaining a delayed birth certificate in September, 1943, he gave his mother's maiden name as "Mittie" Jefferson and stated that his father was named John Collins; that both of them lived at the time of birth in Bryan, Texas; that his father was then 24 years old; that his father was born in Calvert, Texas, and was a farmer. Two witnesses, one of them a half sister of Mrs. Nelson, swore to the truth of all of these facts and that they knew the facts at the time of birth. In addition to the discrepancy as to the place of appellant's birth

it appears that the deceased had never lived in Bryan, had never been seen there, was about 29 years old in 1905; that he was born in Alabama; and that his occupation was a water front worker.

While the appellant testified that he found the letters first above mentioned in an old trunk belonging to his foster mother, a brother of the deceased testified that he saw these letters in the possession of the deceased in 1918. Another brother testified that he saw the letters in 1938, at the time Hannah Dodson Collins separated from the deceased; that at that time the letters were removed from an old trunk which the deceased had brought with him to California in 1904, because Hannah was taking the trunk with her; that the deceased then put the letters in a letter file; that the witness saw the letters in this letter file after the deceased died; that he wanted to take them but that Diana Smallwood refused to let him have them. While Diana Smallwood denied that these letters were in the deceased's possession at the time of his death, or that she had given them to appellant, she was impeached by a showing that she had previously been convicted of a felony and further impeached by showing that she had an interest in the litigation in that she admitted that the appellant had told her that if the estate was awarded to him he would recognize her interest, she having filed a claim in the estate.

[1] The most that can be said is that there is a conflict in the evidence. Two important questions of identity were involved, portions of the evidence are inconsistent with other parts, doubt was thrown on the credibility of much of the important testimony, the question was entirely one of fact for the trial court, and it cannot be held, as a matter of law, that the evidence does not sufficiently support the finding to the effect that the appellant was not the son of the deceased.

[2] It is next contended that the court erred in admitting the evidence given by the collateral heirs of the deceased on the ground that these witnesses were not entitled to give their testimony, since section 195 of the Civil Code provides that the presumption of legitimacy may be disputed only by the husband or wife, or the descendant of one or both of them. The legitimacy of the appellant was in no way attacked by the respondents. The presumption referred to could have no application here until it was established that appellant's mother was once the wife of the deceased. The question here was one of identity and the evidence was properly admitted on that issue.

[3] Finally, it is urged that the court erred in admitting in evidence, and in refusing to strike, the delayed birth certificate relating to the appellant. This certificate was admitted without objection but a motion was later made to strike it, which was denied. Although the appellant relies on this birth certificate, in his briefs, as evidence establishing his parentage and that he was the son of the deceased, he also urges that it was improperly admitted into evidence since it is not a declaration made by a member of his family. One of the affidavits attached to the birth certificate affirming the truth of the matter set forth was made by a half sister of Mrs. Nelson, who raised the appellant after his mother's death. The appellant testified that he had many times been told the facts relating to his parentage by Mrs. Nelson, and shortly before he learned that this John Collins was dead he adopted and used for his own purposes the facts alleged in the certificate, with the accompanying evidence as to the truth of those facts. Not only was the certificate admitted without objection but since the appellant's conduct, as shown thereby, is inconsistent with his contentions in this litigation which followed, this birth certificate was admissible both as an admission made by the appellant and as tending to impeach him. While the weight to be accorded the birth certificate as evidence may be debatable, and while good arguments may be made against its probative value, the entire matter goes to the weight of this evidence and not to its admissibility.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

## CALIFORNIA MOTOR TRANSPORT CO., LIMITED, v. STATE BOARD OF EQUALIZATION. *

Civ. 7210. Sac. 5749.

District Court of Appeal, Third District, California.

April 1, 1947.

Rehearing Denied April 25, 1947.

Hearing Granted May 29, 1947.

**Automobiles** ⇐102

Evidence showed that motor transport corporation's pickup and delivery service in two cities was merely part of its highway transportation business between such cities, so as to render its receipts for intracity transportation of goods taxable as part of gross receipts from its operation of motor vehicles under Motor Vehicle Transportation License Tax Act. Gen.Laws, Acts 5130d, 5134.

THOMPSON, J., dissenting.

Appeal from Superior Court, Sacramento County; P. Shields, Judge.

Action by the California Motor Transport Company Limited, against the State Board of Equalization to recover an amount paid under protest as taxes assessed against plaintiff under the state Motor Vehicle Transportation License Tax Act. Judgment for plaintiff, and defendant appeals.

Reversed.

Fred N. Howser, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for appellant.

Norman A. Eisner, of San Francisco, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover taxes paid under protest, said taxes having been assessed against it as a highway common carrier under the California Motor Vehicle Transportation License Tax Act of 1933. Stats. 1933, p. 928, and amendments, 1 Deering's Gen. Laws of 1937, p. 2160, Act 5130d. Plaintiff operates between San Francisco and Los Angeles, and Oakland and Los Angeles, and it is conceded that its gross receipts from such operations are taxable under the foregoing act. Plaintiff also operates a pick-up and delivery service in Los Angeles and in Oakland, and the only question in this case is whether such portions of its gross receipts as are received for picking up in one city goods to be delivered in the other, and for delivering in one of such cities goods transported from the other, are a part of its gross receipts from the operation of motor vehicles, subject to taxation under said act. Plaintiff contends that its business as a highway carrier—its intercity business—is carried on independently from its business as an intracity carrier, and that its receipts from its intracity activities are not a part of its gross receipts as an intercity carrier. The trial court sustained this contention of plaintiff and this appeal was taken by defendant.

The evidence shows that plaintiff corporation was organized in May, 1930, and that in June, 1930, it succeeded to the operating rights of E. Sunberg who held a certificate of public convenience and necessity issued by the Railroad Commission authorizing him to operate a van truck service between Los Angeles and San Francisco, for the transportation of property consigned to him by California Freight Forwarders, the latter being an express company operated by one Robert W. Lacey. Also during 1930, the California Motor Express, Ltd., a corporation, succeeded to the rights of California Freight Forwarders as an express company, and plaintiff entered into a contract with that company for carriage between San Francisco and Los Angeles.

In 1935 plaintiff's operative rights as a highway common carrier were extended to include operations between Oakland and Los Angeles and a contract for such carriage was made by it with the express company.

In April, 1941, plaintiff secured from the Railroad Commission a permit to operate as a city carrier in any city in the state under the provisions of the City Carriers' Act, Stats. 1935, p. 1057, amend. by Stats. 1937, p. 629, and Stats. 1939, ch. 683, Gen.Laws, Act 5134. Thereupon it purchased the equipment of the Red Line Transfer Company of Los Angeles, which company had been doing pick-up and delivery for the express company in Los Angeles, and acquired from Red Line Express Company of

* Subsequent opinion 187 P.2d 745.

San Francisco the equipment with which it had been carrying on pick-up and delivery in Oakland. Thereafter plaintiff performed such pick-up and delivery in both cities, under contract with California Motor Express, Ltd.

Plaintiff's pick-up and delivery in San Francisco was and continued to be done by the Red Line Express Company of San Francisco, a copartnership; and while one of the issues in the court below was whether a portion of the revenue of that company should be considered as gross receipts of plaintiff subject to tax, that issue has been abandoned on this appeal and may therefore be disregarded.

The trial court made findings covering the foregoing facts, but it also found, and relied upon such findings as a basis for its judgment in favor of plaintiff, that plaintiff has at all times kept separate and distinct books and records covering said pick-up and delivery service and entirely independent books and records covering its intercity operations; that the vehicles used by plaintiff in said pick-up and delivery service have not been and are not used in highway transportation, and have not and do not operate outside the corporate limits of Los Angeles or Oakland; that the common carrier highway operations of plaintiff have not been confused with and have been conducted entirely separately and independently of its pick-up and delivery service; that after the acquisition of said equipment, and after obtaining said city carrier's permit, plaintiff operated its two activities as independent and separate services; that as a city carrier it had separate equipment, lighter and different from that which it employed in its capacity of a highway carrier; that it confined its business as a city carrier strictly within the limits for which it was licensed, and intruded in no particular within the field of the highway carrier; that it kept separate books of account and rendered separate and independent bills to California Motor Express, Ltd., for said city carrier service; that as a highway common carrier it did likewise; that its equipment never deviated from its devotion to the service for which it was licensed; that it kept accounts restricted to its character as a highway carrier and billed its customer solely for its highway carriage; that plaintiff is both a highway carrier and a city carrier and it exists in each of these characters by separate authority; that each business has a separate license or certificate from which it takes its existence and individuality, which certificates were issued at separate times and are authorized and are supported by different statutes; that neither is allowed to work or operate in the field which the other has been created to fill; that penalties have been provided for the violation of this prohibition; that the separate character of these two businesses is as definite as the law can make it; that the businesses were not confused or entangled and did not overlap; that the two operations, that of a city carrier and that of a highway carrier, are just as separate and distinct for all purposes of this case as if the two operations had been conducted by separate and distinct corporations or legal entities; that the Red Line Transfer Co., California Motor Express, Ltd., and California Motor Transport Co., Ltd., have at all times been operated from the same place of business and under the direction of the same individuals.

Regarding the findings that plaintiff has at all times kept separate and distinct books and records covering the pick-up and delivery service, and entirely independent books and records covering its intercity operations, and that it kept accounts restricted to its character as a highway carrier and billed its customer solely for its highway carriage, the trial court was misled, for the record does not support them. William J. Davis, general auditor for plaintiff, testified that plaintiff rendered bills to the express company each month on the basis of total tonnage moved in the pick-up and delivery in Oakland and Los Angeles, and also bills for the total tonnage moved between terminals, and that the revenues are set up separately in plaintiff's accounts. But on cross-examination he said that separate books were not kept for the intercity and intracity operations; that a segregation was made in the *revenue* account on plaintiff's books, but that not even separate pages were used for this purpose; that "just columns on the page would indicate the line haul and the other"; that the same book-

keeper made both entries. There is no evidence contradicting that testimony.

Regarding the bills rendered by plaintiff, there is no evidence that plaintiff rendered any bills except to the express company. Illustrative bills introduced by plaintiff show, for instance, that for the month of May, 1941, one bill was rendered for "Terminal to Terminal Line Haul Charges" "Northbound 5,709,572"; "Southbound 6,631,411"; total 12,340,983 lbs. at 31½¢ $38,474.10; and another bill was rendered for "Pick up and delivery services at Los Angeles and Oakland," "Los Angeles, Northbound 5,709,572 Southbound 6,631,-411," total 12,340,983 lbs. at 12½¢ $15,-426.23; "Oakland Northbound 2,072,222 Southbound 1,229,582," total 3,301,804 lbs. at 12½¢ $4,127.26. It will be noted that the tonnage for which the bill for intercity transportation was rendered is exactly the same as the tonnage in the bill for Los Angeles pick-up and delivery, showing that all of the freight picked up or delivered in Los Angeles for which the express company was billed was carried in intercity hauls.

From this evidence it is apparent that the trial court erred in its finding regarding the keeping of separate books by plaintiff, and that, on the contrary, but one set of books was kept by it in which, in its *revenue account* the pick-up and delivery income was set out in a separate column. And therefrom it also appears, from its billing of its pick-up and delivery as "Northbound" and "Southbound", that such transportation was but a part of its highway transportation business which resulted in its carrying on what was, in effect, a store door to store door transportation business; in other words, that its intracity hauls were "feeders" for and incidental to its transportation between cities.

Conceding that the equipment used by plaintiff in its intracity operations was different from that used in its intercity hauls, that plaintiff confined its operations as a city carrier within the area for which it was licensed—as the law required it to do—that it had two different permits or licenses from the Railroad Commission, and that it had separate contracts with the express company for its intracity and intercity transportation, we are confronted with the question whether, in view of the decision of the Supreme Court in Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 130 P.2d 421, and our own decision in Southern California Freight Lines v. State Board of Equalization, 72 Cal.App. 2d 26, 163 P.2d 776 (hearing in Supreme Court denied), it follows therefrom that the revenue of plaintiff from its intracity operations may not be considered as a part of its gross receipts for tax purposes. In other words, does the evidence sustain the conclusion that plaintiff was carrying on two separate "businesses", and, even if it was, that said businesses were not so interrelated that it can be said plaintiff's receipts from the pick-up and delivery of goods which it also transported between cities are not a part of its gross receipts subject to the tax imposed by the act. We think that the evidence and the findings do not justify such a conclusion in view of the decisions in the two cases above cited. Merely calling the intracity part of plaintiff's operations a separate business does not make it such.

In the Bekins case one of the claims of the company was that the portion of its income derived from certain pick-up and delivery service in municipalities should not be considered a part of its gross receipts subject to taxation, because in such intracity hauls to and from its city terminals it used smaller trucks which did not go outside of city limits, it made a segregation on its bills, separating the pick-up and delivery charges from the charges for transportation between terminals, and its waybills showed such separation of charges. But the Supreme Court said, 21 Cal.2d at page 142, 130 P.2d at page 425: *"Nor may any distinction be made by the plaintiff on its returns between intercity hauls which require for convenience an intracity pick-up and delivery service, and those which do not require such service in the convenient method of initiating or terminating such intercity transportation.* The plaintiff in this connection relies on Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663. In that case the plaintiff's activities were confined exclusively to in-

tercity hauls. *Another company,* formerly a competitor of the plaintiff, abandoned all intercity activities and confined itself to intracity business exclusively, including the pick-up and delivery service required by the plaintiff. It appeared that the plaintiff in that case in good faith did not engage in intracity pick-up and delivery service as part of its intercity hauls. It was held that it had paid its tax in full, based on the report of intercity operations as conducted by it. No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intracity pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business. In re Bush, supra [6 Cal.2d 43, 56 P.2d 511]. The trial court in the present case properly concluded that *receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation.*" (Italics added.)

In the Southern California Freight Lines case plaintiff, a highway common carrier, contended that it was improperly taxed upon what it claimed was the revenue of another corporation, the Southern California Freight Forwarders, an express company, because, by contract with this express company the latter was to do the intracity hauling within the cities which they served. Defendant Board argued that the express company had not in fact rendered the pick-up and delivery service, but that such service had been performed by the carrier. The trial court found that the pick-up and delivery service purportedly rendered by the express company was, in fact, done by plaintiff and constituted a return to plaintiff from its own efforts and upon its own capital investments, and that the relationship between plaintiff and the express company was merely colorable. This court sustained the findings of the trial court, and in support thereof pointed out evidence which showed that plaintiff actually did perform the pick-up and delivery, and that it was not done by the express company; and we concluded that, since plaintiff did the pick-up and delivery, the revenue derived therefrom was plaintiff's revenue upon which it was properly required to pay the tax assessed by respondent.

The decisions in these two cases certainly eliminate most, if not all, of the distinctions relied upon in the case before us. To be sure, in this case plaintiff had two different permits from the Railroad Commission, the one as a highway common carrier, and the other as a city carrier, but so did Bekins Van Lines, Inc. It does not appear in the Southern California Freight Lines case whether plaintiff had two such permits, but it may be assumed that it had, since city carrier permits and permits to operate as highway common carriers, are issued under different statutes. In neither of those cases was the question of different permits deemed relative to the question of the taxability of plaintiff's receipts; and we deem it unimportant in this case.

Respondent relies heavily upon Pioneer Express Company v. Riley, 208 Cal. 677, 284 P. 663, saying that there it was held that business as an intracity carrier is not in the nature of things inseparable from business as an intercity carrier, and that, therefore, though plaintiff here is a single corporate entity doing both, it could so separate its pick-up and delivery business as to effect the same result as if such operations were carried on by separate corporate entities, and thus preclude the consideration of receipts from the intracity branch or department as gross receipts of the corporation itself.

We find nothing in the Pioneer Express Co. case which justifies such conclusion for no such situation was there presented. In that case the intercity and the intracity services were not performed by the one company. The intercity transportation was carried on by the Pioneer Express Company, a corporation, whose capital stock was owned in the main by C. S. McLenegan. The pick-up and delivery service was performed by the Gibson Express, Inc., the capital stock of which corporation was owned by the mother of C. S. McLenegan. While C. S. McLenegan was the manager of both companies, the books of the two companies were kept entirely separately and the net earnings of each corporation were distributed to the respective owners of

the capital stock of the said corporations. Also, as pointed out in the opinion in the case, each corporation had its own set of stockholders and officers and maintained a separate existence. The claim of the State Board of Equalization in that case was that there was such an interlocking of control and ownership in the McLenegan family as bound the corporations together as an inseparable whole so that their earnings should be lumped together. But the court said that the business of the one was not in the nature of things inseparable from that of the other; and that a group of persons, whether belonging to one family or otherwise, could in good faith adopt and maintain separate *corporate entities* for the purpose of conducting several lines of business which, while in some degree connected, are not inseparable.

No such situation is presented here, for here there is but one corporate entity performing both services, separate books are not kept, the total business is carried on from one place, the San Francisco office, and the earnings go, not to different sets of stockholders, but to one alone. Separate corporate entities are not maintained. The Pioneer Express Company case was relied upon in the later Bekins case, but the distinction was there pointed out as appears from the quotation from that opinion above set forth, and in which it was said that plaintiff's "receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation." Also the court there said that plaintiff's receipts were "receipts from [the] operation of motor vehicles" which language was sufficiently plain, and "was undoubtedly intended to be limited to the transportation activities of a company which might also be engaged in warehousing, selling, or other business not strictly related to transportation of goods or persons."

The only other differentiation that can be made between this case and the above-cited cases is that here plaintiff's transportation operations were carried on ostensibly for the express company, California Motor Express, Ltd., with which it had contracts for carriage. But the intervention of this corporation does not, we think, so separate the one phase of plaintiff's operations from the other that it can be said that they must be considered as separate *entities* for tax purposes. See Buick Motor Co. v. City of Milwaukee, D.C., 43 F.2d 385, affirmed in 7 Cir., 48 F.2d 801, certiorari denied 284 U.S. 655, 52 S.Ct. 34, 76 L.Ed. 556; Palmolive Co. v. Conway, D. C., 43 F.2d 226 affirmed in 7 Cir., 56 F.2d 83, certiorari denied 287 U.S. 601, 53 S.Ct. 8, 77 L.Ed. 524, both cited in the Southern California Freight Lines case, 72 Cal.App.2d at pages 31, 32, 163 P.2d 776. The facts remain that in this case the intracity hauls were but a part of the whole movement of the goods transported "Northbound" and "Southbound" from their point of origin in the one city to their point of delivery in the other. Here plaintiff is itself a corporate entity which is doing the pick-up and delivery and the intercity transportation between Los Angeles and Oakland. It is, in effect, doing a store door to store door business when it picks up merchandise from the place of business of the consignor in one city and delivers it to the place of business of the consignee in the other. Its bills show that the total receipts upon which the Board imposed the tax are plaintiff's own receipts for the transportation of goods in that manner, and we think that under the authority of the Bekins case and the Southern California Freight Lines case they were a part of plaintiff's "gross receipts from the operation of motor vehicles," and taxable as such; and that any difference between the facts in this case and the facts in those cases are not of sufficient substantiality as to justify a different conclusion or to justify the imposition of the tax on Bekins Van Lines, Inc., and Southern California Freight Lines, while absolving plaintiff therefrom.

The judgment of the trial court is therefore reversed to the extent that it gives respondent a refund of taxes on the receipts from its Los Angeles and Oakland pick-up and delivery business.

PEEK, J., concurs.

THOMPSON, Justice.

I dissent.

The controversy arises over a question of fact as to whether plaintiff conducted a highway transportation business and an intracity pick-up business as separate enterprises. Based on numerous determined facts the trial court found that it did conduct separate enterprises. The majority opinion disagrees with that conclusion and reverses the judgment. Clearly the question as to what constitutes the maintenance of separate enterprises depends upon the facts of a particular case. I am convinced the majority opinion invades the province of the trial court. It weighs the evidence. It draws an inference in conflict with specific findings. It disregards numerous important facts upon which the trial court determined that plaintiff conducted two separate enterprises. There is an abundance of evidence to support the trial court's conclusions. The judgment is in exact accord with the principle announced in Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663. A reversal of this judgment amounts to a repudiation of the principle determined in the Riley case. Nor is the case of Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 130 P.2d 421, upon which the majority opinion relies, in conflict with the findings and judgment in this case. Peter J. Shields, the eminent jurist who tried this case, clearly distinguished between the facts of this action and those of the Bekins case in a logical and convincing opinion which might well have been adopted as the decision of this court. He is the able judge who tried both cases. He knew the facts of the Bekins case and the judgment which he rendered therein was affirmed. He significantly asserts in his opinion in this case that the principle determined in the Bekins case should not be further extended.

The essential facts of this case are not disputed. The record shows without conflict that plaintiff was organized and licensed in 1930 to conduct a highway transportation business in designated territories with specified equipment. The license precluded the operation of its equipment or business within the limits of cities. It conformed strictly to the terms of its license. In 1941 plaintiff purchased from the Red Line companies its intracity pick-up businesses and equipment for Oakland and Los Angeles. The Red Line businesses had been previously licensed and operated for several years in designated cities. Its licenses precluded it from hauling merchandise over the public highways. It conformed strictly to those terms. When the plaintiff purchased the Red Line intracity businesses and equipment, it procured separate licenses from the Railroad Commission, to continue to operate them with the specified light equipment within the limits of the cities named as separate intracity enterprises. The plaintiff thereafter performed the pick-up and delivery services in the cities, under contract with California Motor Express, Ltd. Neither the highway transportation equipment nor its crews of workmen were employed in the pick-up business. In the process of that service goods were called for and conveyed to terminal depots or delivered to their destinations in the same cities. If the goods were to be conveyed to another city separate contracts were executed for the intracity service, and for transfer over the public highways. The highway transportation service was conducted by means of heavy trucks and crews of workmen different from the equipment and men employed for the intracity service. In the highway transportation service the goods were received at plaintiff's terminal depot in one city and conveyed over the public highways to a similar terminal depot of another city. The different businesses of highway transportation and of intracity pick-up service were carefully conducted in every detail exactly like separate and distant enterprises, in the same manner as though they were separately operated by different corporations. While the plaintiff did not keep separate sets of books for the two enterprises, it did invariably make separate charges against its customers for highway transportation service, and for intracity pick-up service. The account books clearly indicate the intention of plaintiff to segregate all charges and credits for those distinct services.

The trial court found that, in conducting its separate businesses and in making its

contracts for services to be performed by the different enterprises, "The two operations, that of a city carrier and that of a highway carrier, are just as separate and distinct for all purposes of this case as if the two operations had been conducted by separate and distinct corporations or legal entities," and that "There is no evidence of fraud or bad faith on the part of plaintiff" in so doing.

The majority opinion disregards the foregoing material facts, and other evidence contained in the record, which support the findings and judgment, and it erroneously draws an inference that the two enterprises were not separately maintained or operated because the plaintiff failed to keep separate sets of account books for the different transactions. That circumstance might be sufficient to warrant the affirming of a judgment, but it certainly does not afford ground for reversing a judgment based on numerous other determined facts indicating, as the court found, that plaintiff actually conducted different and distinct enterprises. The account books clearly show that plaintiff intended to and did keep the two transactions separate. But, even though that fact should not thereby clearly appear, the mere method of keeping books is not conclusive in this case of the issue as to whether plaintiff actually operated separate industries. The determination of that conclusion was the sole province of the trial judge, to be decided from all the material evidence adduced on that subject. The reviewing court is precluded from thus weighing the evidence. I am confident that the evidence in this case abundantly supports the findings adopted by the trial court.

In support of the reversal of the judgment in this case, the majority opinion relies on and quotes from Bekins Van Lines, Inc., v. Johnson, supra, and Southern California Freight Lines v. State Board of Equalization, 72 Cal.App.2d 26, 163 P.2d 776. The facts of those cases were entirely different from those of the present action. In the Bekins case it was not contended that plaintiff maintained and operated two distinct enterprises for different services performed, or that it executed different contracts for distinct services. The highway transportation carrier merely contended that when it made a contract to haul goods from a dwelling in one city, over the public highway, to a destination in another city it was entitled to deduct from the proceeds of that transaction the value of the services performed in packing, crating, warehousing, preparing for shipment and carrying the goods to the sidewalks or to points where they were picked up by the trucks for transportation over the highways. The trial court found that, under those circumstances, such services were parts of the same transaction of highway transportation, and that the entire proceeds from such contracts were subject to highway taxes. The Supreme Court affirmed that judgment. In holding that the packing, crating, warehousing and hauling of goods over the public highway were, under the particular facts of the Bekins case, parts of the same highway transaction, the Supreme Court said: "The trial court in the present case properly concluded that receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation."

The majority opinion in this case appears to construe that language to mean that, under any and all circumstances, when goods are received in a city and hauled over the highway, or are hauled over the highway and delivered within a city, all proceeds for handling the goods are subject to highway taxes. Apparently that is not what the Supreme Court meant by that language. If the goods are picked up under a completed contract by one intraurban corporation and delivered at a terminal depot in that same city, they are certainly not subject to highway taxes merely because they were intended to be subsequently hauled by another company under a different contract over the public highway to a destination in another city. The above-quoted language was intended to apply only to the determined facts of the Bekins case, as I believe the Supreme Court clearly says. It does not apply to the present case where different contracts were made for separate specified services, one of which was completely performed under a separate license

by means of different equipment and crews of workmen wholly within the boundaries of that same city. To hold that, under the circumstances of this case, the intraurban pick-up services were a necessary and inseparable part of the highway transportation transaction, would require the overruling of Pioneer Express Co. v. Riley, supra.

Likewise, the Southern California Freight Lines case is not authority in support of the reversal of the judgment in this action. That case was determined on entirely different issues. The plaintiff in that case, which was a highway transportation corporation, entered into a written agreement with another company owned and controlled by it, called the Southern California Freight Forwarders, which was licensed to conduct an express business, by the terms of which contract each company was granted the use of the facilities and equipment of the other company, and each was to join in hiring and paying all employees; the last-mentioned company was to conduct an express business and perform the pick-up and delivery service within the limits of the named cities. But the Express Company did not actually perform the pick-up services. The Express Company collected all compensation for the services of both companies and paid the carrier company, by agreement, 40% of such receipts, as its share for highway transportation. This was an arbitrary division of receipts regardless of actual services performed. The trial court found that the plaintiff, and not the Express Company, actually performed the pick-up services, and that the relationship of the two companies "was merely colorable." Judgment was rendered against plaintiff for additional taxes on the receipts from the pick-up services, as incidental to the highway transportation business. In affirming the judgment in that case, this court quite properly held in accordance with the findings that the pretended agreement between the two alleged companies was fictitious, and that their claimed relationship was "merely colorable." In other words, this court determined, in effect, that there was evidence to support the trial court's finding that the pretended severance of the companies was false and untrue. In the present case the trial court specifically adopted a contrary finding. It found that "there is no evidence of fraud or bad faith on the part of plaintiff" in maintaining and operating two distinct enterprises. I believe that finding is adequately supported by the evidence. The distinction between the last-mentioned case and the present one is quite apparent.

The law clearly recognizes the right of one corporation, in good faith, to maintain and conduct different and distinct enterprises authorized by its charter, such as a highway transportation business and a separate intraurban pick-up enterprise, even though they are organized and operated with the intention of diminishing its burden of taxes. Pioneer Express Co. v. Riley, supra. The language of the last-cited case, in that regard, is pertinent to the chief issue of this case. On page 686, of 208 Cal., on page 667 of 284 P., of that decision, it is said:

"* * * *We conclude, therefore, that the business of a public transportation company in conveying freightage from one of its fixed terminal stations to another is not, in the nature of things, inseparable from the pick-up and delivery business* which has to do with the collection of freightage at its terminal depots at the one end and the distribution thereof at the other end of the fixed termini which it is bound to establish and maintain in conformity with law.

"The second problem is as to whether a group of persons, whether belonging to one family or not, who may choose to form themselves into one or more corporate entities for the convenient conduct of such business as they may see fit to undertake, may not in good faith and without fraudulent design adopt and maintain such separate corporate entities for the purpose of conducting several lines of business which, while in some degree connected, are not in the nature of things inseparable. We are satisfied, without going into further detail, that common knowledge and observation would serve to supply an answer to this problem which would also be adverse to the contention which the respondent makes in opposition to the issuance of this writ. * * * But we think it may be stated as a reasonable conclusion of this whole matter that *any citizen or group of citizens seeking to engage in any*

*single line or in several allied lines of business endeavor by which property is accumulated and profits derived may adopt whatever lawful means may exist for the lessening of the burden of taxes which in one form or other may be laid upon such properties or profits.* In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211; Estate of Potter, 188 Cal. 55, 64, 204 P. 826." (Italics added.) See, also, 33 Am. Jur. 329, sec. 4; 37 C.J. 180, sec. 21.

The Motor Vehicle Transportation License Tax Act, Stats. 1933, p. 928, and amendments, 1 Deering's Gen.Laws of 1937, p. 2160, Act 5130d, was adopted primarily to provide revenue with which to construct and maintain public highways. It does not apply to motor vehicles operated exclusively within incorporated cities or towns. Section 22 of the act provides that: "This act shall not apply to motor vehicles operating exclusively within incorporated cities or towns, nor shall it apply to such vehicles operated between incorporated cities or towns where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation, * * *."

Exactly the same exemption appears in Section 9653 of the Revenue and Taxation Code.

Since it must be assumed that plaintiff, in good faith, maintained and operated separate and distinct enterprises, and that the $18,918.83, which is the subject of this suit, was derived solely from intraurban services performed wholly within the confines of the cities, it follows that such funds are not taxable for highway purposes, and plaintiff is entitled to judgment for recovery of that sum which was paid under protest.

The judgment should be affirmed.

Rehearing denied; THOMPSON, J., dissenting.

78 Cal.App.2d 954

## PEOPLE v. ALEXANDER.

Cr. 4067.

District Court of Appeal, Second District, Division 2, California.

April 8, 1947.

**1. Robbery ⇐24(3)**

Evidence established identity of defendant as one of the thieves who robbed jewelry store. Pen.Code, § 211a.

**2. Criminal law ⇐566**

Positive identification of defendant is not essential to a conviction.

**3. Criminal law ⇐260(11)**

Whether a witness is accurate in his observation of an accused person is a matter for determination of trial court.

**4. Criminal law ⇐566**

Even though witness has had but a glimpse at features of accused, if witness' testimony carries conviction it is sufficient to establish identity.

**5. Robbery ⇐24(1)**

Evidence that filling station attendant had in his possession a $575 diamond wrist watch on day after watch was stolen from jewelry store, and that attendant pledged such watch as collateral for loan would not, standing alone, suffice to determine attendant's guilt of robbery, but quality of such evidence was of such high degree that only slight corroborating proof of other inculpatory circumstances would warrant robbery conviction. Pen.Code, § 211a.

**6. Criminal law ⇐1159(2)**

Slight inconsistencies or changes in testimony of witness or conflicts in testimony of two or more witnesses adduced by prosecution do not authorize a reversal of judgment of conviction.

**7. Criminal law ⇐260(7)**

Neither trial judge's final opinion nor his casual observation with respect to evidence or concerning rule of law has place in record, and only what he includes in his decision is of any consequence, and no antecedent expression of trial judge, spoken casually or embalmed in printed words,

can constitute a limitation upon his power to enter a decision.

**8. Criminal law ⇐254**

The trial judge's announcement, "I don't think the evidence is sufficient to raise a reasonable doubt" was not error as placing on defendant the burden of proving a reasonable doubt as to defendant's guilt, where the court had reference to defendant's evidence of an alibi.

**9. Criminal law ⇐31, 257**

The purpose of proving an "alibi" or any affirmative defense is to prove impossibility of defendant's having committed the crime alleged or to raise a reasonable doubt that he had done so, and defendant is entitled to acquittal if he raises such doubt by proof of alibi or if such doubt arises from weakness of people's case.

See Words and Phrases, Permanent Edition, for all other definitions of "Alibi".

**10. Criminal law ⇐561(1)**

The language of trial court that evidence is not sufficient to raise a reasonable doubt as to a particular defense does not modify rule which requires prosecution to prove guilt of accused beyond a reasonable doubt.

**11. Criminal law ⇐572**

An accused relying on alibi to defeat prima facie case carries burden to prove alibi to such a degree of certainty as will, upon a consideration of all the evidence, leave a reasonable doubt of accused's guilt in minds of jury.

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Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William B. Alexander was convicted for first degree robbery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Contending that the evidence against him is inherently improbable and that the court "applied an improper rule of law," defendant appeals from a judgment of conviction of robbery of the first degree, i. e. one committed while the robber is armed with a deadly weapon. (Penal Code, sec. 211a.)

On Friday March 29, 1946, at eleven o'clock a. m. three negro men entered the jewelry store of Peter Borisoff in the city of Los Angeles. By holding a gun they forced the proprietor into a back room, took off his clothes, removed certain merchandise including a diamond wrist watch worth $575 from the store and departed. On the following day at a service station where defendant worked he participated in a crap game with some eight or ten persons. While the game was in progress he borrowed $200 from Robert Easley, one of the gamblers, on the same watch that had been taken from Borisoff. When Easley received a call from the police on the day following the crap game he advised them that he had obtained the watch from appellant whose arrest followed. Easley testified that no other participant in the game made any claim to the watch identified by Borisoff as having been one of his possessions stolen on March 29.

The primary contention is that the identity of appellant as one of the thieves was not established. The proof on that issue is abundant. Borisoff testified that appellant and two other men called at his store on Monday, on Tuesday, twice on Thursday and on Friday the 29th of March. He conversed with appellant on the occasions of the first four visits and became familiar with his voice. He remembered the hat and clothing worn by the bandit on Friday and described them. Having gazed upon appellant's face on Friday, he was absolutely "sure he is the man * * * there is no question about it." He testified that appellant and the smaller man who held the gun on the witness wore goggles while in the store. When Borisoff went to court to attend the preliminary hearing he promptly identified appellant as one of his robbers.

The witness Larry Reid about 11 a. m. on March 29 observed appellant with two other men immediately after the robbery as they walked very fast on the east side of Western Avenue about two doors north

of the jewelry store. On reaching the corner of Second street they turned sharply east and "broke into a dead run." Later the witness positively identified appellant's photograph among four or five shown him by the officers. Also, he identified appellant several days later in the custody of two officers and again at the trial.

[1-4] Such proof of identity is sufficient to support a conviction. While positive identification is not essential to a conviction (People v. Addington, 43 Cal.App.2d 591, 593, 111 P.2d 356; People v. Whitson, 25 Cal.2d 593, 604, 154 P.2d 867) Borisoff's recognition of appellant as one of the three robbers was definite and Reid was positive that Alexander was one of the three men hastening from the scene of the crime. Whether a witness is accurate in his observation of an accused person is a matter for the determination of the trial court. Even though the witness has had but a glimpse at the features of an accused, if his testimony carries conviction it is sufficient. People v. Deal, 42 Cal.App.2d 33, 36, 108 P.2d 103 and authorities therein cited. In the instant case such proof is neither inconsistent nor inherently improbable. It was supplied by two unimpeached, adult residents of the community in which the robbery occurred.

[5] In addition to the identification of appellant by the victim and a casual observer little doubt of his identity could be entertained by an impartial mind when supplied with the fact that this appellant, an attendant at a filling station, was shown to have had possession of a $575 diamond wrist watch on the day after it was stolen and that he pledged it as collateral for a loan. While such possession would not, standing alone, suffice to determine the possessor's guilt, yet as evidence, its quality is of such high degree that only slight corroborative proof of other inculpatory circumstances would warrant a conviction. People v. Wiley, 8 Cal.App.2d 135, 136, 46 P.2d 817; People v. Bonner, 5 Cal. App.2d 623, 631, 43 P.2d 343; People v. Swanson, 120 Cal.App. 173, 174, 176, 7 P.2d 380. The case of People v. Nichols, 52 Cal.App.2d 31, 125 P.2d 513, is not pertinent. It merely declares an "axiomatic" rule that a judgment not based on substantial or credible evidence will be reversed.

[6] Slight inconsistencies or changes in the testimony of a witness or conflicts in the testimony of two or more witnesses adduced by the prosecution do not authorize a reversal. Whether appellant wore goggles in the store and not on the street; whether he wore one brown hat and not another; whether his hirsute adornment was present or he was clean shaven—these are of slight concern in the face of positive proof of his identity.

The appellant's testimony that he was employed in washing and servicing his employer's automobile at 11 a. m. on March 29 was not such as the court was required to believe. The record reveals that appellant is unsupported in his claim that at the hour of the robbery he was either at the home of Ollie Jackson on 48th street or was driving the latter's car to him.

[7] After the case was submitted, a jury having been waived, the court announced: "I don't think the evidence is sufficient to raise a reasonable doubt." From such utterance appellant contends that the court placed upon the defendant the "burden of proving a reasonable doubt as to his guilt." In the first place neither the judge's final opinion nor his casual observation with respect to the evidence or concerning a rule of law has a place in the record. Only what he includes in his decision is of any consequence. Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907; Lawrence v. City of Los Angeles, 53 Cal. App.2d 6, 10, 127 P.2d 931. No antecedent expression of the judge, spoken casually or embalmed in printed words, can constitute a limitation upon his power to enter a decision. Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179.

[8-11] But the criticized pronouncement from no standpoint is error. Clearly the court had reference to appellant's evidence of an alibi. The very purpose of proving an alibi or any affirmative defense is to prove the impossibility of the defendant's having committed the crime alleged or to raise a reasonable doubt that he had done so. If he has raised such doubt by proof of an alibi, or if such doubt has arisen from

the weakness of the People's case, the accused is entitled to an acquittal. The language of the court is a familiar phrase in criminal prosecutions and does not modify the rule which requires the prosecution to prove the guilt of the accused beyond a reasonable doubt. (See I Wharton's Criminal Evidence, § 215, p. 244, 245, 247.) The true doctrine is that if the accused relies upon an alibi to defeat a prima facie case he carries the burden to prove it to such a degree of certainty as will, upon a consideration of all the evidence, leave a reasonable doubt of his guilt in the minds of the jury. People v. Costello, 21 Cal.2d 760, 765, 135 P.2d 164; People v. Dowell, 204 Cal. 109, 118, 266 P. 807.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.




78 Cal.App.2d 669

**PEOPLE v. WEATHERFORD.**

**Cr. 4073.**

**District Court of Appeal, Second District, Division 2, California.**

**March 21, 1947.**

**Hearing Denied April 17, 1947.**

**1. Criminal law ⇐1159(2)**

Jury's implied findings cannot be upset by reviewing court unless on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached by jury and proof by trial judge.

**2. Criminal law ⇐1159(6)**

If circumstances reasonably justify verdict, reviewing court's opinion that those circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

**3. Criminal law ⇐1159(1)**

Though an appellate court will not approve a verdict based on evidence inherently improbable, unusual circumstances do not come within such classification and will not, because unusual, constitute the basis for a reversal.

**4. Criminal law ⇐1159(2)**

To justify rejection of testimony that convinced the jury, there must exist either a physical impossibility that the testimony is true or its falsity must be apparent without resorting to inferences or deductions.

**5. Criminal law ⇐1159(2)**

The fact that testimony adopted by the jury is subject to justifiable suspicion does not justify reversal of a judgment.

**6. Homicide ⇐228(1), 231, 233, 234(1)**

Evidence of malice, criminal agency, identity, and motive sustained conviction for murder. Pen. Code, § 189.

**7. Homicide ⇐142(1)**

Where killing was done with deliberation and premeditation, it was unnecessary for state in murder prosecution to prove the use of the means or one of the crimes enumerated in statute defining degrees of murder. Pen. Code, § 189.

**8. Criminal law ⇐1160**

The accuracy or doubtfulness of identification, incompatibility in testimony, and uncertainty of witnesses, are matters solely for consideration of jury in homicide prosecution, and of trial court on motion for new trial, and, where trial court has approved jury's finding, such finding may not be disturbed on appeal.

**9. Homicide ⇐166(1)**

Evidence of motive adds weight to a showing of guilt in a homicide prosecution, and whatever fact tends legitimately to show motive is proper proof of an assumed motive for the homicide. Pen. Code, § 189.

**10. Criminal law ⇐351(3)**

In murder prosecution, evidence tending to show intention of defendant to flee, at time when he knew that he was under official surveillance for the crime, was properly considered. Pen.Code, § 189.

**11. Criminal law ⇐351(10)**

In murder prosecution, evidence of false statements and forgery of documents for purpose of misleading investigating

officers justified unfavorable inferences against defendant. Pen.Code, § 189.

**12. Homicide ⇐308(1)**

Instruction that all murder which is committed willfully, deliberately, and premeditatedly is murder of the first degree, and that all other kinds of murder are of the second degree, was not erroneous because of failure to include other specific statutory enumerations, where there was no contention that deceased came to her death by any other kind of killing than willful, deliberate and premeditated. Pen.Code, § 189.

**13. Criminal law ⇐1186(4)**

Portion of instruction that, in determining defendant's intention, it is important to consider the means used to accomplish the killing, and that the intent is manifest by circumstances connected with the offense, and the sound mind and discretion of the accused, was not prejudicially erroneous, where there was no showing that any miscarriage of justice resulted, and circumstantial evidence against defendant was cogent and convincing. Pen.Code, § 189, Const. art. 6, § 4½.

**14. Criminal law ⇐784(4)**

Instruction on circumstantial evidence that, to warrant a conviction on circumstantial evidence alone, such facts must be shown as are consistent with accused's guilt, but must be inconsistent with any other rational conclusion, was correct. Pen.Code, § 189.

**15. Homicide ⇐286(3)**

In murder prosecution, instruction correctly defined "deliberation" as careful consideration and examination of reasons for and against a choice or measure. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberation".

**16. Homicide ⇐313(3)**

Where jury's verdict stated that jury found the homicide to be murder in the first degree, jury sufficiently determined the degree of murder committed. Pen.Code, § 189.

**17. Witnesses ⇐395**

Where jury might from cross-examination of witness draw inferences that his testimony given on the trial is recent fabrication, prior extrajudicial statement of the witness, consistent with his recent testimony, will be admitted to rehabilitate it.

**18. Criminal law ⇐785(12)**

Where defendant brought out that state's witness testified differently than he had testified at a prior trial, giving of rehabilitation instruction was not error.

**19. Criminal law ⇐787(1)**

In murder prosecution, instruction in reference to defendant's failure to explain suspicious circumstances or to deny incriminating testimony presented against him, having a reasonable opportunity to do so, was proper. Code Civ.Proc. § 2061, subd. 6; Const. art. 1, § 13.

**20. Criminal law ⇐829(15)**

In murder prosecution, requested instructions of defendant on circumstantial evidence were properly rejected, where they were mere arguments on court's instruction on circumstantial evidence, and instruction given by court on circumstantial evidence was sufficient.

McCOMB, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Jackson M. Weatherford was convicted of murder, and, from the judgment and order denying a new trial, he appeals.

Judgment and order affirmed.

Ben Van Tress and James R. Jaffray, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and W. E. Simpson, Dist. Atty., and Jere J. Sullivan, Robert Wheeler, and J. Miller Leavy, Deputy Dist. Attys., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

By indictment presented on November 10, 1943, appellant was accused of the mur-

der of one Mary Annette Struck. After a second trial a verdict was returned on June 14, 1946, finding him guilty as charged with recommendation of life imprisonment. From both the judgment and the order denying a new trial comes this appeal. Appellant bases his demand for reversal upon the insufficiency of the evidence and errors in giving and refusing instructions.

The Evidence Is Sufficient.

This is the second appeal. In an elaborate opinion (27 Cal.2d 401, 164 P.2d 753) the Supreme Court reversed the first judgment because (1) the proof received at the first trial was wholly circumstantial; (2) there were many conflicting inferences deducible therefrom; (3) of illegal procedure in the communications between the court and the jury through the agency of the bailiff, which constituted reversible error under "the particular facts of the individual case"; (4) the advice sought was on the pertinent question of who should prove the presence of defendant at the scene of the murder, to which the judge returned an incorrect reply; (5) there was not "overwhelming evidence of guilt" as in People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627; (6) "the evidence is such that the jury could reasonably have arrived at opposite conclusions"; (7) rejection of testimony of declarations of deceased.

[1-6] Not only is the present record devoid of such errors, but the evidence adopted by the jury is reinforced by the testimony of a witness who saw appellant at the scene of the crime and by the testimony of 15 other witnesses. And also, the incriminating circumstances detailed at the first trial were multiplied and burnished at the second. Although commonplace, it may not be amiss to repeat the law that the implied findings of a jury cannot be upset by the reviewing court unless upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the jury and approved by the trial judge, and that "if the circumstances reasonably justify the verdict * * * the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780; People v. Woo, 181 Cal. 315, 326, 184 P. 389. Although an appellate court will not approve a verdict based upon evidence inherently improbable, unusual circumstances do not come within such classification and will not, because unusual, constitute the basis of a reversal. To justify the rejection of testimony that convinced the jury there must exist either a physical impossibility that it is true or its falsity must be apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. Even though the testimony adopted by the jury is subject to justifiable suspicion, still such suspicion does not justify the reversal of a judgment the deriving of which is the exclusive function of the trial court. Ibid. With such ancient and classic rules for guidance in considering this appeal a summary of the proof presented upon the second trial will demonstrate that an affirmance is unavoidable.

I.

Deceased Was An Unsatisfactory Tenant.

In December, 1942, appellant leased to Mary Annette Struck the Oh Johnnie's Cafe at 100 North Avenue 50 in the Highland Park community of the city of Los Angeles. The term was five years at a rental of five per cent of her gross receipts.[1] They had met after his reply to her "lonesome ad" in a local newspaper. Prior to his transaction with her his income from the cafe had been over $100 monthly. Their relations became strained soon after her occupancy. While he endeavored to induce her to enhance her patronage she would not do so, preferring to sell her interests. He sued her once for $11.25 but they continued for some time on ostensibly friendly terms. At times he shopped for her. Although she had agreed to settle weekly she excused her own dereliction and forced appellant to wait until March 17, 1943, when they had their only accounting. About the latter date they

[1] Also he gave her a lease on a seven per cent basis, but they acted upon that which required her payment of five per cent.

agreed that she would leave the cafe on March 25, 1943. He served a notice to pay rent or quit and about March 23 he served her with eviction papers, terminated her lease and fixed her rental at $50 per month.

Appellant Complains Bitterly of Deceased.

During the period preceding April 5, 1943, the date of Mrs. Struck's death, whenever appellant met Mrs. Farmer or Mrs. Miller, who resided near the cafe, he spoke bitterly of deceased and of how dirty and filthy she was. She had parked her trailer on his lot adjacent to the cafe. He showed the two neighbors the human excrement near the trailer in which she slept. He was very nervous and walked the floor, declaring deceased was the dirtiest, filthiest, nastiest woman he had ever dealt with, and with vehement gesticulations declared he would do anything to get her out of the cafe. He telephoned the health authorities about her violating sanitation laws and asked Mr. and Mrs. Farmer to make complaint. He was angry, upset and nervous in March when he talked with Mr. Dauk, licensed realty operator, explaining his trouble with Mrs. Struck in that she violated the federal rationing law and constantly violated the health laws; that she was supposed to have a lease but he did not believe he had signed it; that she had forged it; that five per cent of the cafe's receipts should pay more than the $30 as shown by the only two checks he had received; that Mrs. Struck was crooked, was stealing money from him. He induced Dauk to have her list the cafe for sale with him but not to let her know that appellant had anything to do with it as she would demand more; that the $1,000 she asked was too much. About April 3 in a conversation with Reese Farmer appellant stated that decedent claimed to have a lease on the Oh Johnnie Cafe; that he would like very much to get her out; that he had another who wanted to lease the property. Late in March appellant told a police officer that he had leased the Oh Johnnie to Mrs. Struck; that after checking up he thought she was taking out his pots, pans, and silver, and asked the officer to search the cafe.

She Foils His Efforts to Oust Her.

In February Steve Salatich, an experienced cafe operator in the Highland Park area, in company with appellant appraised the Oh Johnnie and offered $60 monthly rental to be increased to $75 after three months. After appellant had conferred with deceased he reported to Salatich that she would vacate within a week. In Salatich's presence deceased told appellant to rent the place to him. In a subsequent conversation appellant told Salatich his tenant would be out in a few days. His next report to Salatich was that she had not given him the key; that he could not get her to leave. About March 28 Salatich visited the cafe and found Mrs. Struck dressing to go into the city with a lady friend who was present. After deceased had cursed a volley the friend stated to Salatich that they were going "to see a friend of mine to see what can be done about keeping Mr. Weatherford from putting her out." Salatich never saw Mrs. Struck again.

In early March appellant asked Jack Branham, a cook who had formerly worked in the Oh Johnnie, to appraise equipment there. He did so and reported that it was worth from $350 to $400 and that the best way to get Mrs. Struck out was to buy her out for as much as $500. In conversation with deceased she told Branham as an inducement to him to work for her that she had an ironclad contract. In conversation with appellant Mr. Branham was told that Mrs. Struck had no contract; that he wanted her out of the cafe but it looked like he could not get her out. Later appellant said to Branham, "If you will go down there and go to work; steal that contract and * * * bring it to me I will pay you double what I owe you." He there referred to an old debt of $135 which a former tenant of the cafe had owed Branham and which appellant had assumed. Later when they met on the street appellant offered Branham $2500 to "get Mary Struck out of the building. * * * Get her out any way you can get her out and I mean out. * * * Get rid of her for good. * * * I will give you $2500 to get rid of that woman."

In early March appellant took deceased and Orpha Hayden to see the Hurry Back Cafe and there tried to induce deceased to take the Hurry Back instead of the Oh Johnnie, but she did not like it; "She was planning on going to the mountains—she would not want to change."

### He Reports Her to the Authorities.

About February 15 appellant reported to the city sanitation inspector that deceased was living in a trailer by the Oh Johnnie Cafe and was operating the cafe in an unsanitary manner. The inspector visited the place and instructed her to cease sleeping there. On his next visit he found a bed and mattress still in the vehicle, but at a later visit found in it no sleeping equipment. He did not inspect the restaurant's toilets.

February 13 appellant complained to the O.P.A. of decedent's failure to report sugar on hand. On February 20 he exhibited 165 pounds of sugar which he asserted had been illegally stored by deceased.

### Appellant's Deceptive Remarks Concerning Decedent After April 5.

In April appellant told Salatich he had bought out decedent for $350 and exhibited a bill of sale (Exhibit 19), whereupon Salatich remarked that he "didn't know she had that much stuff in there." That conversation and display of the bill of sale was about five days prior to the discovery of her body. However, two days after he had shown Salatich the document he told his prospective tenant that Mrs. Struck had gone to Fresno and he did not know what to do. About three days before the decaying corpse was found Salatich's attorney advised appellant to enter Oh Johnnie Cafe. Salatich suggested that he first confer with the police.

### Paul Farmer, Witness to the Final Scene.

April 5, 1943, Paul Farmer, age 15, lived with his parents at 4993 N. Figueroa Street. About a week prior to April 5 he saw appellant and the deceased outside of the rear of the cafe storeroom. Both were angry. Appellant then told Mrs. Struck that he wanted her to leave and that if he did not get the lease he was going to do something drastic. Her reply was that she would get out when she got good and ready. On the evening of April 5, having delivered his newspaper route, Paul arrived home about 7:30 p.m. Finding no one present he put on some food to cook, took his sandwich to his bedroom, turned on the radio and opened the window. On previous occasions he had heard appellant and Mrs. Struck talk together. While sitting by the open window he heard unusual noises coming from Oh Johnnie's cafe like "two people cussing each other." He distinguished Mrs. Struck's voice and the voice of a man. Deceased was yelling the more loudly of the two. He could understand her and had no trouble at all in hearing both of them. He drew back his curtain and looked into the rear window of the cafe storeroom which was about 25 feet away. Neither blind nor curtain obscured his view. Through the storeroom window and the passageway into the kitchen he could see into the cafe dining room. The storeroom was lighted as he watched and listened for about two minutes. He saw and recognized both Mrs. Struck and Mr. Weatherford. The latter wore a medium gray suit but he did not wear a hat. (Subsequently appellant told the officers that he wore his gray suit on April 5.) Paul knew appellant's voice. The two were near each other, appellant facing deceased. She stood in the storeroom entrance to the passageway into the kitchen. Appellant was visible from his neck to his knees as he stood about a foot from and directly in front of Mrs. Struck facing her with his back toward the window through which Paul observed. Although they talked in about the same pitch Mrs. Struck's voice was quite loud. She raised it a little as her anger increased. Paul could understand her words. At first deceased held her hands by her sides, but when she cried, "No, no," to appellant she moved her hands away from her body with the palms out, and put her hands up as appellant talked.

At about this juncture, having observed for about two minutes, Paul pulled the curtain back over his window so that he could not see into the storeroom. While he listened to the radio the voices from the cafe continued in about the same volume. In approximately two minutes he heard the loud scream of a woman in the cafe. He then turned out all the lights in his house,

pulled back the curtain, and for five or ten minutes turned his gaze toward the cafe storeroom window. Though the cafe was still lighted he could see no one there. The storeroom window was blacked out by something over it. Only about two and one-half inches of light were visible at the top. After about five minutes the lights in the cafe were extinguished. During his watch Paul saw no one leave the rear of the cafe but he could see neither the front door nor either of the two outside doors into the storeroom. Frightened, the boy turned on all the lights in his house, never finished his evening meal, covered himself up in his bed. After that night he never saw Mrs. Struck again.

Paul's explanation for not identifying appellant at the former trial as the man he had seen in the storeroom with Mrs. Struck was his fear that appellant might do harm to the Farmer family. Prior to the afternoon on which he gave his testimony at the second trial he had not told any official that he could identify appellant as the party present in the storeroom on the night of April 5. When the parents of the boy returned home about 11 p.m. they knocked on the door, rattled the windows, and called their son but he did not let them in. After they had gained entrance into their home they found Paul in bed and covered up, although he was awake, scared, nervous, in a sweat and appeared to be ill.

Silent Witnesses.

(1) When the Farmers left home about 7 o'clock that evening the neon lights were burning on the clock in the cafe. Looking into the place on his return for the lighted clock, Mr. Farmer observed that there were no lights in the cafe. Prior to that occasion the clock was always lighted when Mr. Farmer passed by on his way home at night. (2) When appellant met Orpha Hayden near the cafe on April 5 and inquired as to decedent, appellant's response was: "Well, she closes on Monday." (3) When appellant called at the Farmer home on April 9 to collect rent Paul observed that he was nervous and weak. He told his mother that the man was sick. Appellant inquired of Mrs. Farmer whether she had seen Mrs. Struck the last few days. (4) After she had answered in the negative he asked her if she had heard any noises down at the cafe. (5) On receiving another negative reply he told her that he was on his way to return a can of shellac which Mrs. Struck had accused him of losing when he moved her into the cafe, and (6) that Mrs. Struck had gone on a trip, that (7) while he did not know of her whereabouts he guessed she was visiting relatives.

(8) Notwithstanding appellant's account to the police that he had shut off the water in the kitchen of the cafe on the morning of April 18, and that it was at that time running a stream "as big as your finger," the jury must have determined the falsity of his utterance when they heard the experience of Patrick Shephard, a lad 12 years of age who at the time of the trial lived near the cafe and played in that vicinity. While he was there at play on a certain Monday in April when it appeared that the cafe was closed, he looked through the cafe into the kitchen and heard a stream of water running into the sink on some dishes. He opened the door near the kitchen window about three inches, then frightened at his own boldness he ran away. Later he reported his experience to Mrs. Farmer who placed the occurrence on April 8. Four or five days later the boy returned to the cafe and again looked and listened. No water was running at that time from the same faucet. (9) At a later time in the presence of representatives from the district attorney's office the boy adjusted the water to run in the sink at the rate it maintained on April 8. A measure of the rate of flow determined that it was flowing at the rate of three gallons per minute. A computation by witnesses of the time required for water to flow at the rate of three gallons per minute disclosed that if the water had been turned off on the morning of April 18, as appellant had stated to the police, the meter would have registered 7230 cubic feet of water instead of 2400 cubic feet which actually did pass through the meter. The latter amount is approximately the quantity that would have passed through the meter between April 5 and several days after April 8 when Pat Shephard could no longer hear the water running.

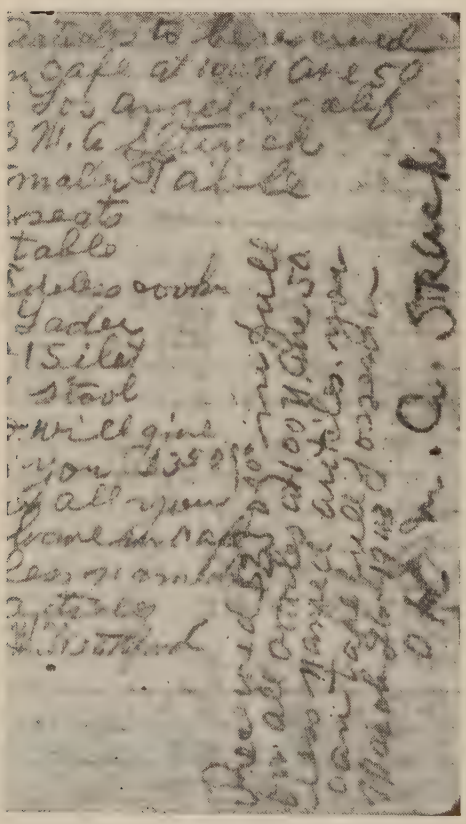
(10) The officers found no gas in the jets on the dining room range. After many

denials that he had turned off the gas appellant finally admitted to officer Ledbetter that he had shut it off on April 6 thinking deceased had gone to the city of Bishop. During the two full months of deceased's occupancy her average monthly consumption of gas was 5650 cubic feet, a daily average of 188 cubic feet. Only 1500 cubic feet were used from March 27 to April 23. Such amount is the same she would ordinarily have consumed from March 27 to April 5.

(11) Coins were found on the floor; a lady's purse in a kitchen table drawer contained currency totaling less than $4. Nowhere could the authorities find a trace of the $350 which appellant asserted he had paid her. The total of her money on deposit in a bank was $134.64.

(12) In checking appellant's statement that he had purchased deceased's refrigerator the officers searched for a document which might refer to its sale for $350, but none could be found. Exhibit 19, having been photographed by the infra-red process, was revealed to be an altered document: It

EXHIBIT 19



was originally a bill of sale of the refrigerator. Among the effects of deceased were several documents evidencing transactions between her and appellant, to wit: Exhibits 21 and 23, the two rental contracts for 7 per cent and for 5 per cent of the gross receipts; a notice to pay rent or quit; an agreement for trailer space rental; an affidavit for the small claims court—all in the writing of appellant. Also there was a typewritten notice to vacate in 30 days, dated March 3, 1943, and signed by the hand of Mr. Weatherford.

(13) On the afternoon of April 5 at about 4:30 o'clock, Mrs. Farmer saw deceased on Avenue 50 about one-half block from the cafe, walking toward it, carrying four full shopping bags. This was in effect a contradiction of appellant's statement to witnesses that decedent had said she was going to the mountains.

(14) Mrs. Farmer was at home at 7 and 9:35 a. m. on April 18 and had a nonmetered telephone which appellant might have used for notifying the police of his discovery. The two wires into the cafe telephone were on April 19 found to have been cut with a dull instrument.

(15) The investigators having concluded that death had probably resulted from the blow of a hammer, asked appellant for a description of such hammers as he possessed. All but one were found.

(16) When the police entered the storeroom after scenting the decomposed flesh, they observed that its only window was covered with a piece of plywood which excluded the light. It was practically of the same dimensions as the glass. It was this window through which Paul Farmer witnessed the quarrel on April 5. Other than the owner of the premises would any one have stopped to cover the window pane?

(17) When an officer told him to allow the residue to be removed from beneath his finger nails to see whether it contained any blood, appellant stated that two weeks before he had cut himself while shaving and that he had used a "short styptic pencil and you will find blood under the fingernails of my left hand." When asked why he did not use the styptic pencil with just one hand he replied that he had used both hands.

When arrested on November 4, 1943, he was locked in his apartment where he lived alone. While he was apparently planning to evade the officers he wrote notes to inform his wife about "an injunction against disturbing that ice box." He had $1,149.49 on his person, evidence of an intended flight.

(18) After April 5 he never repeated his violent criticisms of deceased such as he had made to Mrs. Farmer.

(19) He at no time parked his car in its accustomed place by the cafe between April 5 and April 18.

(20) He lost 20 pounds in weight during the six weeks prior to April 21 and did not sleep over two hours a night.

Appellant's Activities After April 5.

(1) On April 17 appellant in a very excited state complained to the detective bureau that deceased was running his cafe at a loss; he wanted her out; and produced a receipt which looked like Exhibit 19 or 29.[2] He said that he had paid her $350 for some of her equipment but did not know where she was or had been for some time; that though she had been living in a trailer it was now locked. He wished to be certain that he would not get into trouble if he entered the cafe. (2) On the evening of the same day the offensive odor of rotten flesh permeated the atmosphere near the cafe. Such was proved by Mrs. Farmer whose front porch was only 25 feet from the rear door of the cafe. On the following morning appellant opened the place about 7 o'clock. The jury probably determined that he too had become distressed by the ill-scented airs. However, he did not venture to announce his discovery at that hour. That he did enter the front door of the cafe that same morning at 7 o'clock was established by the testimony of the witness Dietz who lived near by and whose office was about 200 yards north of the cafe and on the same side of the street. He had seen appellant two or three times a week in or near the cafe prior to April 5. On the morning of the 18th a message to his home required him to go to his office. He arrived there at 7:10. As he walked along the street on the side opposite the cafe his attention was attracted by appellant's entering and closing the front door of the place. Appellant was turning the knob when first noticed by Dietz. At nine o'clock appellant returned and entered the place, then drove back to his apartment to telephone the police. (3) After 10 o'clock while the police were there the witness heard appellant tell the officers that he had come to the cafe on several occasions but found no one there and the place appeared to be closed; that when he had first called at 7:00 o'clock the front door was locked, as it had been on other occasions, but he had returned at 9 a. m. when he gained entrance at the rear through an aperture caused by a previous removal of a pane months before, and thus found the body of deceased; and that on discovering the body he returned to his apartment six blocks away to notify the police. His excuse for not using the telephone in the cafe or across the street was to "save a nickel."

(4) During the visit of the officers he was very nervous, walking from front to rear, talking and mumbling. After parrying his inquiry the officer asked him the same question, "What do you think about this?" His response was, "Why it looks like a robbery." He then asked, "Where is the money that I gave her?" He brought forth a writing from his pocket (Exhibit 19) which he explained was "a bill of sale and the things on there she is supposed to reserve for herself. * * * I bought an ice box from her for $350." In answer to Officer Pinker he stated that there had been no disagreements or difficulties with deceased; that she had promised to vacate at an early date, and offered the bill of sale in verification of his declaration.

(5) About 9:35 a. m. appellant, excited and incoherent of speech, reported his discovery of the body to the police. He told them it was murder because he had not seen his tenant for several days; that his attorney had advised him as owner he had a right to break into the house.

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2 The contents of Exhibit 29 are almost identical with those of Exhibit 19, but it is written with a graphite pencil and the words constituting the receipt and the list of articles reserved are on both sides of the paper.

Questioned about a padlock found under the counter appellant at first denied knowledge, denied ownership, denied ever having seen it before. He later admitted that he had used it to lock the trailer pursuant to orders of the Board of Health. An examination of the trailer by use of keys found under the counter disclosed the mattresses were gone. They were later found in one of the lavatories.

His Statements to the Police and His Activities on and Subsequent to April 18.

After discovery of the corpse appellant told the officers that he last saw deceased alive on Sunday, April 4, about 6:30 a. m. and that he was never in the cafe any more until he opened it on Sunday the 18th; that he had talked the business over with her on March 23 when she rejected his offer of $150 for her ice box but agreed to accept $350 for the ice box and a few other things; that he then went for the money and on returning made a memorandum (Exhibit 19) of 10 or 12 things she wished to reserve. He was not particular about a bill of sale but when he wrote it and laid the $350 on the table she took a pencil, made an o. k. and signed it "M. A."; that when she started to print her name he told her to write it with his indelible pencil; that after she had traced the other signature she promised him possession on March 25, but when the drayman called to move the refrigerator to another cafe she asked permission to stay a little longer to use up the supplies on hand; that rather than have the place closed he said he permitted her to remain; that on Friday before the final closing of the cafe she desired a gallon of white shellac for the floors of her apartment on Avenue 33; that he bought the shellac on April 5, but he could not give the address of the paint shop where he had made the purchase; that on the afternoon of that day he went to the cafe with the shellac but Mrs. Struck was out; that he still had the shellac in his automobile. However, it could not be found. He said he had purchased the shellac at about 5300 N. Figueroa street, but no shop for the sale of such merchandise was found by the officers in that vicinity.

Hoaxes Attempted by Appellant.

Answering an officer's inquiry as to decedent's male friends, appellant said that one night about three weeks prior to Mrs. Struck's disappearance he had come to the cafe at 8 o'clock and found men sitting with her at the kitchen table talking in a strange tongue, examining maps and charts; that she told appellant to get out. He could not describe the persons he claimed to have seen. Four days later he admitted to Officer Ledbetter that the men he had seen were Steve Salatich and Leo Winter, and that what he had said about German spies was a hoax.

Two days after the discovery of deceased appellant gave Officer Ledbetter a note as follows, "Keep your mouth shut or you will be sorry. I mean it." Nervous and worried, he said that when he arose that morning he found the note under his door and that he had received eight or nine telephone calls threatening his life. Later he confessed that he had printed the note declaring, "we won't talk about it any more."

About 3 a. m. on the 22d of April Officers Fator and Weaver answered a call to go to appellant's apartment over some stores at 5529 North Figueroa street. When they arrived at 3:10 appellant had a small amount of dried blood on his forehead and on his nose. His hair was ruffled and a small, uneven, singed spot the size of a quarter was evident directly in the back of his head. Some slight abrasions on his forehead appeared to have been made with a sharp instrument. On two or three slight cuts on his temple the blood had dried. An old quilt with small burnt holes, a small towel and an old overcoat betrayed the hoax which appellant had arranged to perpetrate. He related that there had been a knock at his door at 1:30 a. m.; that on opening his living room door a strange man entered, who with his fist struck appellant several times on the face and said, "I'll teach you to talk" and knocked him unconscious; that on regaining consciousness about an hour and a half later his hands were tied with the towel and the old quilt and coat were over him, smouldering. He suspected Nazi agents and the party who had telephoned. An examination by Officer Fator disclosed no evidence of a blow upon appellant.

Between 9 and 10 o'clock of the same morning Officer Ledbetter called to make further examination of appellant's injuries. He was told that when appellant opened his door at 1:30 a. m. someone struck him in the eye and knocked him unconscious; that the knots on his head from blows had gone down. The officer found three or four superficial cuts less than a half-inch long, an inch below the hair line. The burned place was the size of a dime. Photographs of his position as he was left tied up and of the burn on the quilt were exhibited to the jury. Acting upon Ledbetter's request appellant accompanied the officer to the receiving Hospital to ascertain the extent of his injuries. On the way the appellant was observed twisting his right cheek with his thumb and forefinger. This resulted in a large bruise on his right cheek. At the hospital the officer requested a complete examination in view of appellant's claim that he had been rendered unconscious, and repeated to the physician appellant's statement that he had been hit over the head. The doctor testified that the only injuries found were superficial; that no treatment was necessary; that he had not been rendered unconscious. When the doctor asked him "what he was trying to pull off" appellant remained silent. When Ledbetter asked him why he did not tell the truth about the matter appellant replied, "We won't discuss it further." After they had returned to the station appellant admitted to the officer, "I made it all up myself. It didn't happen." From such dishonest behavior of appellant his consciousness of guilt was a reasonable deduction.

### The Autopsy.

The Oh Johnnie Cafe faces North Avenue 50 on the north. Its east side stands near Figueroa street which extends north and south. The officers entered the cafe through its east rear door which opens into the storeroom. They found the decomposed body on the west side of the storeroom at the foot of a door which had been designed as an opening to a private walk leading to North Avenue 50. The threshold of that door is about seven inches above the level of the storeroom floor. Decedent's head lay toward that door while her feet extended toward the entrance on Figueroa street. The door near her head is a solid, two-panel construction and was so closed that it could not be opened from the outside. The woman's head was crushed and covered with blood and her body was decomposed. The skull was torn and destroyed over the frontals, and a round hole one inch in diameter was on the left of the median line of the forehead. Other fractured areas were found on both the front and back of the head. The autopsy surgeon opined that the blows to her head had been caused by an ordinary nail hammer.

### Appellant's Forgeries.

Notwithstanding his emphatic denials it was established by all the handwriting experts that both sides of exhibit 29 were in the handwriting of appellant, including the purported signature of deceased. It is a list of articles reserved by and a receipt for "payments in full for all I had at 100 North Avenue 50 less above named articles," etc. It was found in his apartment in a drawer between two books. In the same drawer was a red covered notebook which contained practice writings similar to those on Exhibit 29. The paper of both Exhibits 19 and 29 were taken from that notebook.

The experts agreed that Exhibit 19, which is substantially the same as Exhibit 29, is a substitute for its original contents. The erased under-writing was reproduced by infra-red photography. "O.K. M. A. Struck" had been first written in ordinary carbon pencil, which after being erased was traced with indelible pencil. All of the over-writing including "O.K. M. A. Struck" was proved to be that of appellant. From his possession of documents forged by his own hand but purporting to have been written by the person whom he detested and for whose removal he had offered to pay $2500, the jury could reasonably draw an inference of appellant's guilt.

### Appellant Avoids Cross Examination.

Despite all of the facts established against him the prisoner made no offer to explain one of them. His complete direct examination consisted of a negative answer to one question, to wit: "Did you ever

strike a woman by the name of Mary A. or known as M. A. Struck?" Such disdain of circumstances which showed his hatred of deceased; his inimical attempts to oust her from the cafe; his provocation at her withholding his property from which he could have been receiving a substantial rental; his quarrels with her; his request of the witness Branham to steal the lease and his offer of $2500 to that witness to "get rid of her"; his statement to Mesdames Farmer and Miller that he would do anything to get rid of her and that he would do something drastic if she did not return the lease; his forgeries of her receipts for $350 from him and the nondiscovery of evidence that she had ever gained possession of that sum; his quarrel with her in the cafe an instant before her final scream; his nonappearance at the cafe for two weeks following her disappearance; his entry through the front door at 7 a.m., which he denied, and his delayed announcement at 9:30 on the morning of April 18 of his discovery of her body—such facts required the accused to explain, if he was in fact innocent. The jury were warranted in finding from his silence additional evidence of his guilt. Such proof was of a more serious nature than his silence would have been in the presence of the police under similar accusation. Before an accusing officer an innocent suspect is often warranted in maintaining silence. Not so before the court where final search is made for the truth and the outcome may depend upon the defendant's testimony or upon his failure to explain. Appellant's silence before the jury was tantamount to a derisive thumbing of his nose at the prosecution and the mass of evidence which had gone into the record. The inferences deducible from his failure to explain were persuasive and substantial evidence. They added much to the force of the proof of the avenging circumstances which were built up by his own deeds.

A Murder Was Proved.

[7, 8] The autopsy disclosed that deceased suffered death by criminal means. There is not a circumstance to indicate that she inflicted the wounds upon her own head. Everything warranted a finding that she was the victim of a criminal agency. The only findings implied that required close scrutiny on the part of the fact finders were (1) that appellant applied the force that extinguished the life of the unfortunate woman and (2) that it was done with premeditation and with malice aforethought. His visit alone to her in the night, when she was unattended, his quarrel with her without apparent purpose other than to work up his blood to a vicious pitch, his beating of her body until life was extinct, strongly imply that he acted with malice; while his hostile complaints over a period of two months and proofs of his expressions of hatred of her prove such express malice as constitutes an element of murder. People v. Cook, 15 Cal.2d 507, 513, 102 P.2d 752. Since it was done with deliberation and premeditation it was unnecessary to prove the use of the means mentioned in Section 189, Penal Code, or an attempt to commit one of the crimes enumerated therein. That he was at the scene of the crime the jury evidently had no doubt, for there was no such inherent vice in the testimony of Paul Farmer as to render it irreconcilable with truth. The boy recognized appellant; his position for observation was only 25 feet away; he heard the querulous voices; he saw deceased raise her hands and heard her cry, "No, no," as though she were pleading, and heard her last scream. Such was substantial evidence and it supports the jury's implied finding. People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402; People v. Farrington, 213 Cal. 459, 2 P.2d 814. As said in the Braun case, where the testimony is positive and direct that the accused perpetrated the crime it is incumbent upon him to show that it is inherently incredible before he can prevail. The accuracy or doubtfulness of the identification, the incompatibility in the testimony, if any, and the uncertainty of the witnesses, if any, were matters solely for the consideration of the jury and of the trial court on the motion for a new trial, and when the court has thus approved the finding of the jury such finding may not be disturbed on appeal. People v. Farrington, supra, 213 Cal. at page 463, 2 P.2d 814.

[9] That appellant had motive for the crime was to be readily inferred by the jury.

His irritation caused by decedent's lack of success and her unsavory personality, his zeal to oust her from possession in order to increase his income, her stubborn tenacity in resisting his attempts to gain possession, and perhaps his desire to conceal his forgery and to save $350,—all these may reasonably explain his motive for the deed. Thirty-three days after he had served upon her a notice to vacate she was killed. The evidences of appellant's motive tended to identify him as the culprit. Evidence of motive adds warp to the pattern of guilt woven of circumstance. Whatever fact tends legitimately to show motive is proper proof of an assumed motive for the crime. People v. Soeder, 150 Cal. 12, 15, 87 P. 1016.

[10, 11] The fact that about November 4, 1943, appellant had on his person a large sum of money, in his apartment without any explanation thereof, and that he had prepared instructions to his wife for the care of certain business, show an intention of flight. At that time he attempted to escape from his apartment although he knew that he was under official surveillance and that the minions of the law might call at any time. Such attempt and the attendant circumstances were evidences to be considered. People v. Hall, 199 Cal. 451, 460, 249 P. 859. So, also, his false statements and the forgery of documents were proofs of his zeal to mislead the investigating officers, and they justified unfavorable inferences against appellant. People v. Peete, 54 Cal.App. 333, 352, 202 P. 51. For the owner of a cafe under lease to a lone woman with whom he had quarreled and against whom he had complained and whom he had suspected of dealing with the enemy in time of war, to pass by the cafe for two weeks without making inquiry; for him to write a note to himself to induce the officers to direct suspicion to others and falsely to report that he had been assaulted and made unconscious by a mysterious person—these were evidence of attempts to direct the search of the officers for Nazi spies or other evil agencies.

After a careful review of the facts of this case there is nothing found to justify or excuse the homicide. People v. Wells, 10 Cal.2d 610, 617, 76 P.2d 493; People v. French, 12 Cal.2d 720, 775, 87 P.2d 1014; People v. Thomas, 25 Cal.2d 880, 904, 156 P.2d 7. By reason of his advanced age and life of clean record his predicament has been considered with unfeigned compassion. But despite such sympathy neither this court nor any other can warp the rules of practice to afford him the slightest comfort. The State exacts the complete and loyal service of every agency that serves her, and the judiciary is no exception. Under the authorities it must be held that the evidence presented to the jury was substantial and justified the finding of guilty. This conclusion is derived despite the reversal of the first verdict which was rendered necessary by reason of procedural errors. That opinion did not determine the sufficiency of the wholly circumstantial evidence to support a verdict but merely held (1) that an instruction assumed the existence of a fact and that it was prejudicial in a case where no eye had seen the accused at the scene of the crime, and (2) that the conduct of the court in sending a private communication to the jury concerning a pertinent issue and incorrectly advising them is reversible error where the evidence is such that a jury might reasonably have found either for or against the accused.

II.

No Prejudicial Errors in Instructions Given.

The proof against appellant consists in the main of a web of circumstances and events put in evidence by a number of witnesses. Paul Farmer is the only person to testify to the actual presence of appellant at the scene of the crime. At a former trial and before the grand jury he had refused to identify the accused as the man he had seen at the time when he heard and saw decedent and a man in a heated argument, followed by the woman's scream. As shown in the summary on the second trial in April, 1946, three years after the crime, he testified that as he watched the argument of the deceased and the man he recognized that the latter was appellant. Because the evidence consisted primarily of circumstances and because of Paul Farmer's tardy identification of appellant as the man he had seen quarreling at the scene

of the crime, it is now contended that the language of the court's instructions in specified particulars was erroneous and prejudicial under the doctrine announced in People v. Williams, 17 Cal. 142, 147, and that appellant is entitled to a reversal notwithstanding the constitutional ban upon setting aside a judgment for error in instructions, unless the entire record reveals a miscarriage of justice. Constitution, Art. VI, Sec. 4½. He quotes from the court's instruction on murder and manslaughter the following passage: "All murder which is committed willfully, deliberately and premeditatedly, is murder of the first degree. All other kinds of murder are of the second degree." [3]

Section 189, Penal Code, reads as follows: "Degrees of murder. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

[12] Because of the absence from the second paragraph of the instruction of a

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3 Murder and Manslaughter Defined and Distinguished.

Murder is the unlawful killing of a human being with malice aforethought. Section 187, Penal Code.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Penal Code.

All murder which is committed willfully, deliberately and premeditatedly, is murder of the first degree. All other kinds of murder are of the second degree. Section 189, Penal Code.

In dividing murder into degrees the legislature intended to assign to the first as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murder, and to establish a test by which the degree of every case of murder may be readily ascertained. In cases of murder of the first degree it must be established that the killing was willful, deliberate and premeditated. The test may be thus stated: Is the killing willful—that is to say, intentional—deliberate and premeditated? If it is, the case falls within the first, and if not, within the second degree. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. It is necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree. People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Nichol, 34 Cal. 211, 213–5; People v. Morine, 61 Cal. 367, 369.

There is nothing in the sections of the Penal Code which relate to the subject, which indicates that the legislature meant to assign any particular period to the process of deliberation or premeditation, in order to bring the act within the first degree. The period of time must, however, be of sufficient length to allow deliberation and premeditation. People v. Bealoba, 17 Cal. 389, 395.

You are instructed that the adjective "deliberate" and the verb "premeditate" are used in these instructions in their common, well-known, dictionary meanings. Thus deliberate means formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, according to a preconceived design; weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; unhurried; characterized by reflection; dispassionate; not rash. Deliberation means careful consideration and examination of the reasons for and against a choice or measure. The verb "premeditate" means to think on and revolve in the mind, beforehand; to contrive and design previously. People v. Bender, 27 Cal.2d 164, 163 P.2d 8.

Murder in the second degree is defined as the unlawful killing of a human being with malice aforethought, but without willfulness, deliberation, and premeditation.

If the unlawful killing is done (with malice aforethought) and (without the provocation and sudden passion) which reduces the offense to manslaughter, or is committed in the attempt to perpetrate some felony other than arson, rape, robbery, burglary, or mayhem, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless, as has been stated the evidence proves the existence in the mind of the slayer of the (willful, deliberate and premeditated intent to take life,) in which case the offense would be murder in the first degree. Peo-

listing of the specified means whereby murder is perpetrated and of the names of the major crimes in the attempt to perpetrate which a homicide becomes murder of the first degree, appellant contends that the jury were not adequately or accurately instructed and that he was thereby prejudiced. Citing People v. Holt, 25 Cal.2d 59, 70, 87, 153 P.2d 21; People v. Thomas, 25 Cal.2d 880, 896, 156 P.2d 7. He argues that the "specific statutory enumeration was not given to the jury", and that not having this measure of the statute the jury could not decide whether the murder was first or second degree. Inasmuch as there was no claim by either party that decedent came to her death by means of poison, lying in wait, torture, no claim that she was killed while her assailant was perpetrating or attempting to perpetrate arson, rape, robbery, burglary or mayhem, it was unnecessary to mention those means of effecting a homi-

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ple v. Doyell, 48 Cal. 85, 96; Ex parte Wolff, 57 Cal. 94; People v. Thomas, 25 Cal.2d at page 902, 156 P.2d 7.

Voluntary manslaughter is the unlawful killing of a human being without malice—upon a sudden quarrel or heat of passion. Section 192, Penal Code.

Manslaughter is principally distinguishable from murder in this: That though the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient. Commonwealth v. Webster, 5 Cush., Mass., 295, 307, 52 Am.Dec. 711.

And when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder. People v. Freel, 48 Cal. 436, 437.

The law of this State leaves it to you, the jury, to say whether or not the facts and circumstances in evidence are sufficient to lead you to believe that the defendant did, or to create a reasonable doubt in your minds as to whether or not he did, commit his offense under a heat of passion. You are admonished and advised that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless you, the jury, further believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable person. Thus, no person of extremely violent passion may so justify or excuse himself unless the circumstances were such as to arouse the fears of the ordinarily courageous person. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable person placed in identical circumstances, the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable person. Under these admonitions from the court, the law leaves it to you, the jury, as to the nature of the passion itself. For the fundamental inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary person of average disposition liable to act rashly and without due deliberation and reflection, and from this passion rather than from judgment. People v. Valentine, 28 Cal.2d 121, 139, 169 P.2d 1.

The existence of the provocation which is not adequate to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after deliberation and premeditation. It is sufficient that the malicious intention precedes and accompanies the act of homicide.

In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. Penal Code, Sec. 21.

The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent. 2 Bishop, Cr.Law, Secs. 680, 681; Commonwealth v. Webster, 5 Cush., Mass., 295, 305, 52 Am.Dec. 711; People v. Munn, 65 Cal. 211, 3 P. 650.

cide or the crimes there enumerated. Inasmuch as it was not contended that she came to her death by another kind of killing than willful, deliberate and premeditated, it was therefore incumbent upon the court to advise the jury only with reference to a murder so committed, i.e., willfully, deliberately and premeditatedly, in order to constitute it murder in the first degree. The effect of the quoted portion of the instruction on murder and manslaughter was to say that if the murder was not willful, deliberate and premeditated it was of the second degree. A reading of the instruction discloses that it generously treats of the topics that comprise a fair instruction in a case of murder and that its language is worded with care. In attacking it appellant has engaged in a series of dialectical jibes by discoursing upon several passages taken from their settings. For illustration, he takes from the discussion of manslaughter the following: "although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." He follows that quotation with the comment that "as deliberate intent is not an essential in the crime of murder, the instruction is erroneous." Such practice is not to be approved. The excerpt was a part of the court's effort to direct the jury to understand that the law regards charitably the weakness of human nature and to convict the accused of manslaughter only if the intent found to exist was not malicious and deliberate.

[13] Appellant specifies as prejudicial that part of the instruction on murder and manslaughter as follows: "In determining the intention of defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifest by the circumstances connected with the offense, and the sound mind and discretion of the accused." On the first hearing of this case this court reached the conclusion that it should be guided by the language of the Supreme court in People v. Peterson, 29 Cal.2d 69, 173 P. 2d 11, where the appellant criticized the identical language. In that case the Supreme court condemned that instruction as objectionable in that it assumes that defendant killed deceased, and held that it should not be given in a case based wholly upon circumstantial evidence where the defendant does not concede participation in the transaction. Such disapproval was because the entire evidence was circumstantial and the accused did not concede participation in the transaction. However the court concluded: "but the case presented to the jury does not appear to have been a close one and no miscarriage of justice is shown as a result of the giving of the instruction."

Likewise it is not shown here that any miscarriage of justice resulted from that portion of the instruction criticized, and the circumstantial evidence against Weatherford is just as cogent and convincing as was the proof against Peterson. Moreover, while there was no eye to witness the cruel act of Peterson, a frightened 15-year-old lad observed Weatherford an instant before the final scream of deceased. While Peterson made no concession of his participation, the State made proof of Weatherford's presence by a witness who the jury believed spoke the truth. Therefore, in view of the cautionary instructions given, of the presence near the scene of the crime of a competent witness and of the steel-like web woven about the prisoner by the flood of unexplained facts, it must be here held that there was no prejudice resulting from the criticized instruction and that the cause should not be reversed because thereof.

The lack of merit in the criticism of the instruction appears also from the numerous salutary provisions of the general charge. The instructions in their entirety at once disclose that the jury "are to be governed solely by the evidence introduced in this trial * * * you are the sole and exclusive judges of the weight of evidence and it is your function to determine all questions of fact arising from the evidence * * * an inference must be founded on a fact legally proved * * * you are to judge of the facts upon the testimony and other evidence produced here in court * * *. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satis-

factorily shown, he is entitled to an acquittal * * *. The presumption of innocence attaches to every stage of the case and to every fact essential to a conviction and remains with the defendant throughout the trial to the last and until the contrary is established by proof beyond a reasonable doubt * * *. The jury are the sole and exclusive judges of the effect and value of evidence addressed to them * * *. You are free to exercise your own conscientious judgment as to the credibility of a witness. * * * The defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt * * * the jury are the sole judges of the facts."

[14] Prejudice is asserted to have resulted from a passage in the instruction on circumstantial evidence towit: "and it is the invariable rule and law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged but *must be inconsistent with any other rational conclusion.* People v. Heuss, 95 Cal.App. 680, 273 P. 583." The instruction is correct. In the Huess case a similar instruction was criticized because it did not contain the equivalent of the italicized words. In denying the petition for a hearing of that case the Supreme court observed that the criticized instruction "fell short in not including the well approved and frequently anonunced statement of the law that the evidence adduced must not only be consistent with guilt but *inconsistent with innocence* in order to justify a verdict of guilty." The instruction attacked in the instant case is a substantial compliance with the doctrine thus announced.

Appellant in his argument on his asserted error of the quoted instruction contends that "a conviction may not be based upon circumstantial evidence alone unless each circumstance in the chain of circumstances * * * is * * * inconsistent with his innocence." People v. Koenig, Cal.App., 164 P.2d 923, 928 is not authority for such contention for three reasons, namely: (1) A hearing by the Supreme court having been granted the decision of the appellate court lost its guiding force; (2) the opinion of the Supreme court (29 Cal.2d 87, 173 P.2d 1) repeated the well established rules as to circumstantial evidence but did not approve the language quoted by appellant; (3) the judgment herein does not rest entirely upon circumstantial evidence.

Appellant contends that "from the nature of the evidence and its doubtful sufficiency, it is obvious that if error was committed by the trial court which materially affected the substantial rights of the defendant, and which may have resulted in a miscarriage of justice, such error must be considered prejudicial and grounds for reversal." He thereupon asserts that "the only evidence even suggesting a killer of deceased, is the revised version of the Farmer narrative." The jury heard Paul Farmer's testimony, his searching cross-examination and his explanation of his failure to identify appellant at the first trial. Having been believed and in effect exonerated by the jury for his dereliction at the first trial, his testimony comes to this court with the sanctity of the sovereign whose agent the jury was in determining the credibility of the witnesses and the weight to be given their testimony.

[15] The instruction correctly defined deliberation (People v. Thomas, 25 Cal.2d 880, 898, 901, 156 P.2d 7; People v. Bender, 27 Cal.2d 164, 181, 163 P.2d 8; People v. Bernard, 28 Cal.2d 207, 211, 169 P.2d 636; it properly omitted mention of section 1105, Penal Code, since it was not indicated by the evidence (People v. Lindley, 26 Cal. 2d 780, 161 P.2d 227); it correctly defined manslaughter (Penal Code, sec. 192; People v. Valentine, 28 Cal.2d 121, 136, 169 P.2d 1); and the distinction between the degrees of murder followed the most recent utterances of the Supreme court. People v. Holt, 25 Cal.2d 59, 91, 153 P. 2d 21.

The Degree of Murder Was Determined.

[16] In an elaborate argument appellant contends that the degree of murder committed was not found by the jury, despite the language of the verdict that "We further find it to be murder of the first degree, and recommend * * *." However, he premises his argument upon one passage from the instruction on murder and

manslaughter, towit: "All murder which is committed willfully, deliberately and premeditatedly is murder of the first degree. All other kinds of murder are of the second degree." He follows that quotation with an analysis of section 189 of the Penal Code to show that murder of the first degree has 13 characteristics besides that of "Willful, deliberate, and premeditated killing," and concludes his argument with the unique proposition that when the court said "all other kinds of murder are of the second degree" it intended thereby to direct the jury to classify all of the "thirteen distinct cases as second degree murder." Such argument disregards logic. The first three means of committing first degree murder specified in section 189 necessarily require wilfulness, deliberation and premeditation. Since none of those means was alleged or indicated by the evidence the court's aim was evidently to confine the jury's consideration of murder in the first degree to any means used or manner of performance that was willful, deliberate and premeditated, and if it was not so committed it was murder of the second degree. By omitting the list of means by which foul murder is committed or the list of the several crimes in the commission of which a homicide becomes murder the court did not change "the standard fixed by law." The instruction did inform the jury "as to the elements of each of the degrees of murder." Nothing is found in the authorities cited by appellant (People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Holt, 25 Cal.2d 59, 153 P.2d 21) derogatory of the criticized instruction.

Instruction on Rehabilitation.

Appellant assigns as prejudicial the instruction on "rehabilitation." Before quoting it the events that preceded it will be first narrated. When the murder of Mrs. Struck occurred Paul Farmer was a lad of 15. When called before the grand jury in November, 1943, he testified that on the evening of April 5, 1943, he saw deceased in front of her back window but saw only the gray arm sleeve of the man who was present; that he heard the latter's voice and it was not that of appellant. In January, 1944, he testified at the first trial that it was not Weatherford, and at about that time he made extrajudicial declarations of the same import. At the trial in April, 1946, his testimony varied in one material respect from that given in 1944. A resume of his testimony at the second trial has already been recited above. He testified that the reason he did not admit at the first trial or testify before the grand jury that it was appellant in the storeroom with Mrs. Struck was his fear that the defendant might harm a member of his family. As a reason for the rehabilitation instruction it was developed that in the fall of 1944 and at other subsequent times the witness had told several persons including Mrs. Merle Miller that he recognized appellant at the scene of the murder.

The criticized instruction is as follows: *Rehabilitation.* "The court further instructs the jury that upon the cross examination of Paul Farmer certain questions were asked from which it might be inferred that Paul Farmer had fabricated his testimony at this trial, or that Paul Farmer had base or ulterior motives, or that his testimony in court at this trial was a recent fabrication. Following such inferences or attempts by counsel for the defense to impeach Paul Farmer, certain testimony was given by Mrs. Merle Miller on behalf of the prosecution of statements made by Paul Farmer to her in November of 1944 and in June or July of 1945.

"The court instructs you at this time that in admitting the testimony of Mrs. Merle Miller of what Paul Farmer told her on these occasions, such testimony was not received for the purpose of proving the truth of the facts which had been told to her by Paul Farmer, but solely and for the limited purpose of refuting the suggestions or inferences, if any, that Paul Farmer had at this trial fabricated his testimony or that his testimony was actuated by base or ulterior motives. Mrs. Merle Miller's testimony of what Paul Farmer said to her on these occasions is introduced and received into evidence to prove the state of mind of Paul Farmer on a date prior to this trial, for the purpose of determining whether his state of mind at that time was the same as disclosed at this trial and to prove that his testimony at this trial was not a fabrica-

tion. It is admitted for the limited purpose of rehabilitating Paul Farmer's testimony at this trial." People v. Nobles, 44 Cal. App.2d 422, 112 P.2d 651; People v. Kynette, 15 Cal.2d 731, 104 P.2d 794; Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am.St. Rep. 413; People v. Doyell, 48 Cal. 85, 90; People v. Shaw, 36 Cal.App. 441, 445, 172 P. 401.

[17, 18] The authorities cited on the instruction establish its correctness. Where it appears that the jury might from the cross-examination of a witness draw inferences that his testimony given on the trial is of recent fabrication, prior extrajudicial statements of the witness consistent with his recent testimony will be admitted to rehabilitate it. After such prior statements have been placed before the jury they are to determine whether the witness under attack had fabricated his testimony given before them. People v. Nobles, supra. The instruction complies with the law and was therefore not erroneous.

Failure to Explain.

[19] The court's instruction that defendant's failure to explain the suspicious circumstances or to deny incriminating testimony presented against him, having a reasonable opportunity to do so, was in conformance with the constitution, the statutes and the decisions. "That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict." Constitution, Art. I, sec. 13; Code Civil Proc., sec. 2061, (6); People v. Adamson, 27 Cal. 2d 478, 488, 165 P.2d 3.

Refused Instructions.

[20] The five instructions on circumstantial evidence offered by appellant and refused were unnecessary. The court's instruction heretofore quoted was sufficient. Those rejected were mere arguments upon the court's instruction that the circumstances "must be consistent with guilt and in consistent with any other rational conclusion." Such instruction is "intelligible and free from doubt" and was in accordance with that approved in People v. Navarro, 74 Cal.App.2d 544, 169 P.2d 265. The refused instruction number 8 was an attempt to have the court decide a question of fact. Refused instruction 5 was equivalent to directing the jury to disregard the statements of the district attorney in his opening statement as to proof of other crimes. The same subject was fully covered by the court's "General Instruction to consider evidence only."

The judgment and the order denying the motion for a new trial are affirmed.

WILSON, Justice.

I concur in the opinion of the PRESIDING JUSTICE, and join in the judgment of affirmance. It would be inaccurate to say that appellant denied participation in the crime. His evidence consisted solely in a bare denial that he struck the lethal blow, but he never denied participation in the murder. His entire testimony is composed of his answer to a single question from his counsel: "Q. Did you ever strike a woman by the name of Mary A. or known as M. A. Struck? A. No, sir." The court sustained objections to all questions asked by the district attorney on cross-examination. The answer might possibly have been technically true. Insofar as appellant's evidence is concerned the murder may have been committed by another person at his instigation and in his presence.

McCOMB, Justice.

I dissent. In my judgment the majority opinion is erroneous in holding that it was not prejudicial error for the trial court to instruct the jury as follows:

"In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.

"The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent."

This identical language was condemned by the Supreme Court in People v. Peter-

son, 29 Cal.2d 69, 173 P.2d 11, the court, speaking through Mr. Justice Schauer, saying at page 78 of 29 Cal.2d at page 16 of 173 P.2d, "* * * that the instruction * * * should not be given in a case such as this, where defendant does not concede participation in the transaction." The erroneous instruction did not cause a reversal of the judgment in the Peterson case for the reason as stated by the court that the case was not "a close one and no miscarriage of justice is shown as a result of the giving of the instruction."

In the instant case defendant specifically denied participation in the crime, and in my judgment such erroneous instruction was prejudicial in view of the fact that the evidence was entirely circumstantial and the only evidence identifying defendant as a participant in the crime was given by the witness Farmer, an admitted perjurer.

That this conclusion is unavoidable, that is, that the case was a close one and that the concededly erroneous instruction was prejudicial, is supported by the following facts:

First: It is conceded that all of the evidence is circumstantial with the exception of the testimony of the witness Farmer a self-confessed perjurer, who at the time he testified was on probation after conviction of a criminal offense, and who had testified before the grand jury in November, 1943 that in looking out of his window on April 5, 1943 into the Oh Johnnie Cafe he had seen only a part of an arm of a man and that the man's voice he had heard was not that of defendant. He gave similar testimony at a prior trial of the present case in January, 1944. Likewise on December 15, 1943, he stated to Mr. Hyde and Mr. Mason that defendant was not the man whose voice he had heard on the evening of April 5, 1943. Again in March, 1945, and in 1946 he made a similar statement to Mrs. Elsie Weatherford.

In the case of People v. Weatherford, 27 Cal.2d 401, 164 P.2d 753, our Supreme Court held on evidence substantially the same as that set forth in the majority opinion, with the exception of the testimony of the perjurer Farmer, that such did not constitute sufficient evidence to make applicable the provisions of Article VI, section 4½ of the Constitution relative to an erroneous instruction which had been given.

It should be borne in mind that the only material addition to the evidence in the instant case over that appearing in People v. Weatherford, 27 Cal.2d 401, 164 P.2d 753, is the testimony of the witness Farmer.

Second: The justices of this court, men trained in evaluating evidence and the conclusions to be drawn therefrom, have differed as to the conclusions to be reached from the present record. It is therefore self-evident that an untutored lay jury must have had extreme doubts as to the sufficiency of the evidence to sustain the conviction, and clearly this court should not say that a concededly erroneous instruction in a case where the evidence is entirely circumstantial, and the defendant denied participation in the crime is not prejudicial to the substantial rights of the defendant, and that a "miscarriage of justice" did not result from the erroneous instruction.

Third: The extreme length of the majority opinion illustrates the extreme tenuousness of the evidence of guilt in the present case.

It has been held in many cases the phrase "miscarriage of justice" as used in Article VI, section 4½ of the Constitution does not mean simply that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable as pointed out by Mr. Justice Carter in People v. Weatherford, supra, 27 Cal.2d at page 420, 164 P.2d 753, to cases where the conviction has resulted from some form of trial in which an essential right of the defendant has been disregarded or denied.

I therefore adhere to the former opinion* of this court and believe that the judgment should be reversed and a new trial granted.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

* The opinion concurred in by all members of this court reversing the judgment and granting a new trial, filed on January 14, 1947, appears in —— 77 Cal.App. 2d ——, 176 P.2d 382.

78 Cal.App.2d 828

## FIRST NAT. BANK OF CHICAGO v. SCULLY.

Civ. 15657.

District Court of Appeal, Second District, Division 1, California.

March 31, 1947.

Hearing Denied May 26, 1947.

1. Appeal and error ⇐983(3)

On appeal from order denying motion for issuance of an execution on a judgment after five years, question is whether the trial court abused its discretion, and if no abuse is found the Appellate Court may not set aside the order. Code Civ.Proc. § 685.

2. Execution ⇐73

On motion for an order for issuance of execution on a judgment after five years, the trial judge is called upon to determine whether the creditor has exercised due diligence under the circumstances in attempting to enforce his judgment during the five-year period. Code Civ.Proc. § 685.

3. Execution ⇐73

Where the facts show that, if judgment creditor had exercised even slight diligence in making inquiry concerning the circumstances of the judgment debtor, he would have discovered property subject to execution, the exercise of sound discretion requires trial court to deny motion for issuance of an execution on judgment after five years. Code Civ.Proc. § 685.

4. Execution ⇐73

On motion for issuance of execution after five years, the evidence showed that even slight diligence on part of judgment creditor in making inquiries concerning judgment debtor would have resulted in discovery of property subject to execution and court did not abuse discretion in denying the motion. Code Civ.Proc. § 685.

DORAN, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by First National Bank of Chicago against Daniel B. Scully, also known as Daniel B. Scully, Jr., wherein there was a judgment for plaintiff on February 19, 1934, and on July 3, 1946, the plaintiff made a motion for issuance of an execution. From an order denying the motion, the plaintiff appeals.

Order affirmed.

Bicksler, Smith, Parke & Catlin, Catlin & Catlin, Frank D. Catlin, and Henry W. Catlin, all of Los Angeles, for appellant.

Lawrence F. Edmisten, Jr., of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from an order denying plaintiff's motion of July 3, 1946, for issuance of an execution of a judgment after five years under section 685 of the Code of Civil Procedure.

The within action to collect on a promissory note executed by respondent Scully in favor of appellant corporation was reduced to final judgment on February 19, 1934. Execution duly issued thereon and was returned unsatisfied on March 12, 1934. The affidavit of appellant's counsel in support of the motion of July 3, 1946, avers that respondent judgment debtor was examined on April 24, 1934, at which time he asserted he had no assets exempt from execution; that affiant was then "unable to find any property that was subject to execution or that was not exempt from execution, although Mr. Scully at that time promised that he would pay the judgment whenever he obtained the money and would keep affiant advised." That thereafter affiant "attempted to get said judgment debtor in for further examination" and orders for his appearance made returnable on September 26 and November 29, 1938, February 27, April 12 and June 27, 1939, were "compelled to go off calendar" because service could not be made upon the judgment debtor; that "affiant was informed and believed that said judgment debtor had left the State of California and was residing outside the State of California and that he continued to reside outside of the State of California and in the State of Illinois for long periods of time between 1934 and 1946; and * * * that he is now in the County of Los Angeles, State

of California." It is also averred that affiant checked the Los Angeles County assessment rolls for each of the years 1934, 1935, 1936, 1937 and 1938 and could find no property assessed to said judgment debtor; also that because of judgment debtor's promise to pay the judgment when he obtained the money and affiant's lack of success in his search of the assessment rolls, the latter believed any further effort on his part would be futile; further that affiant "is informed and believes that said judgment debtor, subsequent to his first examination herein has collected and now has in his possession or under his control, cash, bank accounts and other personal property which he accumulated from a trust fund, or which was distributed to him from the estate of his father," and from the estate of Wilhelm, as well as 150 shares of D. B. Scully Syrup stock, "all of which is not exempt from execution."

Respondent Scully's affidavit in opposition to the motion avers that in response to an order he appeared in court on April 24, 1934, for examination concerning his property, at which time he answered fully concerning the same; that no other order for his appearance to answer concerning his property had ever been served upon him until Feb. 21, 1946, which order was subsequently set aside. Affiant then avers that he has been a resident of Los Angeles County, State of California, from the year 1929 to the date of said affidavit, except for a period of 11 months when he resided in Visalia, California; that he was domiciled and resided in Westwood, California, during the years 1931 to 1938, inclusive, during which time he was served with a copy of the complaint and summons in this action and with a copy of the order for supplemental proceedings of April 24, 1934; that during the latter part of 1938 he moved to Beverly Hills where he resided until 1939; that from the year 1939 to and including 1945, he was domiciled and resided in the San Fernando Valley, except for about 11 months during 1941 and 1942 when he was residing at Visalia and where he conducted a Pilot Training School for the United States Air Corps; that from 1945 to the date of the affidavit (July 10, 1946) he resided at Hermosa Beach, California; that whenever he moved he left a forwarding address with the postal authorities; that since April 24, 1934, to and including February 21, 1946, he had never received any letter or communication from appellant corporation or from anyone on its behalf concerning the instant action or any matter connected therewith; that he was registered on the assessment rolls of Los Angeles County from 1934 to date, paid all assessments levied against him during that period and filed for his Veteran's exemption each year. That during such period, affiant purchased new automobiles in his own name, free and clear of encumbrance, which were registered with the Motor Vehicle Department of the State of California, to-wit: In 1936 an Oldsmobile 8 Sedan; 1937, LaSalle Convertible Coupe; 1939 a Pontiac 8 Sedan; 1941 a Pontiac 8 Coupe; 1942 Buick 8 Convertible Coupe, which "continues to be registered in his name up to and including the present time." It is further averred that in 1937 a partial distribution in the estate of affiant's father was made from which he received approximately $75,000 in cash and securities; that due to a bad business venture entered into by him he incurred a number of debts, including the judgment herein; that "due to the wide publicity given this partial distribution on the front pages of the Chicago papers, by reason of the fact that Daniel B. Scully, Sr., had been a citizen of great wealth and prominence, the creditors, above referred to, of defendant, immediately began to make demands for payment and defendant advised his counsel to take care of the settlement of all of these claims; that defendant paid out approximately $30,000.00 in the payment of claims made and was advised by his counsel at Chicago, that all claimants had been satisfied; that defendant believed and continued to believe until on or about February 21, 1946, at which time he was served with a copy of the Order for supplemental proceedings, that the judgment of plaintiff in this action had been satisfied along with all of the other creditors; that plaintiff must have been advised through this wide publicity on the front pages of the Chicago newspapers of this partial distribution; that according to defendant's best information and belief, he

advised the attorney for plaintiff at the hearing on April 24, 1934, that a partial distribution of his father's estate would be made during the year 1937; that defendant is at a loss to understand why plaintiff failed to use diligence in satisfying this judgment when said partial distribution must have been known to plaintiff or its attorney, or both." That from 1934 to date affiant was a registered voter of the City and County of Los Angeles; that during the years 1937, 1938, 1943, 1944, and 1945, affiant was listed in the local telephone directory; in 1941 and 1942 he was listed in the Visalia telephone directory; and from 1945 to date in the Hermosa Beach directory; that during 1935, affiant was secretary of the Advance Petroleum Company, with offices at Los Angeles and held a 15% interest in that company; during 1936 and 1937, he was sales manager for the Parkerite Company, a metal alloy company of Los Angeles, receiving therefor $135 per week; that during the years 1937 and 1938, affiant owned the lease and equipment of the Long Beach Arena and was promoter of fights there, being prominently mentioned in the press during that period; that he sold his lease and equipment in 1938 for $7,000 and in 1941 became part owner of a pilot training school at Visalia, California, and was employed there for about 11 months at $400 per month; that in April, 1942, he sold his 10% interest in said school for $20,000.00; and in April, 1943, bought a ranch in Canoga Park, California, in the name of himself and wife, which he sold in 1945 for $26,000.00; that said property remained in the name of affiant and his wife for approximately 2½ years and was assessed to them; that from about 1935 until the year 1945, affiant received a yearly income of approximately $11,000 from the trust estate of his father, over and above any distributions made from said trust estate during that time; that appellant judgment creditor has made no effort since April 24, 1934, until on or about February 21, 1946, to collect said judgment or to contact said affiant by telephone, letter or otherwise; that if said creditor had made any effort to contact affiant, the latter would have been in a financial position to have satisfied said judgment; that said creditor has failed to do anything toward the collection of said judgment since April 24, 1934, "and has allowed said judgment to rest dormant and uncollected."

Section 681 of the Code of Civil Procedure provides that "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." This section of the code was complied with by appellant which had a writ of execution issued shortly after the judgment herein became final, to-wit, on March 12, 1934, but the same was returned unsatisfied. On April 24, 1934, appellant without success examined respondent concerning his property, pursuant to the supplemental proceeding provided by section 714 of the Code of Civil Procedure. Thereafter within the five year period, i.e., 1934 to 1939, inclusive, appellant unsuccessfully attempted to further examine respondent concerning his property, for the reason that *service could not be made upon him* of the five orders for his appearance which were made returnable on the dates heretofore mentioned.

The instant motion was made pursuant to section 685, Code of Civil Procedure: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion. * * *"

Appellant urges that the court abused its discretion in denying its motion because the reasons presented amount to an honest, sensible and logical explanation of its failure to obtain an execution within the five-year period.

[1, 2] As was aptly stated in Hull v. Santino, 68 Cal.App.2d 300, 301, 156 P.2d 946: "The question raised by this appeal is whether the court abused its discretion in refusing to authorize the issuance of the writ of execution. If no abuse is found, this court may not set aside the order. The prob-

lem which the trial judge was called upon to solve was whether the creditor has exercised due diligence, under the circumstances of this case, in attempting to enforce his judgment during the five-year period. As stated in Beccuti v. Colombo Baking Co., supra, 21 Cal.2d [360], at page 363, 132 P.2d [207] at page 209: 'Whether he has exercised such diligence is, by the express provisions of the statute, for the trial court to determine in its discretion. And an order made under such authority will not be disturbed upon appeal unless it clearly appears that the determination constitutes an abuse of discretion. Butcher v. Brouwer, supra, [21 Cal.2d 354, 132 P.2d 205, 209].'"

[3] "But if the facts show of a certainty that, had the judgment creditor exercised even slight diligence in making inquiry concerning the circumstances of the judgment debtor, he would have discovered property subject to execution, the exercise of sound discretion requires the court to deny the motion." Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 363, 132 P.2d 207, 209.

[4] Having in mind the averments of the affidavit filed on behalf of appellant in support of the motion that "service could not be made upon the judgment debtor" during the years 1938 and 1939; and that a check of the Los Angeles County assessment rolls for the years 1934 to 1938, inclusive, failed to disclose any property assessed to respondent judgment debtor; and also keeping in mind the averments of respondent's affidavit, heretofore recited in detail, that he maintained a continuous residence in Los Angeles County from 1929 to date, except for eleven months in 1941 and 1942; that he was a registered voter of the said county from the year 1934 forward and was listed in the Los Angeles city telephone directory in 1937, 1938, 1943, 1944 and 1945; that from 1936 he was the frequent purchaser of new automobiles all of which were registered in his name with the State Motor Vehicle Department; that during 1935, 1936 and 1937, he was employed by and owned substantial interests in two companies operating in Los Angeles city; that during 1937 and 1938 he owned the lease upon the Long Beach Arena, where he promoted fighting matches, and which he sold in 1938 for $7,000; and that for the ten year period from 1935 to 1945 he received an annual income of approximately $11,000 from a trust estate—it can hardly be said that appellant exercised due diligence in making inquiry concerning the circumstances of the respondent. Under the facts presented by the record herein, even slight diligence on the part of appellant in making inquiry concerning respondent would have resulted in the discovery of property subject to execution. Therefore, there was no abuse of discretion by the trial court in denying the motion.

For the reasons stated, the order appealed from is affirmed.

WHITE, J., concurs.

DORAN, Justice (dissenting).

I dissent for the reasons appearing in John P. Mills Organization, Inc., v. Shawmut Corporation,— Cal.App.2d —, 171 P. 2d 937.




78 Cal.App.2d 870

**THOMPSON v. MACHADO et ux.**

**Civ. 7276.**

District Court of Appeal, Third District, California.

April 1, 1947.

Rehearing Denied April 25, 1947.

Hearing Denied May 29, 1947.

**1. Evidence ⇐351**

The object of the business record statutes is to eliminate necessity of calling each witness and to substitute record of a transaction or event and it is not necessary that person making the entry have personal knowledge of the transaction. Code Civ.Proc. §§ 1953e–1953h.

**2. Courts ⇐90(4)**

Decisions on the admissibility of business records decided before the Uniform Business Records as Evidence Act became effective in California are not controlling. Code Civ.Proc. §§ 1953e–1953h.

**3. Evidence ⇐69, 70**

In the case of the conduct of business and affairs of an establishment, it is presumed that regular course of business of such establishment is followed and that the books and records of an establishment truly reflect the facts set forth in such books. Code Civ.Proc. §§ 1953f, 1963, subd. 20.

**4. Account, action on ⇐22**
**Evidence ⇐376(1)**

In an action to recover an alleged balance due for goods sold and services performed by plaintiffs' assignee for defendants, evidence was sufficient to establish existence of an open book account and to sufficiently authenticate business records to warrant their admission. Code Civ. Proc. § 1953f.

**5. Evidence ⇐351**

Courts must construe Uniform Business Records as Evidence Act so as to facilitate the effectuation of its purpose. Code Civ.Proc. § 1953g.

**6. Evidence ⇐20(1)**

That many business firms employ a bookkeeping system consisting of the making of tags at time of sale or transaction, giving customer a copy of such tag and filing original, entering debits and credits on hard sheets instead of in a bound ledger, and sending a statement to the customer each month, is a matter of common knowledge.

**7. Account, action on ⇐23**

In an action to recover a balance due upon an alleged open book account for goods sold and services performed, correctness of account was for trier of fact.

**8. Appeal and error ⇐931(1), 989**

Where issue in an action on an account was whether defendant's son, who had placed a number of orders with plaintiff, was defendant's agent, in support of trial court's decision on matter of agency, evidence must be construed most strongly in favor of such decision and the conflicting evidence disregarded. Civ.Code, §§ 2298, 2300, 2307, 2317.

**9. Principal and agent ⇐151(3)**

Where son had previously transacted authorized business for father, father's failure to notify grain dealer to make no more sales and to render no further services to son for father and that all authority of anyone to act for him had been revoked was a failure to exercise ordinary care and dealer was warranted in continuing to do business with son as ostensible agent of father. Civ.Code, §§ 2298, 2300, 2307, 2317.

**10. Principal and agent ⇐23(2), 24, 123(1), 124(1)**

Agency and extent of power of agent are questions of fact which may be established by circumstantial evidence.

**11. Principal and agent ⇐20(2)**

As proof of agency a previous course of dealing, sanctioned or ratified by principal is competent, as having a tendency to prove agency although jury must determine weight of proof for such purpose.

**12. Estoppel ⇐72**

Where defendant, who had dealt with plaintiff through agency of defendant's son, neglected to advise plaintiff of revocation of son's agency at a time when plaintiff would still have had time within limitation period to commence an action on an old account, plaintiff as an innocent person was entitled to rely on limitation period commencing at date of last transaction with son. Civ.Code, § 3543; Code Civ.Proc. § 337, subd. 2.

**13. Evidence ⇐313, 589**

In action to recover the balance due on an open book account, defendant's testimony that he protested to plaintiff's manager, since deceased, that defendant was being charged with more merchandise than he received was of the weakest kind and trial court was not compelled to accept defendant's testimony if not satisfied with defendant's veracity.

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Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by J. K. Thompson, doing business under the fictitious name of Oroville Credit Bureau, against Manuel T. Machado and Saraphina Machado to recover on an assigned claim a balance alleged to be due upon an open book account for goods sold

and services performed by plaintiff's assignee for defendants. From a judgment for plaintiff against defendant Manuel T. Machado, such defendant appeals.

Affirmed.

Seth Millington, of Gridley, for appellant.

Clewe & Deahl, of Oroville, for respondent.

PER CURIAM.

Plaintiff, as assignee of Walter Jansen & Son, brought this action for the recovery of $1194.43, alleged to be the balance due upon an open book account for goods sold and services performed by Walter Jansen & Son for defendants. A second count was based upon an account stated for the same amount.

Defendant denied the allegations of the complaint and also pleaded the statute of limitations, Code of Civil Procedure, sec. 337, subd. 2. A jury being waived, the cause was tried by the court and resulted in a judgment for plaintiff, on the first count only, against defendant Manuel T. Machado alone. From that judgment said defendant has prosecuted this appeal, contending that the evidence introduced by plaintiff is insufficient to show an open book account, that even if it does it shows that plaintiff closed his account in 1939, and that, as the action was not brought until 1945, recovery was barred by the statute of limitations.

As for the first of these contentions, the evidence shows that during the time here involved, Walter Jansen & Son were engaged in the business of buying and selling grain and beans, the manufacture and sale of feeds, and the milling of grains. The bookkeeping system used by them was that used by banks and is known as the Burroughs Bookkeeping Machine System. Under that system when a sale was made or a transaction entered into, a tag, showing the items, was made in duplicate on a billing machine. One of these tags was given to the customer and the other was filed in the office. The following day the transactions shown by the tags were entered on what is referred to as a "hard sheet", comparable to a ledger leaf, which constituted a permanent record. Every month a statement was sent each customer, showing the debits and credits for the preceding month, and the debit balance. Testimony to this effect was given by Walter Jansen, general partner in the business of the company, who was in charge of same. It was corroborated by Edward Anderson who had worked for the company since 1933, and had been general manager since 1941, who also stated that he supervised the work of the bookkeepers. This witness identified the hard sheet showing Machado's account and said sheet was introduced in evidence as plaintiff's Exhibit 9. The testimony of these witnesses also showed that in 1940 the mill building and office of the company were destroyed by fire, the only records saved being some hard sheets which were in a safe. The sales tags were destroyed and the hard sheets did not show the specific items, but only the debits and credits. The hard sheet pertaining to Machado's account, which was among those saved, showed a balance of $1371.07 brought forward in October, 1936, which was followed by debits and credits for the succeeding years, including August, 1943. The balance shown thereon at the end of 1939 was $1194.43. No transactions were thereafter recorded until February, 1942, at which time entries were made showing a charge of $10.34 on February 11th, a charge of $7.70 on February 28th, and a credit of $18.04 on the latter date. On February 4, 1943, charges were made for $7.08 and $6.20, and on February 6th a credit for $13.28 was entered. On August 16, 1943, a further charge of $13.60 was made, and, on the same day there was a credit for the same amount. The balance due was then, as in 1939, $1194.43.

The rules as to what is admissible to prove such an account have been greatly liberalized by the enactment in 1941 of sections 1953e to 1953h of the Code of Civil Procedure, the "Uniform Business Records as Evidence Act." Section 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near

the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." And section 1953g provides: "This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it."

[1, 2] In Loper v. Morrison, 1944, 23 Cal.2d 600, 607, 145 P.2d 1, the Supreme Court said that the purpose of the said act was to enlarge the operation of the business records exception to the hearsay evidence rule; and that the object was to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event; and that it is not necessary that the person making the entry have personal knowledge of the transaction; that cases decided before the aforesaid act became effective in this state are not controlling. Also see Arques v. National Superior Company, 67 Cal.App.2d 763, 777, 155 P.2d 643; Doyle v. Chief Oil Co., 64 Cal.App.2d 284, 292, 148 P.2d 915; Barth v. Adelstein, 66 Cal.App.2d 406, 408, 152 P.2d 498; H. F. Shepherdson Co. v. Central Fire Ins. Co., 220 Minn. 401, 19 N. W.2d 772, 777–778.

[3] In People v. Caldwell, 1942, 55 Cal.App.2d 238, 254, 130 P.2d 495, 503 (hearing in Supreme Court denied), the court said that "In the case of the conduct of the business and affairs of an establishment, it is presumed that the regular course of business of such establishment is followed, Code Civ.Proc., § 1963, subd. 20, and that the books and records of an establishment truly reflect the facts set forth in such books. Code Civ.Proc. § 1953f."

[4-6] We are satisfied that under the authorities above cited there was sufficient proof of an open book account and that the records relied upon were properly admitted in evidence, since the trial court was obviously satisfied that the sources of information, method and time of preparation were such as to justify their admission, and it is the duty of the courts to so construe the Uniform Business Records as Evidence Act as to facilitate and not to hamper the effectuation of its purpose. It is a matter of common knowledge that many business firms employ the system used by Walter Jansen & Son, making tags at the time of a sale or transaction, giving the customer a copy of such tag and filing the original, entering the debits and credits on hard sheets instead of in a bound ledger, and sending a statement to the debtor each month.

[7] As for the correctness of the account, that was a matter of fact for the trial court which is not without support in the evidence. Machado admitted doing business with the Jansens between 1935 and 1939. He was sent monthly statements none of which was returned, and he admitted receiving some of them, and produced 21 of such statements. Defendant pointed out no item of charge prior to 1942 which he could dispute, and while he testified that before the death of the manager, Mr. Fowler, he asked him for an itemized statement because he thought that he was being charged for things that he did not get and asserts that he never saw any of the duplicate tags issued by the company, he did not ask to see the originals on file, and did not make any protests regarding the balance due appearing on his monthly statements to anyone other than Mr. Fowler, either before or after the latter's death. His veracity and the weight to be given his testimony were matters for the trial court alone. Plaintiff's witness Anderson testified that he had himself delivered feed to Machado's ranches on more than one occasion, and that copies of invoices covering the purchases were left with the products delivered, usually under the top sack.

As for appellant's contention that plaintiff's action was barred by the statute of limitations, he asserts that the entries on the company's books pertaining to transactions in 1942 and 1943 were not authorized by or known to him, and that such entries cannot, therefore, be relied upon to toll the statute. The testimony shows, regarding such transactions, that on February 11, 1942, defendant's son drove up to the Walter Jansen & Son plant in defendant's truck and brought 10340 pounds of barley to be rolled. The charge for this, amounting to $10.34, was entered on de-

fendant's account on the son's instructions to "charge it to the old man." On February 28, 1942, the son again came to the plant in defendant's truck and had 7700 pounds of barley ground at 10¢ per hundred, and the item of $7.70 was charged to defendant's account. On the same date, February 28, 1942, the aggregate of the two above items, viz., $18.04, was paid by a check signed by defendant in blank, in which the name of Walter Jansen & Son and the amount of the check were inserted by the son; and credit for the amount was entered on defendant's account. Next, on February 4, 1943, the son again came to the plant in defendant's truck and brought 7080 pounds of rice screenings to be ground at 10¢ a hundred, and the charge of $7.08 was entered on defendant's account; and on the same date the son had 6200 pounds of wheat ground at 10¢ a hundred, making $6.20, and the last two above items were charged on defendant's account in the aggregate sum of $13.28. On February 6, 1943, the charge of $13.28 was paid by the son with defendant's check. On August 16, 1943, defendant's account was charged with $13.60 and on the same day was credited with $13.60 paid with defendant's check.

[8] Appellant does not contend that the foregoing transactions did not take place as shown by plaintiff's witnesses, but he asserts that there is no showing that they were ever authorized by him, or that the son was acting as defendant's agent; that the transactions were the son's; and that agency cannot be proven by the declarations of the agent not made in the presence of his principal or acquiesced in by him. However, other facts appear which, with the inferences that the trial court was authorized to draw therefrom, give support to the conclusion of the trial court that the son was acting as the agent of his father when the charges were made on defendant's account in 1942 and 1943. In support of the trial court's decision on the matter of agency, the evidence must be construed most strongly in favor of same, and the conflicting evidence disregarded. There is evidence that the son lived with his father, and worked for him, that the son had previously acted for his father, that the father himself had not previously acted for himself in his dealings with Jansen & Son, that defendant had never instructed that company that his son no longer had authority to act for him; that the son had no place of his own and did not raise oats, barley or rice, while defendant had two ranches upon which he raised those products; that the son owned no livestock other than two saddle horses for which he obviously would not use the rice hulls or wheat that were ground, nor any such quantity of grain as he had milled. There are also the further significant facts that statements sent to defendant by the company showed transactions in the years 1942 and 1943, but defendant never disavowed them, though he said he always examined his monthly statements and checked them against previous ones, and that the checks with which these charges were paid were signed by defendant and made out to Walter Jansen & Son, and defendant said he always examined his cancelled checks when they were returned to him by the bank to ascertain the amounts thereof, to whom they were issued and for what. He therefore must have known that charges were made to his account and paid for with his checks in 1942 and 1943. Furthermore, one of the statements which he produced showed debits and credits for those years, yet he made no protest to the company about these items. In making his complaints to Mr. Fowler, who had died in 1941, he said that he thought he was being charged for stuff that he never bought, but he did not deny owing the company at least some part of the balance shown by the statements to be owing.

Section 2298 of the Civil Code provides that an agency is either actual or ostensible. Section 2300 of the same code provides than an agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Section 2307 of that code provides that an agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification. Section 2317 of the same code provides that ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

[9] In view of the above code provisions, if defendant did not intend to do any more business with Walter Jansen & Son after February, 1939, since his son had previously transacted authorized business there for his father, defendant failed to exercise ordinary care in not notifying Walter Jansen & Son to make no more sales to nor render any further services for defendant and that all authority of anyone to act for him had been revoked. Defendant gave Walter Jansen & Son no notice relative to agency.

[10] In Bergtholdt v. Porter Brothers Company, 114 Cal. 681, 688, 46 P. 738, the court stated that agency and the extent of the power of an agent are questions of fact which may be established by circumstantial evidence. See, also, Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 704, 92 P.2d 812; Hazard, Gould & Co. v. Rosenberg, 177 Cal. 295, 299, 170 P. 612; Ferroni v. Pacific Finance Corporation of California, 21 Cal.2d 773, 779, 135 P.2d 569.

In the latter case, 21 Cal.2d at page 779, 135 P.2d at page 572 the court said: "Unquestionably, under the circumstances here present, evidence of a prior course of dealing between appellant and the partnership in similar transactions would be relevant on the question of an agent-principal relationship between them, and that appellant was authorized as such to make the contract on behalf of the partnership. An implied agency relationship may arise from the words and conduct of the parties and the circumstances of the particular case. [Cases cited.]"

[11] In 2 C.J., § 713, p. 947, it is said: "As proof of agency, a previous course of dealing, sanctioned or ratified by the principal, is competent, as having a tendency to prove agency in the given case, although the jury must determine its weight for such purpose." See also, 3 C.J.S., Agency, § 324, p. 290.

In the case of Gaine v. Austin, 58 Cal. App.2d 250, 261, 136 P.2d 584, 590, we held: "An agent's authority may be proved by circumstantial evidence [cases]; and it may likewise be implied from circumstances [cases]."

In County First National Bank of Santa Cruz v. Coast Dairies & Land Co., 46 Cal. App.2d 355, 366, 115 P.2d 988, 994, the court said: "The two essential elements of an ostensible agency are: (1) The third person must believe that the agent had authority; and (2) such belief must be generated by some act or neglect of the person or company to be held. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. Evidence that similar acts of the agent were approved by the principal establishes ostensible authority, if the other element of belief is present. See cases collected and commented on in 1 Cal.Jur. p. 742, sec. 42."

Whether such agency existed in this case was a question of fact for the trial court. (Stanhope v. Los Angeles College of Chiropractic, 54 Cal.App.2d 141, 146, 128 P.2d 705; 1 Cal.Jur., sec. 139, p. 865.) In view of defendant's receipt of monthly statements into the year 1944, and that each statement showed debit and credit items for the preceding month, and the fact that defendant received and examined his cancelled checks from the bank and some of these were used in the 1942-1943 transactions, it was the defendant's duty to notify Walter Jansen & Son that no one had authority to transact business for him if such was the fact, particularly for the reason that prior to February, 1939, the son had made authorized purchases.

In Dunlap v. Dean, 109 Cal.App. 300, 308, 292 P. 991, 995, the court quoted from other authorities as follows: "The respondent in this case, upon receipt of the July statement, was under the necessity of acting promptly. The law as stated in the case of Quinn v. Dresbach, 75 Cal. 159, 16 P. 762, 7 Am.St. Rep. 138, is controlling in this case. We quote from the syllabus: 'Where a person is the agent of another in the commencement of a transaction, and such other is chargeable with knowledge that the first is continuing to act in the matter in some way, the inference which he ought to draw is that the person assuming to act as agent is continuing to act in the same capacity in which he commenced, and it is negligence not to repudiate the agency.' Here, it was simply a continuation of the former action, and the respondent is estopped by reason of his negligence in not immediately notifying the plaintiffs upon receipt of the July statement that the authorization theretofore

given to purchase supplies and render him directly liable had been withdrawn."

[12] When the son entered into the transactions in February, 1942, the account was not barred by the statute of limitations and had a little over one year more to run before becoming barred. Had defendant acted promptly upon receipt in March, 1942, of his statement from Walter Jansen & Son for the previous month showing debit and credit entries, and upon examination of his cancelled checks to Walter Jansen & Son for February, 1942, and notified Walter Jansen & Son that the transactions were not authorized by him, the company would have had almost a year longer within which to commence an action on the account. This seems to be a proper case for invoking the maxim set forth in section 3543 of the Civil Code: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

In Ballard v. Nye, 138 Cal. 588, 598, 72 P. 156, 160, the court said: "We are mindful of the general rule that a party must have full knowledge of all the material facts before the doctrine of ratification can be applied. 'Ignorance of such facts, however, can avail nothing where it is intentional and deliberate, or where the circumstances are such as reasonably to put the principal upon inquiry.' Mechem on Agency, § 148. This general rule is intended to protect the vigilant, not to aid those who, advised by the situation and surroundings that an inquiry should be made, make none; and ignorance of the existence of facts which might have been ascertained with ordinary diligence is no protection. Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed, in law, possessed of such facts as the inquiry would have disclosed."

See, also, Chain v. Ehrman, 92 Cal.App. 334, 336, 268 P. 438, and 1 Cal.Jur., § 71, p. 780.

[13] Also some significance may be attached to the fact that defendant's alleged protests that he thought he was being charged with more stuff than he got were made to no one other than Mr. Fowler, who was dead at the time of the trial. Such testimony is of the weakest kind, not only because it is that of an adverse party but because no one is left to dispute it (Smellie v. Southern Pac. Co., 212 Cal. 540, 559, 560 299 P. 529). The trial court was not compelled to accept the testimony of defendant if it was not satisfied with his veracity, and the record shows that such testimony was at times contradictory and his answers evasive.

The judgment is affirmed.




78 Cal.App.2d 900

## CARLSBAD MUT. WATER CO. v. SAN LUIS REY DEVELOPMENT CO. et al.

Civ. 3643.

District Court of Appeal, Fourth District, California.

April 4, 1947.

**1. Waters and water courses ⇐156(4)**

A reservation clause in deed that right was expressly reserved by grantor to develop, pump and extract waters from described lands for use of irrigation, domestic and other purposes was not repugnant to general grant of deed conveying all riparian rights to waters of river. Civ.Code, §§ 1638, 1641, 1652; Const. art. 14, § 3.

**2. Waters and water courses ⇐156(5)**

Where original owner of riparian land conveyed water rights to another but reserved right to pump and extract waters from the lands for irrigation, domestic or other purposes, and original owner thereafter conveyed the land to defendant company which executed deeds to other defendants with proportionate shares of water rights, defendants succeeded to all riparian rights which the original owner reserved in the deed of the water rights. Civ.Code, §§ 1638, 1641, 1652; Const. art. 14, § 3.

**3. Waters and water courses ⇐156(4)**

A deed of water rights containing an exception passes all the rights embraced in the terms of the grant, less what is included in the exception.

**4. Waters and water courses ⇐156(7)**

Where grantor of water rights gave grantee the right to divert water from river at points above grantor's lands, deed did not limit point of diversion of water by grantee to dam erected 17 miles upstream by grantee's successor in interest, or to any specified point above the grantor's land.

**5. Waters and water courses ⇐156(4)**

If reservation clause in deed of water rights was repugnant to the grant of the deed, it was void and granting part would prevail, and successors in interest of grantor would have acquired no riparian rights by their deeds, but if reservation was reconcilable to granting clause, extent of riparian rights of grantor's successors in interest was required to be measured by what was reserved or excepted by the reservation clause. Civ.Code, §§ 1069, 1070.

**6. Waters and water courses ⇐40**

A riparian right is a part and parcel of the land.

**7. Waters and water courses ⇐40, 153**

All riparian owners of a common water right have a common right therein and each is entitled to sever his share for use on his riparian land.

**8. Waters and water courses ⇐42**

A riparian owner has the right to make any reasonable and beneficial use to himself on the riparian land.

**9. Waters and water courses ⇐100, 101**

With respect to sub-surface flow, all riparian owners share correlatively, just as in the surface flow.

**10. Waters and water courses ⇐153**

One riparian owner cannot by grant or otherwise, extinguish or diminish the riparian rights attached to the lands of other non-consenting riparian owners.

**11. Waters and water courses ⇐49**

To assure each riparian owner his share of water in a stream, it may be apportioned among the various users in a suit in equity brought for the purpose, and it is necessary to bring into court only those between whom there is a dispute as to relative rights.

**12. Waters and water courses ⇐49**

In a suit in equity to apportion water among various users, courts may regulate the use of the water among the riparian owners so that each obtains his just proportion, and, in so doing, it may divide the water on a time or rotation basis, or on a quantitative basis and as to sub-flow or underground waters, a definite capacity should be fixed.

**13. Waters and water courses ⇐152(10)**

Where a riparian or overlying owner brings action against an appropriator, court must determine whether such owners, considering all needs of those in particular water field are putting waters to any beneficial use, giving consideration to all factors involved, including reasonable methods of use and diversions, and, from consideration of such uses, trial court must then determine whether there is a surplus in the water field subject to appropriation. Const. art. 14, § 3.

**14. Waters and water courses ⇐127**

A riparian owner, as against an appropriator whose right has not ripened into a right by prescription, is not entitled to the full flow of the stream as it is wont to flow in a state of nature without diminution, but the appropriator's rights are limited by the doctrine of reasonable use which applies between riparian owners and appropriators. Const. art. 14, § 3.

**15. Eminent domain ⇐84**
**Waters and water courses ⇐127, 156(1)**

Water rights may be severed from land by grant, condemnation, or prescription.

**16. Waters and water courses ⇐156(2)**

Where original owner of riparian land conveyed all riparian rights to waters of river but expressly reserved the right to develop, pump and extract waters from the lands for the use of irrigation, domestic and other purposes, sale was in effect a sale of a portion of the riparian rights.

**17. Waters and water courses ⇐156(5)**

Where original owner of riparian land conveyed all riparian rights to waters of river but expressly reserved the right to develop, pump and extract waters from the lands for irrigation, domestic and other purposes, and successor in interest of grantee constructed a dam 17 miles above stream and diverted all water above the dam, successors in interest of original owner were not entitled to use water from the river to irrigate their lands as though waters had not been impounded and diverted by the dam above stream. Water Code, §§ 100–102, 104; Civ.Code, §§ 1638, 1641, 1652; Const. art. 14, § 3.

**18. Waters and water courses ⇐133**

If under reservation clause of deed granting water rights to upper riparian owner, successors in interest to grantor did not have sufficient water for domestic and irrigation purposes, because of diversion of water by upper riparian owner, they could apply to the Division of Water Resources for a permit to appropriate water, and if the Division should find that water was available, a permit might be granted. Water Code, §§ 100, 101.

**19. Waters and water courses ⇐152(3)**

Before appropriator of water in river could invoke power of court of equity to restrain diversion of water above its lands by riparian owners appropriator must show first that there was a wrongful diversion of water above its lands, and second that amount wrongfully diverted would be rightfully used by appropriator and that water was being used or would be used for reasonable and beneficial purposes. Water Code, §§ 100, 101, 226, 2000, 2001; Const. art. 14, § 3.

**20. Judgment ⇐203**

There should be but one final judgment and, in absence of a clear showing, it is not to be presumed that trial court will attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy.

**21. Judgment ⇐233**

Generally, there must be an express adjudication of the subject matter of a controversy as to all parties plaintiff, and all of the parties defendant.

**22. Appeal and error ⇐110**

No appeal lay from order denying motion for new trial.

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Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Carlsbad Mutual Water Company, a corporation, against the San Luis Rey Development Company, a corporation, and others to enjoin the defendants from diverting waters of the San Luis Rey River. From an adverse judgment and from an order denying plaintiff's motion for new trial, the plaintiff appeals.

Appeal from order dismissed, and judgment reversed.

Eberhard & Zeigler, Ray C. Eberhard, and Elisabeth Eberhard Zeigler, all of Los Angeles, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

GRIFFIN, Justice.

This action was commenced by plaintiff and appellant Carlsbad Mutual Water Company, a corporation, against defendants and respondents San Luis Rey Development Company, a corporation, et al., to enjoin it and other named defendants from diverting waters of the San Luis Rey River.

Plaintiff company was organized for the sole purpose of supplying water for domestic, irrigation and other uses, to the holders of its capital stock. It is also the sole source of supply of water for the community of Carlsbad. It has, since 1914, secured, substantially, its entire water supply from the surface and subterranean waters of the San Luis Rey River at a point only a few miles east of its outlet into the Pacific Ocean.

Plaintiff's complaint alleges that it owns 15 acres of land riparian to the San Luis Rey River; that in 1913 and 1914 the South Coast Land Company, plaintiff's predecessor in interest, commenced and completed the drilling and construction of wells and pumping plants on said land for the purpose of extracting and developing water from said river and the diversion thereof to land in and about the town of Carlsbad;

that at that time the South Coast Land Company owned approximately 1,100 acres of land in the Mission Basin, riparian to the river, and also owned certain rights, duly conveyed to it by other riparian owners, to develop and convert any part of said water for use in places within and without that watershed; that on March 14, 1915, that company deeded to plaintiff the right to enter upon certain described lands embraced within the 1,100 acres and to pump water to the extent of 200 miner's inches to other lands.

The answer admits most of these allegations but denies the rest of them by reason of lack of information.

At the trial it was stipulated between the parties that "plaintiff company had sufficient interest to maintain this action". Plaintiff is not only an appropriator but also an overlying landowner, as well as a riparian owner. We will therefore assume that this dispute involves rights existing between a lower and upper riparian landowner, as well as a determination of rights between an appropriator and an upper riparian landowner.

In Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486, it was said quoting from the syllabus, that "In addition to the rule of reasonableness of use as previously applied, the constitutional amendment whereby section 3 was added to Article XIV has enjoined the doctrine of reasonable use as between a riparian owner and an appropriator, the limitations and prohibitions of said section, and the rule of reasonable use, now apply to every water right and every method of diversion; and its plain and positive mandates, which admit of no exception, apply to the use of all water, under whatever right the use may be enjoyed." See, also, Jones v. Pleasant Valley Canal Co., 44 Cal.App.2d 798, 807, 113 P.2d 289; and Larsen v. Apollonio, 5 Cal. 2d 440, 55 P.2d 196.

On October 7, 1938, the Division of Water Resources made an order granting plaintiff the right to divert, from the river, annually, 750 acre feet of water.

Plaintiff claims that defendants. who own an aggregate of approximately 1,700 acres of land located about 10 miles above plaintiff's point of diversion, are preparing to and intend to, pump and divert water from said river and use it on their lands for irrigation and other purposes under a claim of riparian right. In the ownership of their respective parcels of land defendants are successors in interest of William E. Gird. On January 24, 1906, Gird executed a deed to one Charles Forman, which by its terms conveyed "all riparian rights to the waters of the San Luis Rey River that may belong to or be appurtenant to" certain described lands, which included all of the land owned by all of the defendants and other land adjacent thereto. Following the description of the land, said deed contains the following clauses: "Together with the right to divert, by either conduits, canals, pumping plants or other devices, water from San Luis Rey River at points above the lands of the party of the first part hereinabove described. Together with the right to impound waters of the San Luis Rey River by the construction of a dam at a point in or above Section 4, Township 11 South, Range 2 East, S.B.B.&.M., with the right to conduct said waters so impounded or diverted to such lands as party of the second part may desire * * * But this conveyance is made subject to the right of the party of the first part, and *the right is hereby expressly reserved to develop, pump and extract waters from the lands hereinabove described* for the use of irrigation, domestic and other purposes upon the lands hereinabove described. The grantee hereby expressly waives any and all claims for liability on the part of the grantor for damages to the pipe lines or canals of grantee crossing said property growing out of the use of his property by said grantor."

The Henshaw Dam was erected 17 miles upstream from defendants' property by the San Diego County Water Company, successor in interest to Charles Forman. It now impounds all the surface and subterranean flow of the river back of said dam which would have otherwise flowed down said river to the lands of defendants.

Subsequent to the execution of that deed, defendant San Luis Rey Development Company acquired the 1,700 acres aforementioned. On February 15, 1944, the defendant development company executed deeds

conveying to certain other defendants portions of the 1,700 acres. There was conveyed with each of the several deeds one share of stock in the San Luis Rey Heights Mutual Water Company for each one acre of land acquired.

Defendants admit in their pleadings that they intend to pump, extract and divert from said river, and use on their respective lands, reasonable quantities of water for domestic and irrigation purposes.

Plaintiff alleges in its complaint and claims that defendants, unless restrained, will pump, extract and divert from said river large quantities of water, and will deprive plaintiff and other riparian owners below of water which they are rightfully entitled to use and appropriate for the purposes heretofore described.

Plaintiff also claims (based upon Bulletin 48a of the Division of Water Resources in evidence) that if defendants are permitted to take water from the river to which they are not entitled the inevitable result will be that, sooner or later, the flow into the Mission Basin from which plaintiff's water supply is derived, will be insufficient to prevent the intrusion of salt water from the ocean and that that basin will be destroyed as a source of water for any purpose.

After issue was thus joined, counsel for the respective parties signed a written stipulation agreeing that they all desired to conserve time and expense in the trial of the action, and agreed that the "legal effect of the two deeds, * * * Exhibits 'A' and 'B', be first determined by the court; * * * That the issues raised by paragraphs XII and XVII (the deed from Gird to Forman and the deed, dated February 19, 1944, from the Development Company to San Luis Rey Heights Mutual Water Company, of all water and water rights appurtenant to the described land) * * * be first tried and determined * * * and that the evidence be limited and restricted to such issues; * * * That no evidence be * * * received respecting the other issues raised by the complaint and answer pending" such determination. It was then stated by counsel for defendants that in view of the stipulation, that they need not go any farther and might proceed with the argument as to the meaning of those deeds.

The court granted the request and the deeds themselves were admitted in evidence. Argument of counsel ensued. Some evidence was taken explaining the map received in evidence which set forth the acreage and ownership and the use or uses to which it was and had been put. A witness described the pumps that had been installed in the river basin, the location of present tanks now used and the dirt fill or reservoir constructed for the purpose of holding and storing water pumped from said river lands. After considerable argument it was stipulated that Henshaw Dam has never overflowed since it was built; that no surface water has been released to defendants from the dam; that no sufficient information is available as to the subterranean flow, and it was finally stipulated that during the negotiations in reference to the original sale of the water rights for $2,500, a letter, dated January 22, 1906, was written by Forman to Gird, which read in part as follows: "We have added a clause to the agreement (clause referring to reservation of right to use water on his land and waiver of damages), as you suggested, and we hope it will be satisfactory to you. It is our present intention to use nothing but a pipeline across your property."

An objection to an offer to prove other surrounding circumstances as to the execution and meaning of the clauses in the deed was sustained. The court then expressed the fact that it was "*confused about the issue or issues that you wish to try first* * * * Here is what I had in mind, * * * that if the use of this water by the defendants has no disadvantage to the plaintiff, then of course you are not in court. You would have to establish that by some proper proof showing that by the use of this water you were deprived in some way of the use of water from the river and there wasn't enough there to supply * * * plaintiff. Mr. Higgins: Well, if Your Honor please, we are glad you brought that up because that is one of the things that we are postponing depending upon Your Honor's construction

of the deed * * * If Your Honor holds one certain way then we are going to ask that the help of the Division of Water Resources be secured as to the use of water, the amount of damages and the amount that is there and available, and all that, but for the purposes up to now, under our stipulation, we are only attempting to try the validity of these two deeds. The Court: I wanted to be clear about that before we went farther."

After further argument the case was submitted on the issues presented for determination. The trial judge signed a memorandum opinion reciting that the parties had stipulated "to try and submit * * * the following issues and no others, at this time." "1. Did William E. Gird, the predecessor in interest of the defendants, by his conveyance of January 24, 1906, to Charles Forman, extinguish the riparian rights appurtenant to the tract of land now being developed by the defendants? (2) Did the conveyance by San Luis Rey Development Company to the San Luis Rey Heights Mutual Water Company, dated February 19, 1944, together with conveyances to individual purchasers of tracts of land not contiguous to the stream, and the plan adopted to convey to such purchasers one share of stock in the said water company, for each acre of land conveyed to such purchasers, extinguish the riparian rights appurtenant to such non-contiguous tracts so conveyed?"

After discussing the several cases cited, the trial judge stated that the granting and reservation provisions in the deed were reconcilable; that "Riparian rights include the right to have the entire flow of the stream pass through the lands of the riparian owner; as well as the right of the riparian owner to use the waters of the stream;" that "When by this deed Gird reserved to his land the right to develop, pump and extract waters from the lands for irrigation, domestic and other purposes, he did not thereby reserve *all* of his riparian rights, thereby establishing a repugnancy in the deed which is irreconcilable; but he did dispose of his right to have the continued flow of the whole water of the whole watershed of the San Luis Rey River, pass through his land; that is, he waived the right to have the waters of the Warner's basin (or Henshaw basin), flow by his land. He reserved less than the whole granted."

As to the other issue, he stated: "The effect of the establishment of this right upon the use of water by other riparian owners, and upon other water users with other established rights has been expressly reserved for further trial and determination. Let the further trial of this matter as to the other issues involved be set down for a date certain."

For some reason the court then signed findings reciting that the issues were limited as set forth in the stipulation and "reserved jurisdiction" to take evidence and make findings on the remaining issues. It then found generally in accordance with the facts here related and then specifically found that the 1,700 acres that belonged to defendant development company was riparian to the San Luis Rey River; that it was subdivided and proportionate shares of said riparian rights were sold to the purchasers of the subdivided property through the agency of the San Luis Rey Heights Mutual Water Company, and concluded that the lands belonging to the defendants herein named, owning property in the subdivision, were riparian to the San Luis Rey River; that the deed from Gird to Forman granted Forman and his successors in interest the right to interrupt and interfere with the natural flow of the river, and to dam it and impound waters thereof by construction of a dam above the point indicated in the reservation in the deed, and to divert waters so impounded to such lands outside the watershed of said river; that said deed did not grant him any other or further riparian rights nor did said deed divest said lands then owned by Gird of the right to divert from the river and use upon said lands the water which Forman did not actually impound or divert; that as to all water not actually impounded or diverted by him, Gird retained and reserved complete riparian rights to use said water upon all lands described in said deed, and defendants herein succeeded to all rights which Gird reserved; that the deeds to the property in the subdivision and the sale of the shares

of water stock were executed as a part of a scheme or plan for the subdivision of the lands formerly owned by the development company; that each defendant is entitled, as a riparian owner, to use the waters of the river upon the portion of land referred to in the complaint, for all purposes for which any other riparian owner might use it, subject to the right of the San Diego County Water Company, as successor in interest of Charles Forman, to impound the waters of said river at any point in or above that described in the deed, and to divert any waters so impounded. It finally concluded that the contemplated use of the waters of the river by defendants upon the land referred to in the complaint is not a violation of any right of plaintiff, and therefore it is not entitled to any relief against defendants. Judgment was entered accordingly. After the court denied a motion for new trial plaintiff appealed.

Plaintiff's main argument is that since Gird deeded to Forman "all riparian rights to the water" of said river "that may belong to or be appurtenant" to such land belonging to the grantor, the land is divested of its riparian right, and an independent clause in said deed reserving the right "to develop, pump and extract waters *from the lands* * * * for the use of irrigation, domestic and other purposes" upon the land, is a reservation repugnant to the grant and therefore void.

[1] We are in accord with the court's finding that the reservation clause is not repugnant to the general grant. Secs. 1638, 1641 and 1652, Civ.Code; Los Angeles & Salt Lake Ry. Co. v. United States, 9 Cir., 140 F.2d 436; Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100; Pavkovich v. Southern Pac. R. Co., 150 Cal. 39, 87 P. 1097; 4 Tiffany on Real Property, 3rd Ed. Vol. 4, Sec. 975, pp. 54, 55; Hartwig v. Central-Gaither Union School Dist., 200 Cal. 425, 253 P. 733; Seligman v. Carr, 8 Cal.App. 572, 575, 97 P. 324; Burnett v. Piercy, 149 Cal. 178, 86 P. 603.

[2] We also concur in the finding that defendants herein succeeded to all riparian rights which William E. Gird *reserved* in the deed to Charles Forman. Lux v. Haggin, 69 Cal. 255, 393, 4 P. 919, 10 P. 674; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242; Painter v. Pasadena Land & Water Co., 91 Cal. 74, 27 P. 539; Spring Valley Water Co. v. County of Alameda, 88 Cal.App. 157, 263 P. 318; Barnett v. Barnett, 104 Cal. 298, 37 P. 1049.

[3] A deed containing an exception passes all the rights embraced in the terms of the grant less what is included in the exception. 6 Thompson on Real Property, Permanent Ed. sec. 3471, p. 698; 84 A.L.R. 1063, 1064; Jacobs v. All Persons, etc., 12 Cal.App. 163, 106 P. 896. The deeds executed by the San Luis Rey Development Company to the San Luis Rey Mutual Water Company and to the other named defendants, transferred proportionate shares of *those water rights* to the purchasers of tracts within the original tract of land. They were so executed as to be a part of a scheme or plan for the subdivision of the entire tract. We agree that each owner is entitled to use *such waters* on the portion of lands referred to in plaintiff's complaint. Forest Lake Mutual Water Co. v. Santa Cruz Land Title Company, 98 Cal.App. 489, 277 P. 172; Stesel v. Santa Ana River Water Co., 35 Cal.App.2d 117, 94 P.2d 1052; 25 Cal. Jur. 1085, sec. 90.

[4] We are not in accord with the court's finding that defendants' use of the water is subject only "to the right of the San Diego County Water Company, as successor in interest of Charles Forman, to impound waters of said river at any point in said river *in and above sec. 4*, T. 11 S.R. 2 E., S.B.M., and to divert any waters so impounded" and that defendants' use or contemplated use of the waters of the river upon other lands is not in violation of any right of plaintiff or that plaintiff is not entitled to any relief.

In addition to the general grant of all riparian rights, the deed specifically granted to Forman "the right to divert, by either conduits, canals, pumping plants or other devices" water from the river at any point *above defendants' lands*, and did not limit such point of diversion to the Henshaw Dam or to any specified point above the grantor's land.

[5] By the grant deed, Gird conveyed to Forman "all riparian rights to the waters of the San Luis Rey River that may belong to or be appurtenant to" certain described lands. This clause was an absolute grant of all such rights, with the reservation or exception of "the right to develop, pump and extract waters from the lands. If the reservation clause was repugnant to that grant and absolutely irreconcilable with it, it was void and the former granting part would prevail and defendants would have acquired no riparian rights by their deeds. Civ.Code sec. 1070; Painter v. Pasadena Land & Water Co., supra, 91 Cal. at page 83, 27 P. 539. If the reservation in the deed is reconcilable and not repugnant to the granting clause, the extent of defendants' riparian rights must be measured by what was *reserved or excepted by that clause.* Spring Valley Water Co. v. County of Alameda, supra; Painter v. Pasadena Land & Water Co., supra; Forest Lake Mutual Water Co. v. Santa Cruz Land Title Co., supra; sec. 1069, Civ. Code.

[6-12] A riparian right has been well defined, and such right is a part and parcel of the land. 25 Cal.Jur. p. 1060, sec. 58 et seq. All riparian owners of a water course have a common right therein, each being entitled to sever his share for use on his or her riparian land. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062. Such riparian owner, by reason of the situation of his land on the stream, has the right to make any reasonable and beneficial use to himself on the riparian land. Mentone Irr. Co. v. Redlands, etc. Power Co., 155 Cal. 323, 100 P. 1082, 22 L.R.A.,N.S., 382, 17 Ann.Cas. 1222. With respect to subsurface flow, all riparian owners share correlatively just as in the surface flow. Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 685, 93 P. 1021. One riparian owner cannot, by grant or otherwise, extinguish or diminish the riparian rights attached to the lands of other nonconsenting riparian owners. Spring Valley Water Co. v. County of Alameda, supra. In order to assure to each riparian owner his share of the water, it may be apportioned among the various users in a suit in equity brought for the purpose. It is necessary to bring into court only those between whom there is a dispute as to relative rights. In such action the court may regulate the use of water among the riparian owners so that each obtains his just proportion, and in so doing it may divide the water on a time or rotation basis, or on a quantitative basis. As to subflow or underground waters, a definite capacity should be fixed, for it is said to be impracticable to give a proportion of the stream. It is impossible to formulate any mathematical rule to determine such rights. Each case will be decided on its own circumstances, which are questions of fact for the trial court. 25 Cal.Jur. pp. 1139, 1140, sec. 152; Stanford v. Felt, 71 Cal. 249, 16 P. 900.

[13, 14] These general rules prevail except such as have been modified by the adoption of Article XIV, sec. 3 of the Constitution. Under the new doctrine, established by the Constitution, this rule has been declared, that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction, but the court must determine whether such owners, considering all the needs of those in the particular water field, are putting the waters to any beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion, and from a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation. The long-standing riparian doctrine has been modified and a riparian, as against an appropriator whose right has not ripened into a right by prescription, is not entitled to the full flow of the stream as it is wont to flow in a state of nature, without diminution by the appropriator, and his rights are limited by the doctrine of reasonable use, which doctrine applies between riparian owners and appropriators, and between overlying owners and appropriators. The new doctrine not only protects the actual reasonable beneficial uses of the riparian, but also his prospective reasonable beneficial uses, and the trial

court should declare that such future or prospective reasonable beneficial uses are paramount to any right of the appropriator, and at the same time permit the appropriator to use the water until the riparian needs it, thus, at all times, putting all of the available water to beneficial uses. It is also suggested that in such cases the trial court might well, by appropriate provisions in its judgment, retain jurisdiction over the cause, so that when a riparian claims the need for water, the right to which was awarded him under such a declaratory decree, the trial court may determine whether the proposed new use, under all the circumstances, is a reasonable beneficial use and, if so, the quantity required for such use. Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 45 P.2d 972.

Chapter 586 of the Statutes of 1913, adopted the Water Commission Act. The Statutes of 1943, chapter 368, established a Water Code. Section 100 thereof declares that because of the conditions prevailing in this state, the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent to which they are capable, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. Section 101 recites that nothing in section 100 or section 101 shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. Section 102 provides that all water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law. Section 104 provides that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. Section 226 sets forth the powers of the department. The act provides that courts may make reference of these subject matters to such department. Secs. 2000 and 2001; Peabody v. City of Vallejo, supra, 2 Cal.2d at page 374, 40 P.2d 486.

[15] Riparian rights may be severed from land by grant, condemnation, or by prescription. Gould v. Stafford, 91 Cal. 146, 155, 27 P. 543, 546. It was there said: "If, therefore, the grantors of the plaintiff, while they owned the land, granted to the corporation * * * all *or any portion* of their riparian rights to the waters of Montecito creek, they thereby, *to the extent of such grant,* severed from the land their riparian rights, and disabled themselves to grant such rights to the plaintiff". (Italics ours.)

[16, 17] By the grant deed here involved, Gird sold to Forman his riparian rights, with certain reservations or exceptions. The construction by the trial court that this sale was, in effect, a sale of *a portion* of those riparian rights is a reasonable construction and will not be disturbed on appeal. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945. Gird's successors in interest now contend that notwithstanding such sale of a greater portion of the riparian rights they still have the right to exercise their original and full riparian privileges and use, irrespective of the effect such use may have upon lower riparian owners or appropriators and their rights. The grantee of the riparian rights, Forman, and his successors in interest, have actually impounded and are diverting all of the water of the river arising above the Henshaw Dam. They permit none of that water to reach defendants' lands. To permit defendants to use water from the stream to irrigate their lands as though such waters were not thus impound and diverted, would result in a double riparian right for defendants' lands. This, to us, seems inequitable and lacking in judicial sanction.

It was said in Duckworth v. Watsonville Water etc. Co., 158 Cal. 206, 217, 110 P. 927, 932: "The McKinley deeds conveyed the entire right to use this water for irrigation on these lands to the defendant's predecessors, and it now belongs to the defendant, and not to Duckworth. A man

may not eat his cake and have it. A man who sells a right to do a thing cannot thereafter exercise the right himself, except by permission of the buyer, and it is immaterial that the buyer may not be using or exercising it."

[18, 19] The conclusion here reached makes it essential that evidence be taken and some finding be made as to the extent of the riparian rights originally owned by Gird, the amount of riparian water actually impounded and diverted by Forman or his successors, and the extent or proportion of the riparian rights to the waters of the San Luis Rey River actually reserved by the grantor under the reservation clause, and what amount is being put to beneficial uses. If, under the reservation clause, defendants do not have sufficient water for domestic and irrigation purposes, there is open to them the same right which any other nonriparian owner has to make application to the Division of Water Resources for a permit to appropriate water, and if that State agency finds that water is available, a permit may be granted. Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049. Of course, before the plaintiff could invoke the power of a court of equity to restrain the diversion of water above its lands, it would be necessary for it to show first, that there was a wrongful diversion of water above its lands, and second, that the amount wrongfully diverted would be rightfully used by plaintiff and that the water is being used or would be used for reasonable and beneficial purposes. Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 156, 36 P. 431; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R.A.,N.S., 772; Secs. 100, 101, Water Code; art. XIV, Sec. 3, Constitution of California.

By reference to the memoranda opinion it is apparent that the trial court did recognize the necessity of taking further evidence. For some undisclosed reason, without setting the case down for further trial, it signed the findings above mentioned and entered a final judgment decreeing that plaintiff was not entitled to any relief.

[20, 21] Our system of procedure contemplates that there shall be but one final judgment in a case, and in the absence of a clear showing, it is not to be presumed that a trial court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy. In general, there must be an express adjudication of the subject matter of the controversy as to all the parties plaintiff and all of the parties defendant, otherwise there is no final disposition of the matters litigated between the parties. 2 Cal.Jur. pp. 140, 141, sec. 19.

[22] The order denying the motion for a new trial not being an appealable order, the attempted appeal therefrom is dismissed. Sec. 963, C.C.P.; Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.




78 Cal.App.2d Supp. 959

**PEOPLE v. WEPPLO et al.**

**C. A. 2242.**

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 24, 1947.

**1. Obscenity ⇐5**

A book is "obscene" if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arising lustful desire. Pen.Code, § 311, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Obscene Book".

**2. Obscenity ⇐19**

Whether a particular book is obscene is primarily a question of fact for the jury. Pen.Code, § 311, subd. 3.

**3. Criminal law ⇐1159(1)**

Jury's determination that book was obscene or indecent cannot be set aside by Appellate Department of the Superior Court unless court can say that jury could

not have reasonably reached such conclusion. Pen.Code, § 311, subd. 3.

**4. Obscenity ⇐5**

A book must be considered as a whole in determining whether it is obscene or indecent. Pen.Code, § 311, subd. 3.

**5. Obscenity ⇐5**

A book cannot be condemned as obscene or indecent merely because it contains somewhere between its covers expressions which taken by themselves alone are obnoxious to the statute, neither can a book escape condemnation because it contains some innocent matter. Pen.Code, § 311, subd. 3.

**6. Obscenity ⇐5**

A book is obscene or indecent if it contains prohibited matter in such quantity or of such nature as to flavor the whole and import to it the qualities mentioned in the statute. Pen.Code, § 311, subd. 3.

**7. Obscenity ⇐17**

Evidence sustained verdict that book involved was obscene or indecent. Pen. Code, § 311, subd. 3.

**8. Criminal law ⇐450**

In prosecution for sale of obscene or indecent book, exclusion of evidence on whether the book was obscene or indecent was proper, since question was for jury. Pen.Code, § 311, subd. 3.

**9. Obscenity ⇐5**

That a book possesses literary merit does not prevent it from being obscene or indecent. Pen.Code, § 311, subd. 3.

**10. Obscenity ⇐1**

Where the introductory words of Penal Code relating to obscenity, that "Every person who willfully and lewdly, either" were followed by five subdivisions enumerating specific acts in the alternative and concluded with "is guilty of a misdemeanor" the introductory words applied to each succeeding subdivision, and none of the acts enumerated constitute an offense unless they are done willfully and lewdly. Pen.Code, § 311, subd. 3.

**11. Statutes ⇐147**

Where Penal Code amended the law by requiring that acts be done willfully and lewdly, the presumption was that a change in the law was intended. Pen.Code, § 311, subd. 3.

**12. Indictment and Information ⇐166**

Where a statute makes a specific intent an element of an offense, such intent must be proved.

**13. Criminal law ⇐568**

A specific intent may be proved by circumstantial evidence reasonably justifying an inference of such intent.

**14. Obscenity ⇐7**

Where book gave no indication that it was obscene or indecent, that obscene or indecent book was in stock in store owned by one defendant and that it was sold to a police officer by the other defendant was insufficient to show that it was "willfully and lewdly sold". Pen.Code, § 311, subd. 3.

**15. Obscenity ⇐16**

In prosecution for willfully and lewdly selling obscene or indecent book, exclusion of testimony whether defendant had any lewd intent in making the sale was error. Pen.Code, § 311, subd. 3.

**16. Criminal law ⇐448(3)**

A witness may be examined concerning intent with which he did an act when that intent is material, even when the defendant is the witness and his intent is an element of the crime charged.

**17. Obscenity ⇐16**

Any reviews commending a book without disclosing that it was in fact an obscene or indecent book and relied on by defendants without knowledge to the contrary in selling, etc., the book would be admissible to prove lack of lewd intent. Pen.Code, § 311, subd. 3.

**18. Obscenity ⇐20**

In prosecution for willfully and lewdly selling, etc., an obscene or indecent book instructing that State was not required to prove that defendants acted lewdly in selling etc., and refusing to instruct to contrary constituted error. Pen.Code, § 311, subd. 3.

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Appeal from Municipal Court of Los Angeles; Arthur S. Guerin, Judge.

Harry Wepplo and another were convicted of selling, etc., an obscene or indecent book, and they appeal.

Reversed, and cause remanded for a new trial.

Parker, Stanbury & Reese, and R. M. Robertiello, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendants were prosecuted and found guilty by a jury on a charge that they did "willfully and unlawfully and lewdly, in the City of Los Angeles, sell, distribute and keep for sale an obscene and indecent book," naming it, in violation of subdivision 3 of section 311 of the Penal Code. That section provides in part as follows:

"311. Every person who willfully and lewdly, either:

"1. * * *; or,

"2. * * *; or,

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; * * *; or,

"4. * * *; or,

"5. * * *, is guilty of a misdemeanor."

[1-3] On appeal defendants contend that the book is not obscene or indecent. A book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." (Commonwealth v. Isenstadt (1945), 318 Mass. 543, 62 N.E.2d 840, 844; see also United States v. Dennett (1930), 2 Cir., 39 F.2d 564, 568, 76 A.L.R. 1092; Dunlop v. United States (1897), 165 U.S. 486, 501, 17 S.Ct. 375, 41 L.Ed. 799, 804.) The question whether any particular book is obscene or indecent is primarily one of fact, to be decided by the jury. Here the book was introduced in evidence as an exhibit, and the jury read it. We cannot upset their determination that it was obscene or indecent unless we can say that upon consideration of the book they could not reasonably reach such a conclusion. (People v. Pesky (1930), 254 N.Y. 373, 173 N.E. 227.)

[4-6] Since section 311, Penal Code, condemns the sale etc. of a *book*, rather than a *part* of a book, we agree with the contention that a book must be considered as a whole in determining whether this law is violated. On this subject we agree with these statements made in Commonwealth v. Isenstadt, supra, (1945), 318 Mass. 543, 62 N.E.2d 840, 843, 844: "It is not to be condemned merely because it may contain somewhere between its covers some expressions which, taken by themselves alone, might be obnoxious to the statute. Halsey v. New York Soc. for Suppression of Vice, 234 N.Y. 1, 4, 136 N.E. 219; United States v. One Book Entitled 'Ulysses', 2 Cir., 72 F.2d 705, 707; United States v. Levine, 2 Cir., 83 F.2d 156. But this does not mean that every page of the book must be of the character described in the statute before the statute can apply to the book. It could never have been intended that obscene matter should escape proscription simply by joining to itself some innocent matter. A reasonable construction can be attained only by saying that the book is within the statute if it contains prohibited matter in such quantity or of such nature as to flavor the whole and impart to the whole any of the qualities mentioned in the statute, so that the book as a whole can fairly be described by any of the adjectives or descriptive expressions contained in the statute. The problem is to be solved, not by counting pages, but rather by considering the impressions likely to be created. For example, a book might be found to come within the prohibition of the statute although only a comparatively few passages contained matter objectionable according to the principles herein explained if that matter were such as to offer a strong salacious appeal and to cause the book to be bought and read on account of it."

[7] Examining the book in the light of these rules, we find ample support for the finding of the jury. Even were we

to accept the reasoning of United States v. One Book Entitled Ulysses, (2 Cir., 1943), 72 F.2d 705, 707, urged upon us in argument, where the court said, "The erotic passages are submerged in the book as a whole and have little resultant effect," we could not say that the jury were bound to come to any such conclusion in this case. However, we do not assent to everything said in that case, which appears to have gone to the extreme of liberality in its interpretation of the statute in favor of the book.

[8, 9] We find no error in the rulings excluding evidence offered by defendants on this point. The jury were competent to decide the question of the character of the book without resort to these adventitious aids. If the book sold by the defendants was in fact obscene, judged by its contents, it would not become any less so because other book dealers were selling it, or the public library had copies of it, or literary critics praised it as a work of literary merit, or because other books equally bad were being openly sold. (See Commonwealth v. Isenstadt, supra, at pages 846, 848, 849 of 62 N.E.2d for discussion of some of these matters.) The fact that a book has literary merit does not prevent it from being obscene, if otherwise it has that character. Halsey v. New York Soc. (1922), 234 N.Y. 1, 136 N.E. 219; Commonwealth v. Buckley (1909), 200 Mass. 346, 86 N.E. 910, 22 L.R.A., N.S., 225, 128 Am.St.Rep. 425. It does not appear that the critics whose opinions were offered discussed the question of obscenity, but if they had done so it would have been proper to exclude the opinions because this was the very issue to be decided by the jury. (32 C.J.S., Evidence, § 446, p. 74; Gardenswartz v. Equitable, etc., Soc. (1937), 23 Cal.App.Supp.2d 745, 753, 68 P.2d 322; People v. Crossan (1927), 87 Cal.App. 5, 16, 261 P. 531.)

[10] The defendants further contend that the court erred in instructing the jury on the matter of intent and in excluding evidence regarding it, and that the evidence fails to show such intent as is necessary to constitute the offense charged. These contentions must be sustained. As already seen, section 311 of the Penal Code begins thus: "Every person who willfully and lewdly, either:". Following this are five numbered subdivisions set off from each other by semicolons, with the word "or" following each semicolon, and at the end of the fifth subdivision, following a comma, are the words "is guilty of a misdemeanor" and a period. Each numbered subdivision begins with a verb and proceeds to describe one or more acts or courses of action. We are particularly concerned here with the part of subdivision 3 above quoted. With a section so worded and set up, the conclusion is inescapable that the introductory phrase above quoted applies to and governs each of the numbered subdivisions which follow it. Consequently, none of the acts described in these subdivisions is a crime unless it is done "willfully and lewdly." In recognition of the correctness of this conclusion, the complaint charges that the sale of the book in question was so made. If authority for this plain conclusion is needed, it may be found in In re Correa (1918), 36 Cal.App. 512, 172 P. 615. There a complaint was filed attempting to charge a violation of subdivision 1 of section 311, but instead of using the introductory phrase above copied, the complaint charged merely that the acts described were done "willfully and unlawfully." The court held this complaint bad because it failed to allege that the acts were done "lewdly," and declared that "an essential element of the crime" was thus omitted.

The statute thus requires a specific intent, and in that respect it differs from those referred to in the cases from other jurisdictions above cited. In the same way it differs from our statutes prohibiting the sale of adulterated food and drugs, with which respondent seeks to establish an analogy. No doubt the legislature could, on the reasoning which justifies the pure food and other similar laws, adopt a statute prohibiting the sale of obscene books regardless of knowledge of their character or without any specific intent (see In re Marley (1946), 29 Cal.2d 525, 175 P.2d 832; People v. Schwartz (1937), 28 Cal.App. Supp.2d 775, 70 P.2d 1017); but the fact remains that it has not done so.

[11] Consideration of the history of this prohibition in our legislation confirms our construction of section 311. Prior to the enactment of the Penal Code, the subject matter of subdivision 3 of section 311 was dealt with by a statute of 1859 (Stats. 1859, p. 297), which contained no words requiring a specific intent to constitute the offense. When the code was enacted, the substance and many of the words of this statute were placed in subdivision 3 of section 311, but the introductory words "willfully and lewdly," which had not appeared in the statute of 1859, were prefixed to them in the manner above stated. This is a material and substantial change, and we must presume that the legislature intended to change the law accordingly. (Bales v. Superior Court (1942), 21 Cal.2d 17, 21, 129 P.2d 685; In re Estate of Broad (1942), 20 Cal.2d 612, 618, 128 P.2d 1; Whitley v. Superior Court (1941), 18 Cal.2d 75, 79, 113 P.2d 449.)

Respondent argues and the trial court apparently believed that this court gave a different construction to this statute in People v. Fananstein (1944) Cr.A.1995.[1] That case also involved a prosecution for violation of subdivision 3 of section 311 of the Penal Code, and in the opinion affirming a conviction, this court, after stating one of the defendant's arguments to be that the evidence was insufficient to show that he lewdly kept obscene writings, papers or books for sale, went on to declare this rule in regard to it: "One who keeps for sale obscene or indecent writings, papers or books, *knowing the character thereof,* [emphasis now made] acts lewdly in so doing because the sale of such 'literature' tends to demoralize those into whose possession the same may come. (36 C.J. 1035.)" Following this statement, this court said that section 311 should be liberally construed to effectuate its purpose of stopping the circulation of obscene or indecent "literature," and that any other interpretation of subdivision 3 "than that here given would have the practical effect of nullifying that subdivision." This is no ruling that a lewd intent need not be proved in order to establish a violation of subdivision 3 of section 311, but rather a holding that the evidence there showed defendant's knowledge of the character of the writings, etc., which he kept for sale, and that from such knowledge a lewd intent might be inferred.

Respondent also cites in support of its contention In re Sekuguchi (1932), 123 Cal.App. 537, 11 P.2d 655. The court there had under review subdivision 3 of section 311 of the Penal Code, and gave it a rather liberal interpretation, setting forth the rules regarding the power of courts to add, change or strike out words in a statute. But the court was not there considering, and did not decide, the question whether the introductory words of section 311 apply to subdivision 3, and in fact the opinion assumes that they do so apply. Nor do the stated rules suggest any reason why interpretation should excise the words of the introduction from this section or any part of it. Indeed, the general rule, as stated in that case, is that this cannot be done, and while some exceptions to this rule are set forth, none of them cover the present case. There is no doubt, ambiguity or uncertainty in the statute as it is written, nor can we say it results in any manifest absurdity needing correction. To be sure, it may somewhat hamper the prosecution in such a case as this, because of the difficulty of making proof of the defendant's knowledge of the contents of a book or otherwise showing his intent in selling it. But, on the other hand, the legislature may have believed that the evils to result from this difficulty were less than those to be anticipated from the possibility that without the questioned words in the statute persons who were ignorant of the true character of a book might nevertheless be convicted of a crime for selling it. At least when the legislature had the opportunity to choose between these alternatives, it placed in the statute the words requiring an intent.

[12-14] Where the statute makes a specific intent an element of the offense, such intent must be proved. (People v. Becker (1934), 137 Cal.App. 349, 352, 30 P.2d 562.) Of course, the proof may be, and, on the

1 No opinion for publication.

part of the prosecution in most cases, it is, circumstantial; but, if so, the circumstances must be such as reasonably to justify an inference of the intent. (People v. Snyder (1940), 15 Cal.2d 706, 708, 104 P.2d 639; People v. Rothrock (1937), 21 Cal.App.2d 116, 119, 68 P.2d 364; People v. Maciel (1925), 71 Cal.App. 213, 218, 234 P. 877). Here the facts proved were merely that the book was in stock in the book store owned by one of the defendants and was, on request, sold by the other defendant to a police officer. The book was introduced in evidence, but it bears no marks or indications of its character on the outside, nor is its title enlightening or even suggestive on the subject. This evidence, without more, is not sufficient to show that defendants "lewdly" sold the book. If it appeared that the defendants knew the obscene character of the book, this would support an inference that they acted lewdly in selling it, but we find in the record no evidence to this effect. The pamphlets involved in our unpublished decision above mentioned were so printed that their character could be ascertained by merely looking at them, which is not the case here.

[15, 16] The defendant Eastman, who sold the book but did not own the store, was asked by her counsel in substance whether she had any lewd intent in making the sale, and an objection of the prosecution to this question was sustained. This was error. A witness may be examined as to the intent with which he did an act, when that intent is material. People v. Morley (1928), 89 Cal.App. 451, 457, 265 P. 276; People v. Brierton (1933), 132 Cal.App. 471, 474, 23 P.2d 63. This is true even where the defendant is the witness and his intent is an element of the crime charged. People v. Sheasbey (1927), 82 Cal.App. 459, 464, 255 P. 836 and cases cited.

[17] It may be that some of the book reviews offered by the defendants were relevant to the question of intent. If it appeared that the reviews commended the book without disclosing its true character—as apparently some of them did—and that the defendants had read such reviews and relied on them, having no more accurate knowledge, in selling the book, these facts would tend to establish a lack of lewd intent. But we do not attempt to pass on the admissibility of any particular review offered, since other sufficient grounds for a reversal appear.

[18] At the request of the People, the court gave this instruction to the jury: "In a prosecution under Section 311, Sub. 3, of the Penal Code of the State of California, it is not necessary for the People to prove that the defendants acted lewdly in selling, keeping for sale or distributing an obscene or indecent book, but it is only necessary for the People to prove that the defendants wilfully sold, kept for sale or distributed an obscene or indecent book; and if you find from the evidence beyond a reasonable doubt that the defendants, and each of them, wilfully and unlawfully sold, kept for sale or distributed an obscene or indecent book, it will be your duty to find the defendants guilty as charged." The same theory was carried into other instructions, and the court refused instructions asked by defendants which would have given the jury the proper rule regarding intent. These instructions and refusals of instructions were erroneous for the reasons already given, and on the state of the record here must result in a reversal.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

BISHOP and STEPHENS, JJ., concur.

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